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Hilty Tank Corporation *and* Teamsters Local Union No. 776. Cases 4–CA–14084 and 4–CA–14160

14 December 1984

DECISION AND ORDER

BY MEMBERS ZIMMERMAN, HUNTER, AND DENNIS

On 7 August 1984 Administrative Law Judge Thomas D. Johnston issued the attached decision. The Charging Party filed exceptions and a supporting brief, the Respondent filed cross-exceptions and a supporting brief, and the General Counsel filed an answering brief to the Respondent's cross-exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Hilty Tank Corporation, Carlisle, Pennsylvania, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

[1] Both the Charging Party and the Respondent have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The Respondent contends that the judge improperly excluded from evidence an unsworn out-of-court statement made by union witness Reisinger after he testified, which contradicted his testimony at the hearing. The Respondent attempted to authenticate the statement through the hearsay testimony of the Respondent's president Stranko, and not by Reisinger. Under these circumstances, we find that the Respondent failed to provide sufficient proof of the statement's authenticity, and that the judge properly excluded the statement from evidence.

DECISION

STATEMENT OF THE CASE

THOMAS D. JOHNSTON, Administrative Law Judge. These consolidated cases were heard at Carlisle, Pennsylvania, on April 4 and 5, 1984, pursuant to amended charges filed by Teamsters Local Union No. 776 (the Union) in Case 4–CA–14084 on November 28, 1983,[1] and in Case 4–CA–14160 on January 18, 1984,[2] and a consolidated complaint served on February 22, 1984.[3]

The consolidated complaint, which was amended at the hearing, alleges that Hilty Tank Corporation (the Respondent)[4] violated Section 8(a)(1) of the National Labor Relations Act (the Act) by unlawfully threatening to close its facility and transfer or subcontract work if its employees selected the Union as their bargaining representative, threatening employees with unspecified reprisals because they selected the Union as their representative, interrogating an employee about the employee's support for the Union, promising to give employees a wage increase if they rejected the Union as their bargaining representative, threatening to discharge its employees because of their support for the Union, indicating to its employees that any collective-bargaining agreement would contain only those terms desired by the Respondent, informing employees that it would be futile for them to select the Union as their bargaining representative, telling employees they would not receive wage increases because they supported the Union, indicating to its employees it would not negotiate an agreement with the Union, and prohibiting its employees from talking about the Union on company property at any time including their lunch and break periods; and violated Section 8(a)(1) and (3) of the Act by issuing a written warning to employee Robert Mosier, suspending employee Richard Zeigler for several days, and discriminatorily discharging and refusing to reinstate Robert Mosier and employee Ronald Dick all because these employees supported and assisted the Union.

The Respondent in its answer dated March 2, 1984, denies having violated the Act as alleged.

The issues are whether the Respondent violated Section 8(a)(1) and (3) of the Act, as alleged, by engaging in unlawful threats, interrogations, promises, and statements regarding the Union or its selection by the employees as their bargaining representative; prohibiting employees from talking about the Union on company property at any time; and discriminatorily suspending Robert Zeigler, issuing a written warning to Robert Mosier, and discharging and refusing to reinstate Robert Mosier and Ronald Dick because of their union activities.

On the entire record[5] in the case and from my observations of the witnesses, and after due consideration of the briefs filed by the parties, I make the following[6]

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT

The Respondent, a Pennsylvania corporation with a plant located at Carlisle, Pennsylvania, is engaged in the

[1] All dates are in 1983 unless otherwise stated.

[2] The original charges in these cases were filed on November 14, 1983, and January 3, 1984, respectively.

[3] The consolidated complaint itself, which was dated the 22d day in the year 1984, did not show the month it was issued.

[4] The name of the Respondent appears as corrected at the hearing.

[5] The General Counsel's unopposed motion dated May 23, 1984, to correct the transcript is granted.

[6] Unless otherwise indicated, the findings are based on the pleadings, admissions, stipulations, and undisputed evidence contained in the record which I credit.

business of the manufacture of carbon steel tanks for use in the plumbing, heating, and petroleum industries. During the 12-month period preceding February 22, 1984, the Respondent in the course of its operations shipped goods and materials valued in excess of $50,000 directly from its Carlisle, Pennsylvania plant to points located outside the Commonwealth of Pennsylvania.

The Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

Teamsters Local Union No. 776 is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. *Background*

The Respondent operates a plant located at Carlisle, Pennsylvania, where it is engaged in the manufacture of carbon steel tanks for use in the plumbing, heating, and petroleum industries. Included among its official and supervisory personnel are its president and majority stockholder William Stranko, Part-Owner Dale Brougher, Plant Superintendent Rick Loy,[7] and Secretary-Treasurer Yvonne Stranko, who is the wife of President Stranko.

The Union as described by Union Business Agent Wayne Shughart began an organizing campaign among the Respondent's employees in July. On July 29 it filed a petition with the Board seeking to represent certain of the Respondent's employees and on October 11, following an election held on September 30 which the Union won by a vote of nine to four, the Union was certified as the bargaining representative of the Respondent's production and maintenance employees, including welders, rollers, warehousemen, truckdrivers, and leadmen.

B. *Unlawful Interrogations, Promises, Threats, and Statements*

Several employees testified concerning conversations they had with the Respondent's officials and supervisors.

Ronald Dick stated that, about 3 weeks prior to the election held on September 30, President Stranko talked to him about the Union. After telling Dick the Union would be no good for him, Stranko said there would be raises if the Union did not get in but he could not give Dick a raise then on account of the Union. Stranko also asked him twice which way he was going to vote, to which Dick first replied he would rather not say and the second time he responded by saying he would make his own decision the way he felt like he wanted to vote and thought it was his own decision.

President Stranko, who said he first heard about the union organizing on July 27, acknowledged having a conversation with Dick prior to the election but stated he only informed Dick he needed help and would appreciate Dick's support at voting time. He also reminded Dick he had helped him when Dick had previously asked for his job back. Stranko denied asking Dick how he was going to vote or threatening anyone.

I credit Dick rather than Stranko and find that about September 9 President Stranko interrogated Ronald Dick about which way he was going to vote in a Board-conducted election and promised to give employees raises if they did not select the Union to represent them. Apart from my observations of the witnesses in crediting Dick instead of Stranko, I do not find Stranko's testimony plausible.

Robert Mosier, Ronald Dick, Russell Bender, and Richard Zeigler all testified that, on September 30 shortly after the election was held that day and the votes were counted showing the Union had won the election, President Stranko came into the shop, shook hands with certain employees who had voted, congratulated them, and said they had won and he had lost. Mosier stated that a few minutes later Stranko told him that Mosier had not heard the last of this yet. Zeigler, whose testimony was corroborated by Mosier, Dick, and Bender, denied Stranko shook his hand and said Stranko remarked to him that he knew where Zeigler was coming from right from the start. Mosier said he also heard Stranko remark to Dick that after all Stranko had done for Dick that he had done this to him. While Dick did not testify about such a remark he stated Stranko said to them something like "your day's coming" or something like that. Bender stated that the same day after the election as he was talking to Dick about not having a way to get home and was getting his check from Stranko, Stranko told Bender not to tell Stranko his problems and remarked Bender's troubles had not started yet.

Dick and Bender described Stranko as being mad or upset on this occasion when he spoke to the employees.

President Stranko, who admitted being disappointed on election day, acknowledged shaking hands with the employees after the election and congratulating them and telling them they had won. Although he denied saying anything different to Mosier, he acknowledged remarking to Zeigler that he knew where Zeigler was coming from all along. Stranko at the hearing explained he knew Zeigler had belonged to a union prior to coming to work for the Respondent and he intended by this remark to show he knew Zeigler was a union supporter.

Based on the testimony of Mosier and Bender, which I credit, that immediately after the Union won the election Stranko informed Mosier that he had not heard the last of this yet and told Bender that Bender's troubles had not started yet, I find that on September 30 President Stranko threatened Robert Mosier and Russell Bender with unspecified reprisals because the employees had selected the Union as their bargaining representative. With respect to Dick's testimony about Stranko making a statement about "your day's coming" or something like it, he was too uncertain exactly what Stranko said to allow me to make a finding.

Following the Union's certification the first negotiation meeting was held on October 27. Present for the Union were Business Agent Shughart, Allan Klose, Robert Mosier, and Clarence Shaffer. President Stranko represented the Respondent. Klose testified that at this

[7] These three individuals are supervisors under the Act.

meeting they went over a contract proposal presented by the Union and during the meeting Stranko said he would hire and fire anybody he wanted to and neither the Union nor anybody else was not going to tell him what to do. Stranko also said there would not be anything in the contract he did not want there and nobody was going to run his business but himself. Business Agent Shughart, who corroborated Klose's testimony about Stranko saying he would fire anyone he wanted to, also stated Stranko commented he did not like unions and the Teamsters was not going to run his business. Mosier also stated that at this meeting Stranko said he would fire whom he wanted, when he wanted, and they were not going to tell him what to do.

President Stranko did not deny making such statements at this meeting. While I credit the undenied testimony of Klose, Shughart, and Mosier concerning the statements made by Stranko, I do not find such statements constitute threats by President Stranko to discharge employees because of their support for the Union as alleged. Rather, such statements about discharging employees, unrelated to the union activities of employees and uttered in the context of bargaining, reflect only bargaining positions.

According to Shughart at each additional negotiation meeting, including three held in November and three held in January 1984, President Stranko repeated his statement that he did not like unions and a union was not going to run his business and he would discharge anyone he wanted to.[8] Klose, who corroborated Shughart's testimony, also said that at these meetings when the Union brought up changing something Stranko would tell them he did not want it in the contract so it was not going to be there.

While President Stranko did not deny making such statements, his wife, Secretary-Treasurer Stranko, who attended three negotiation meetings in January 1984, denied he said anything about unions or not liking unions at those meetings. She also denied remembering whether Stranko said he could fire anybody for any reason or the Union was not going to tell him whom he could hire and fire, but stated he did say it was his business and he would run it the way he wanted. I credit Shughart and Klose and find such statements made by Stranko at the first negotiation meeting were repeated at subsequent negotiation meetings.

Prior to the election the Respondent held three meetings of all its employees. President Stranko placed these meetings as occurring on July 29, the last week in August, and on September 29 which was the day before the election. Stranko spoke at the first meeting and both Stranko and Part-Owner Brougher, who was present at the last two meetings, spoke at those meetings. Several employees testified concerning certain statements made at these meetings by Stranko and Brougher.

Robert Mosier said that during the first meeting held on July 29 Stranko told them he had no use for the Union and mentioned at the present time he was doing the best of his ability about the employees' wages and benefits. Allan Klose stated Stranko said they did not need a third party, referring to the Union, to settle differences between employees and the Respondent and if they had any grievances to call him. Ronald Dick testified Stranko informed them the Union was not any good and was not going to help them. Dick also stated Stranko said there definitely would not be any raises because of this Union.

Robert Mosier, Allan Klose, Ronald Dick, Russell Bender, and Richard Zeigler testified Stranko at the meeting informed them if the Union was voted in he would shut the doors, close the shop, take the tanks out of the shop, ship the trucks back to Brougher, or contract out and there would be no jobs or everybody would be out of a job.

President Stranko's version of what he said about closing the plant was if the Union was voted in and put the Respondent in an uncompetitive position the Respondent might be forced to close the plant down. Stranko denied raises were mentioned.

Based on the testimony of Robert Mosier, Allan Klose, Ronald Dick, Russell Bender, and Richard Zeigler, which I credit instead of that of Stranko, which I have previously discredited, I find that on July 29 President Stranko threatened employees with closing the plant and transferring work if the employees selected the Union to represent them.

Robert Mosier testified that during the second meeting held in late August Part-Owner Brougher mentioned the Union could not do anything for them and he could not understand why they wanted one. Allan Klose stated Brougher said they did not need a union there and any differences they had could be settled between the employees and Stranko and himself. Russell Bender said Brougher told them the Union really would not help them and a third party could not settle their problems, and the Respondent would rather the employees wait another year and give the Company a chance to make things right and then they could join the Union if things were not made right for them. Richard Zeigler stated Brougher also said they did not need a union and the Union could not do anything for them and they did not need a third party involved.

Both Robert Mosier and Richard Zeigler testified Brougher told the employees if the Union came in he would take the road joints[9] out and take them back to where they came from. Allan Klose stated Brougher said he could take them out and take them back to where they came from, and Russell Bender testified Brougher said they had brought the road joints up from one of his companies and if the Union got in there could be a good chance they would discontinue building. While Ronald Dick first stated Brougher told them he would do away with the road joints for voting for the Union, under cross-examination Dick was not sure whether Brougher or Stranko said it.[10]

[8] These statements made at those meetings were not alleged as violations, but only offered as evidence of Respondent's union animus.

[9] The road or expansion joints as described by Mosier are used in highways between concrete sections to allow for expansion in hot weather and contraction in cold weather.

[10] Dick in an affidavit given to a Board agent stated that at one meeting Stranko had said he would do away with the road joints if they voted for the Union.

According to Bender, Klose, Mosier, and Dick if the road joint work was moved, employees would be laid off or have less work or the plant would be closed.

Mosier also testified that in the meeting Brougher told them if they voted in the Union the most that could happen was the Respondent would have to sit down for two or three meetings and the employees would go out on strike and the Respondent would hire somebody to replace them.

Allan Klose testified that at the second or third meeting Stranko told them they could not get a raise then. However, Stranko mentioned he was just starting out of the red into the black and said that until the time they started talking about bringing in the Union they were going to get a raise,[11] but since the Union was in he could not give it to them because it might be considered a bribe before the election. Richard Zeigler stated Brougher told them at this meeting the Respondent had received a letter from the NLRB and it could not give them a raise because it would be considered a bribe. Robert Mosier did not recall whether Brougher made any comment about wages.

Allan Klose testified that Stranko also said in negotiating with the Union for contracts there would be nothing in the contract except what Stranko wanted there and there was no one who knew how to run the Company except him.

Richard Zeigler also stated that at the last meeting, which was on September 29, Stranko said he had to negotiate a contract but the only thing that would be in it was what the Company wanted in there. Russell Bender also stated that at the meeting the Respondent told the employees it wanted them to give the Respondent another chance before the vote the next day and see if it could make things right.

Both Part-Owner Brougher and President Stranko explained at the hearing that what Brougher had said about the road joints[12] in the meeting was that he mentioned the fact that the road joints during a work stoppage due to the Union would have to be subcontracted out because of their commitment to the highway contractors. According to them, their commitment was under no circumstances would they hold up contractors' jobs, but they would be able to complete deliveries when needed, and their work was but a very small part of an overall contract.

Brougher and Stranko both denied anything was said to the employees in the meetings about giving them a raise. Rather, they stated when Allan Klose had asked them about a raise they informed the employees they could not discuss it.

Brougher, on being asked at the hearing what he had told the employees in the meetings about the process of negotiations or collective bargaining with the Union, stated at the first meeting he attended that as far as negotiating he said they would not negotiate. However, at the last meeting he told them if they voted for the Union the Company would sit down and discuss it with the Union. Stranko also stated Brougher said it was a give-and-take process with an exchange of ideas working towards a contract, but indicated no one was forced to agree to anything and the Company would bargain in good faith. Both Brougher and Stranko denied Brougher said they would only have two or three meetings and the contract would just say whatever he wanted it to say.

I credit the testimony of Robert Moiser, Richard Zeigler, Allan Klose, Ronald Dick, and Russell Bender, instead of that of Brougher and Stranko, concerning these meetings, and find that in late August Part-Owner Brougher threatened the employees with transferring or subcontracting the road joint work if they selected the Union as their bargaining representative; Brougher told employees the Respondent could not give them a raise indicating it was because of the Union;[13] Brougher by his own admission told employees he would not negotiate with the Union; and President Stranko informed employees any collective-bargaining agreement negotiated with the Union would contain nothing except what the Respondent wanted, thereby indicating to employees it would be futile for them to select the Union as their bargaining representative. Besides my observations of the witnesses in discrediting Brougher, his explanation of what he told the employees about subcontracting the road joint work is not persuasive.

C. *Prohibiting the Employees from Discussing the Union on Respondent's Property*

Richard Zeigler, Allan Klose, and Russell Bender testified that, about the latter part of August, Plant Superintendent Loy instructed them they were not to talk about the Union on company time or property. They all denied the Respondent had any rule at the time prohibiting employees from discussing nonwork subjects on worktime and stated they and other employees had previously discussed such subjects on worktime every day. According to Bender, Zeigler, and Klose, supervisory personnel, including Plant Superintendent Loy, were aware of these discussions and had talked to employees about things other than work, including sports, and had told jokes on working time.

Superintendent Loy under cross-examination acknowledged that prior to the election he told employees they were not to campaign for the Union while on company-paid time or on the premises. Loy at the hearing explained he did so on advice of a labor consultant employed by the Respondent. Loy further acknowleged he had had discussions with employees at work including subjects like sports and hunting. While Loy stated there was no rule against such discussions as long as they did not disrupt production, no evidence was proffered to show that at the time Zeigler, Klose, and Bender were given their instructions production was being interfered with and the instructions themselves made no reference to the interference with production.

[11] Klose acknowledged that prior to their contacting the Union Stranko had not mentioned a raise.

[12] Stranko stated the Respondent has been manufacturing the road joints since 1982 and the work was contracted to the Respondent by Brougher.

[13] According to Klose, President Stranko had said the employees were going to get a raise until they started talking about bringing in the Union.

Based on the testimony of Zeigler, Klose, and Bender, which I credit, and Loy's own admissions, I find that about the latter part of August Plant Superintendent Loy prohibited employees Richard Zeigler, Allan Klose, and Russell Bender from talking about the Union on company property at any time.

D. *The Discharge of Ronald Dick*

Ronald Dick was employed by the Respondent in December 1980 and worked about a year until he quit. He was rehired in May and worked until November 17.[14] His job was welding tanks and he also built road joints.

Dick's union activities included signing a union authorization card and attending union meetings.

According to Dick, for about a week prior to November 17 a rotator button on the equipment he was using was broken with the wires exposed. Despite his complaints to three different foremen over a period of several days the button was not fixed.

The last day Dick worked for the Respondent was November 17. That morning Dick, who was working in the plant, heard President Stranko hollering and screaming at Russell Bender and Richard Zeigler, who were about 20 feet away. Dick walked around the tank he was working on and listened; after he returned to his tank Stranko came over to where he was and using profanity told him it was none of his business if the buttons worked or not. After Dick replied Stranko was right, Stranko told Dick if he did not like it he could quit. When Dick made no response Stranko repeated his statement, whereupon Dick told Stranko if Stranko wanted him to quit he could fire him. Stranko told Dick he was not firing him but then started hollering and screaming at Dick, cursing him, and told him if he did not like it he wanted him to leave—the third time Stranko told him to leave. Dick then told Stranko he was going to leave, but would see what he could have done about it. Stranko, still hollering and screaming, kept asking Dick, "What'd you say?" as Dick went to the timeclock, punched out, and left.

Both Russell Bender and Richard Zeigler, who estimated they were about 15 to 20 feet away, stated they saw Stranko talking to Dick and, although they did not hear everything Stranko, who was talking in a loud voice, said, they heard Stranko curse Dick and tell him to get out of there, whereupon Dick then punched out and left. According to Bender and Zeigler, prior to Stranko's talking to Dick, Stranko had come over to where they were working and had yelled at and cursed them and said if they had something to bitch about they were not to do it behind his back but to come to him. Zeigler also said Stranko told them if they could not come to him they were to leave.

Zeigler stated that just before this incident occurred he and Allan Klose had been in the lunchroom talking about an electrical box with no cover at the rotator and how unsafe it was. Zeigler did not know whether Dick was involved in that discussion.

President Stranko denied discharging Dick on November 17 or that his treatment of Dick had anything to do with Dick's union activity. His explanation of the incident was his wife had reported to him that morning she had overheard Bender, Zeigler, and Dick in the lunchroom using profanity against the Respondent and the fact the rotator button was broken and he went and spoke to those three employees because of his concern that salespeople and customers could have overheard them talking in the lunchroom. Stranko stated he confronted Bender and then Zeigler, who were at the road joint tables, about the report he had received and asked them why they did not come to him instead of cursing the Company for something they did not make the Company aware of. When Zeigler said he did not have anything to say Stranko, using profanity, told him not to be gutless and if he had anything to say to say it.

Stranko testified he then went over to the rotator where Dick was and told Dick he understood Dick had a problem or complaint and had been in the lunchroom cursing the Company, saying that it did not fix anything and the rotator button was not working. When Dick replied he did not have anything to say and just wanted it fixed, Stranko told Dick, using profanity, not to be gutless and if Dick had anything to say to say it and to tell them so they could take care of it and not to just complain in front of the men and cause a lot of problems with that sort of thing. Dick then accused Stranko of telling him to leave and of firing him, both of which Stranko denied. However, Dick proceeded towards the timeclock while repeating those accusations, which Stranko again denied. Dick then punched out and left.

Stranko estimated Bender and Zeigler were about 80 feet from Dick and denied because of the normal noise in the plant that day they could hear what he said to Dick. While Stranko acknowledged he was upset and his voice was up when he talked to Dick, he denied he was yelling.

Raymond Neal, who was a crew leader or assistant crew leader for the Respondent, stated that on November 17 he was in the plant standing by the 3.8 amp rotator and he observed President Stranko talking in a loud conversation to both Bender and Zeigler and then with Dick. Neal was unable to estimate how far he was from them, but stated he was closer to Bender and Zeigler than to Dick. While Neal denied being able to hear what was being said because of the noise, he first said he may have heard a word or two in Stranko's conversation with Bender and Zeigler but then stated he did not remember hearing any words. Dick denied Neal was in the area when he talked to Stranko that day.

While Plant Superintendent Loy testified that between where Bender and Zeigler worked from Dick a person might be able to pick up a conversation if those persons were yelling, he claimed there was no way to identify what was being said. However, Loy acknowledged he was not present on that occasion and the noise level in the plant fluctuated.

Based on the testimony of Dick, Bender, and Zeigler, which I credit rather than that of Stranko, which I have previously discredited, and Neal, which testimony was

[14] Dick was uncertain of the date and this is the date given by the Respondent's witnesses.

contradictory, I find that on November 17 President Stranko instructed Dick to leave, thereby discharging him.

Later that same day President Stranko called Ronald Dick's home and talked to his wife, Gloria Dick. Gloria Dick testified that on that occasion Stranko asked her whether her husband was there and told her he and Ronald Dick had had words and Dick had walked out. After Gloria Dick informed Stranko her husband, who she thought was at work, was not home, Stranko told her that he could come down and ask for a job but was supposed to call back between 3 and 3:30 p.m. if he wanted his job back, and if Stranko did not hear from him between 3 and 3:30 p.m. he would replace him the next morning. Gloria Dick also testified during the conversation Stranko told her he had taken pity on her husband and had given him a job, but in the meantime they were working to get the Union and Ronald Dick was supposed to promise him he was not going to vote for the Union.

President Stranko stated on that occasion he told Gloria Dick that he and her husband had had a disagreement and Dick had walked off the job, but if her husband returned home by 5 p.m. for him to call Stranko and his job was there. Stranko stated Gloria Dick then mentioned her husband should never have gone against Stranko in the Union, whereupon he denied that had anything to do with it and stated he did not want to discuss it.

Secretary-Treasurer Stranko, who said she overheard her husband talking to Gloria Dick on the telephone that day but could not hear what Dick said, corroborated her husband's testimony concerning what he said he told Gloria Dick.

I credit Stranko's testimony, which was corroborated by his wife, instead of Gloria Dick's, which version I do not find plausible concerning their conversation.

Ronald Dick stated on returning home that day about 4:30 p.m. his wife gave him Stranko's message. However, he did not call because it was too late since he had been working until 3:30 p.m. and his wife did not say anything to him about calling before 5 p.m.

Later that week[15] Ronald Dick called President Stranko and asked for his job back; however, Stranko refused to rehire him. During the conversation Dick mentioned he had been to the NLRB.

Stranko at the hearing said the reason he did not rehire Dick on that occasion was when Dick left his employment the first time he had worked there he had improperly accused Stranko of firing him[16] when he quit his job instead because he did not have a way to get to work, and because he had already taken steps to replace Dick after he left on November 17 although he had not actually hired anyone to replace him.

[15] Dick placed this conversation as occurring 2 days later, which was November 19, while Stranko stated it occurred on Friday, which would have been November 18.

[16] Dick denied accusing Stranko of firing him on that occasion, while Plant Superintendent Loy corroborated Stranko's testimony about the incident.

E. *The Suspension of Richard Zeigler*

Richard Zeigler has been employed by the Respondent for over 2 years and works as a welder. His union activities include signing a union authorization card and attending union meetings. He along with Allan Klose initially contacted the Union about organizing the Respondent's employees.

Zeigler credibly stated that about the middle of August Plant Superintendent Loy asked him whether there was anything they could do to keep the Union from coming there. He informed Loy that there was not at that point and he thought it was too late. Loy did not deny such conversation occurred.

Zeigler stated that on Monday, December 19, he did not report to work because of a severe headache caused by medication he was taking for tuberculosis. He instructed his nephew William Reisinger, who worked for the Respondent and with whom he rode to work, to report him as being off work for sickness.

Reisinger confirmed Zeigler had called him at home that morning and said he was sick and would not be going to work. Reisinger stated that on his arrival at work he told Plant Superintendent Loy that Zeigler was sick and would not be in to work. When Loy asked what was the matter he told him he did not know.

Loy acknowledged Reisinger told him that morning Zeigler would not be in to work that day. However, he claimed he asked Reisinger both the reason and then whether Zeigler was sick, with Reisinger answering both times he did not know. I credit Reisinger, who I find was a more credible witness than Loy. Besides my observations of the witnesses in crediting Reisinger rather than Loy, Loy's testimony was contradictory.

Zeigler stated that about 11:30 a.m. that same morning he drove over to his brother's farm nearby and while he was crossing a fence to speak to his brother, who was outside, a stick from a tree struck him in his eye. Zeigler stated that about 5:30 a.m. the next morning he had to go to the hospital as a result of his eye injury and he did not go to work that day but had his sister notify Loy at home he would be off from work. Reisinger also testified on November 20 while he was getting ready to go to work Zeigler's sister notified Reisinger's mother that Zeigler was not going to work that day and he told Loy the same morning Zeigler would not be there.

Loy acknowledged that Zeigler's sister called him at home that morning and informed him Zeigler had been struck in the eye with a stick and he would not be at work that day.

Zeigler testified on the afternoon of December 20 Loy called and informed him he had been given a 3-day suspension for not properly reporting being off from work on December 19 and said he should have reported being off from work personally. Loy further stated Zeigler also had an indefinite suspension for not reporting being off from work properly on Tuesday.

Loy, who said he decided on December 19 to suspend Zeigler for 3 days and on December 20 to make the suspension indefinite because Zeigler's sister had called in instead of Zeigler, acknowledged notifying Zeigler on December 20 he had placed him on an indefinite suspen-

sion. He said he told Zeigler it was for improperly reporting being off from work, which he explained meant Zeigler could have called him personally and he had given him no excuse for being off. Loy did not recall asking Zeigler why he had been off from work or for an excuse.

Loy sent Zeigler a letter dated December 19 informing him he had failed to call and report his being off from work and had violated company policy by giving a fellow employee a message to report him off from work. It indicated Zeigler was suspended without pay from December 20 through December 22 for his failure to report being off from work under company procedure and threatened termination for future violations.

Zeigler, Reisinger, Russell Bender, and Allan Klose all testified other persons had called in for them before and reported they would be off from work for sickness without any discipline being taken against them. They all denied being told they had to call personally when they were going to be off from work for sickness, and, as stated by Bender and Klose, they were only told that the Respondent be notified before starting time. Both Zeigler and Reisinger stated on several prior occasions Reisinger had reported Zeigler would be off from work for sickness without incident.

The Respondent's policy on reporting being off from work as described by Loy is the employee himself is to notify Loy's office within a half-hour of the start of the workday if he is going to be off from work and give an excuse why he is going to be off. Loy admitted, however, in the past he had allowed persons other than the employee himself to call in for an employee. Under cross-examination, Loy admitted he had permitted Reisinger to report Zeigler off sick before and it was okay for an employee to report another employee off sick.

Zeigler testified later that week he went to the Respondent to find out how long he was being suspended; however, Loy ordered him off the Respondent's property. When he returned on Friday, December 23, to get his check, President Stranko told him he could come back to work on Tuesday, which would have been December 27. On December 28 after Zeigler returned to work, he was given a written confirmation of his suspension by Loy, who signed it, which provided as follows:

> Due to your violation of Company Policy on December 19–20, 1983, you were suspended without pay for four days. You are hereby returned to work effective Tuesday, December 27, 1983 with the understanding that this is your last chance warning. Any future violation of Company policy will result in your termination.

Loy, who said he discussed the matter with President Stranko, who had accused Zeigler of being a union supporter, but made the decision himself, gave several reasons for suspending Zeigler. Although he thought Zeigler had voted for the Union, he denied Zeigler's union activities had anything to do with it. According to Loy, a few days prior to December 19 Zeigler had asked for permission to be off from work on December 19 to go deer hunting[17] and he had denied Zeigler's request. He denied on December 19 he was given any reason for Zeigler being off from work. He said he called Zeigler's home after 7 but before 8 that morning and no one answered, and he believed Zeigler was not sick but had gone deer hunting. Besides believing Zeigler had gone deer hunting and no excuses were given to him, Loy, who said the biggest factor was Zeigler had broken company policy, also stated he relied on the fact Zeigler had not called him personally to inform him about being off from work and he also considered Zeigler's work record.

Zeigler's work record contains various written notations reflecting on June 19, 1931, he failed to follow his shop drawings; on November 11, 1981, he failed to follow instructions properly; on December 23, 1981, he did not show up for work for 1 day after his request to go bear hunting had been denied, for which he was suspended for 1 day, and the record reflects his wife had called in but he did not have a doctor's excuse and it was common knowledge he intended not to come in thereby disregarding instructions;[18] on April 8, 1982, he mocked his supervisor with hand gestures, for which he was warned; on May 25, 1982, he performed improper work and displayed an improper attitude, for which he was warned; on March 18, he failed to properly test a tank for which he was told future negligence would result in suspended time off without pay; on March 29 he performed improper welding with a last warning that future negligence would result in disciplinary action; on May 31 he was given a 2-day suspension for improper welding and a warning of future suspension and then termination; on August 18 he was given a 3-day supension for gross negligence that day for what appears was improper welding and damage to a tank with a warning of termination on the next offense; on October 7 he did improper testing of a tank, for which he was warned that future negligence may result in discipline or possible termination; and on December 15 he was verbally warned for not wearing ear protection.

F. *The Written Warning to and the Discharge of Robert Mosier*

Robert Mosier was employed by the Respondent from March 1982 until October 31, 1983. His duties primarily consisted of driving trucks and on occasions he worked in the plant.

Mosier's union activities included attending union meetings, signing a union authorization card, discussing the Union with other employees, wearing a union insignia[19] on his hat at work, and participating in the negotiation meeting held on October 27.

Mosier was given a written warning in a letter from President Stranko dated October 24 for five violations of the work rule policy occurring on October 20 for failing to follow trip ticket instructions and not calling in after

[17] Zeigler did not recall making such a request.

[18] Zeigler did not recall an incident where he had gone hunting when his wife had called him in sick and Plant Superintendent Loy acknowledged his own knowledge about the incident was based on what former Plant Superintendent Miller had told him.

[19] Mosier was the only employee who wore a union insignia at work.

the last stop; on September 14 for a complaint on his driving habits; on July 7 for housekeeping on the tractor he drove; on May 31 for insubordination; and on May 19 for sideswiping two vehicles with an oversize load on the trailer, including one in Pennsylvania and one in Ohio. This letter further stated that it was confirming their meeting on October 21, that Stranko had previously spoken to Mosier about the serious nature of each offense but the violations were continuing, and that this was his final warning and the next offense would mean disciplinary action and after that termination.

President Stranko testified he had met with Mosier on October 21 and gone over the various incidents reported in the letter and Mosier's attitude towards them, and he had mentioned things were mounting and they would have to get them straightened out. According to Stranko, Mosier's attitude in the meeting was the incidents were nothing and Mosier said Stranko had mentioned them before. Stranko stated during the meeting while he was talking to Mosier, Mosier started getting up to leave, whereupon he informed Mosier he was not finished with him and reminded Mosier he had told him in the past not to leave until his supervisor told him to go. Mosier then sat down until the conversation was over.

Stranko stated he sent the warning letter to Mosier after the meeting because Mosier's violations were continuing and he wanted Mosier to have the confirmation so he could not forget they had talked about those offenses which he described as serious.

Mosier acknowledged meeting with Stranko and being verbally warned prior to receiving the warning letter. According to Mosier, Stranko informed him on that occasion he had black marks against him and they would write them off, but said any further black marks would come in disciplinary action and anything after that would be a discharge.

Mosier denied on that occasion Stranko told him he should not walk away when Stranko was talking to him. Mosier also stated after Stranko had finished going over the incidents Stranko pointed to the union insignia on his hat and said that did not scare him one bit.

Stranko explained the May 19 incident involved Mosier's sideswiping another vehicle knocking the mirror off without stopping, which the Respondent had to pay to have repaired, and while on the same trip Mosier had another accident. Mosier acknowledged having an accident on that trip knocking a mirror off of another tractor and another accident involving passing a dump truck at which time a door jam was bent. While Mosier denied Stranko warned him on that occasion but only said he would check into it, Stranko said he told Mosier these were serious things and warned him to be very careful.

On the May 31 incident Stranko testified on Mosier's return from a trip which Stranko estimated took 4 hours longer than necessary he asked Mosier twice what had happened; however, each time Mosier did not answer. On telling Mosier he was 4 hours late and asking whether he had a problem Mosier's response was he did not have to talk to Stranko. He then told Mosier he was his employer and he was entitled to an answer. When Mosier continued to ignore him he informed Mosier he was fired. Later that day Mosier, who had returned to get his check, apologized and asked for his job back. Stranko rehired Mosier but informed him he would not tolerate that kind of conduct and said when he or any supervisor talked to Mosier for Mosier to give them a civil answer; they were entitled to it because Mosier worked for them.

Mosier acknowledged being fired by Stranko and rehired that same day after Stranko had questioned him about where he had been on his returning from a trip and he did not answer but instead proceeded with his paperwork. Stranko also told him when he was talking to him for him not to walk away. Mosier could not recall if Stranko threatened him with discharge if a similar incident occurred.

On the July 7 incident Stranko stated he discovered the tractor Mosier was operating was filthy inside and contained empty soda cans, bottles, paper, and rags and appeared to have coffee spilled over the dashboard, at which time he talked to Mosier about his responsibility to keep it clean and said he would give him until Monday to get it squared away. When Mosier appeared to get upset during the conversation Stranko told him his attitude was very poor. Mosier acknowledged Stranko had talked to him about keeping his truck clean on one occasion after something had been spilled inside the truck and he had put towels down so it would not spread. While Mosier denied Stranko gave him a verbal warning, under cross-examination he tacitly admitted he was reprimanded on that occasion.

On the September 14 incident Stranko testified a man called and complained about Mosier's driving habits, whereupon Stranko requested the man to put it in writing. A month or two later Stranko said he received such a letter. Mosier acknowledged on one occasion Plant Superintendent Loy had talked to him about a man being upset and asked what had happened, at which time Mosier explained he had blinked his lights to pass a vehicle and evidently the man in the vehicle thought he was closer than he was. Stranko, who was present, then told Mosier he had to be careful and they could not afford accidents. Mosier denied being told he was being warned.

Stranko described the October 20 incident as one where Mosier made a trip to deliver and pick up some bars as noted on his trip ticket. Mosier delivered the bar but returned to the plant without picking up the bar as required or calling into the plant after he had delivered the last bar, which was the standard procedure. On confronting Mosier he said he had not read the trip ticket and they had to send him back to pick up the bar. Mosier acknowledged Stranko talked to him about not getting the bar, but denied he warned him.

All of these incidents except for the September 14 complaint about Mosier's driving habits are recorded on Mosier's work record. Mosier denied being told any of these incidents were verbal warnings or were going on his record.

I credit Stranko's testimony concerning his conversations with Mosier about the warnings given to Mosier. Apart from my observations of the witnesses in not crediting Mosier about the warnings, his testimony about

them was not persuasive and on other occasions was contradictory.

Mosier was discharged on Monday, October 31. On that date, Mosier, who was not scheduled to work, went to the plant in the morning to turn in his trip tickets and fuel receipts for a trip he had made the previous Friday. Mosier stated at the time he was on his way to drop his son off to catch the school bus and estimated he arrived at the plant about 7:55 a.m. Mosier stated that on going to the office and handing Plant Superintendent Loy his papers Loy told him they had had difficulty starting the tractor Mosier had been driving and said when Mosier was stopped at places such as to get unloaded he wanted him to check his batteries once in a while. Mosier acknowledged he made no comment but said he shook his head affirmatively. Mosier had been standing by Loy's desk, and after shaking his head he turned, paused a couple of seconds, and, when no other remarks were made, he left the office and proceeded outside. When he was about halfway across the yard President Stranko, who had come into the office during the conversation and had been sitting at a desk about 12 feet away, came to the door and called him. Mosier turned and walked back towards Stranko. Stranko then said, "When somebody's talking to you, you do not walk out." On asking Stranko what else he wanted, Stranko repeated his statement. Mosier then remarked, "Well, what else is there?" whereupon Stranko informed Mosier he was fired.

According to Loy, the reason he talked to Mosier that day was because the day before when he went to the plant to prepare for Monday's deliveries the tractor assigned to Mosier would not start and he discovered two of the battery water levels were dry,[20] which resulted in having to assign another tractor and paying two employees overtime pay on Monday to come in early and jump start the tractor with two other vehicles. On informing Stranko that Monday morning about it Stranko instructed him to talk to Mosier.

Loy's version of the conversation, which he placed as occurring about 8:15 a.m., was he explained about finding two of the battery levels dry and felt Mosier had not checked them for a long time, whereupon Mosier just shook his head but did not say anything. Loy then went on to explain it was Mosier's responsibility to check the batteries and if there were any problems to let Loy know and they would be replaced. Loy stated while he was still talking to Mosier about opportunities Mosier would have to check the batteries while waiting at jobsites and to add water, if they were low. Mosier, who was standing beside his desk, turned away from him and walked away from his desk and out the door. Loy denied the conversation was finished or telling Mosier he was through. He stated Mosier did not say anything but nodded his head up and down practically the whole time. Loy stated when Mosier went out the door Stranko looked up from his desk where he was sitting and asked where Mosier was, whereupon he informed Stranko that Mosier had walked out or had walked out on him.

Under cross-examination, Loy acknowledged he had testified at an unemployment hearing Mosier opened the door as he was concluding his remarks and stepped out and closed the door, and in a memorandum Loy had made of the conversation he had also stated as he was concluding his remarks Mosier opened the door and left.[21]

President Stranko, who stated he was in the office sitting at the secretary's desk with his head down using a calculator but listening to the conversation, corroborated Loy's testimony regarding what was said during the conversation which Stranko could tell was not finished and that Loy had said Mosier had walked out on him.

Stranko testified he then went to the door and called to Mosier, who was in the yard, to come back and after Mosier came back part of the way Mosier asked what he wanted. Stranko stated when he told Mosier he had walked out on his supervisor in the middle of a conversation Mosier again asked what he wanted. While he was telling Mosier it was not what he wanted but it was what Mosier did by walking out in the middle of the conversation, Mosier interrupted and again asked Stranko what he wanted. Stranko then told Mosier he was fired.

Loy, who stated he overheard the conversation, corroborated Stranko's testimony.

I credit the testimony of Stranko and Loy, rather than Mosier, concerning their conversations that day leading up to the discharge and the discharge itself.

Following his discharge Mosier went into the plant to get a number from Allan Klose, but was told by Loy, acting on Stranko's instructions, and then by Stranko, to leave the plant which he did. Mosier has not been employed by the Respondent since his discharge.

Although Mosier did not punch in on October 31 and denied punching in or being paid on similar occasions in the past, the testimony of Secretary-Treasurer Stranko, who stated she paid Mosier for that day on instructions from President Stranko, and the Respondent's records reflect that Mosier was paid for coming in that morning for about 15 minutes and turning in his papers.

Stranko, in a letter dated November 1 to Mosier confirming his discharge, reminded him of the October 24 letter outlining the five previous violations of the work rule policy and warning, and stated Mosier had deliberately walked away from his immediate supervisor while he was speaking to him about the batteries and he was therefore terminated in accordance with article VI of the Company's work rule policy.

Stranko at the hearing said his reasons for discharging Mosier were his insubordination on October 31 and the prior violations he had talked to him about including his discharge for a similar incident on May 31. Additionally, Stranko credibly testified that about a week before the October 31 incident he was on the telephone trying to get some information from a customer and he instructed Mosier, who was standing there, to wait. However, Mosier left without waiting and went home. While Mosier later told Stranko he left after Loy had nodded

[20] While Mosier denied he had let the batteries run down no testimony was proffered to show when he last checked them.

[21] Loy at the hearing explained what he meant was he was concluding a remark or phrase of the conversation but not the conversation itself.

his head, Stranko told Mosier not to walk out on his supervisor.

Although Mosier denied having been told on numerous occasions not to walk away from his supervisor, he did not specifically deny such incident occurred.

Loy acknowledged knowing on October 31 Mosier was a union supporter and that he previously suspected Mosier had voted for the Union.

Stranko denied that his decision to issue the written warning to or to discharge Mosier, who he acknowledged was the only employee he saw wearing a union insignia, was caused by Mosier's union activities.

G. *Analysis and Conclusions*

The General Counsel and the Union contend the Respondent violated Section 8(a)(1) and (3) of the Act by engaging in unlawful threats, interrogations, promises, and statements regarding the Union; prohibiting employees from talking about the Union on company property at any time; and discriminatorily suspending Richard Zeigler, issuing a written warning to Robert Mosier, and discharging and refusing to reinstate Robert Mosier and Ronald Dick because of their union activities. The Respondent denies having violated the Act and asserts as defenses that the suspension of Zeigler and Mosier's warning and discharge were for cause and that Dick quit instead of being discharged.

Section 8(a)(1) of the Act prohibits an employer from interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act. Section 8(a)(3) of the Act provides in pertinent part: "It shall be an unfair labor practice for an employer . . . by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization."

The test applied in determining whether a violation of Section 8(a)(1) of the Act has occurred is "whether the employer engaged in conduct which, it may reasonably be said, tends to interfere with the free exercise of employee rights under the Act." *Electrical Fittings Corp.*, 216 NLRB 1076 (1975). On the granting of wage increases to employees an employer, when confronted by a union organizing campaign, must proceed as it would have done had the union not been conducting its campaign. *Russell Stover Candies*, 221 NLRB 441 (1975). While an employer may also speak freely to employees about issues arising in connection with a union organization campaign, such statements cannot contain threats of reprisal or force or promises of benefit. *Components, Inc.*, 197 NLRB 163 (1972).

The findings supra establish that about September 9 President Stranko interrogated Ronald Dick about which way he was going to vote in a Board-conducted election and promised to give employees raises if they did not select the Union to represent them; on September 30 President Stranko threatened Robert Mosier and Russell Bender with unspecified reprisals because the employees had selected the Union as their bargaining representative; on July 29 President Stranko threatened employees with closing the plant and transferring work if the employees selected the Union to represent them; in late August Part-Owner Dale Brougher threatened the employees with transferring or subcontracting the road joint work if they selected the Union as their bargaining representative; in late August Brougher told employees the Respondent could not give them a raise indicating it was because of the Union; in late August Brougher told employees he would not negotiate with the Union; and in late August President Stranko informed employees any collective-bargaining agreement negotiated with the Union would contain nothing except what the Respondent wanted, thereby indicating to employees it would be futile for them to select the Union as their bargaining representative.

Applying the applicable law to these findings, I find such conduct interfered with, restrained, and coerced the employees in the exercise of the rights guaranteed in Section 7 of the Act and the Respondent, by engaging in such conduct, violated Section 8(a)(1) of the Act.

Insofar as employees were prohibited from talking about the Union on company property, the evidence supra establishes that about the latter part of August Plant Superintendent Loy prohibited employees Michael Zeigler, Allan Klose, and Russell Bender from talking about the Union on company property at any time. Employees engaged in a union organizational campaign have the right to solicit on plant premises subject only to the restriction that it be on nonworking time. *Stoddard-Quirk Mfg. Co.*, 138 NLRB 615, 621 (1962). Since the employees here were prohibited from engaging in union solicitation on company property at any time, I find about the latter part of August the Respondent unlawfully prohibited employees from talking about the Union on company property at any time and thereby violated Section 8(a)(1) of the Act.

The remaining issues to be resolved are whether Richard Zeigler, Ronald Dick, and Robert Mosier were discriminated against in their employment because of their union activities as alleged.

The law is well settled that to discriminate against employees in their employment because of their union activities violates Section 8(a)(3) and (1) of the Act. Where motivation for discharge is at issue the General Counsel must make a prima facie showing sufficient to support the inference that protected activity by employees was a motivating factor in an employer's decision to discharge and the employer then has the burden of showing that the employees would have been discharged absent that protected activity. *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved by the Supreme Court in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). Direct evidence of discriminatory motivation is not necessary to support a finding of discrimination and such intent may be inferred from the record as a whole. *Heath International*, 196 NLRB 318 (1972).

The evidence establishes Ronald Dick was discharged by President Stranko rather than quitting his job as Stranko alleges and that when Dick asked for reinstatement he was refused. Prior to his discharge Dick, who had signed a union authorization card and attended union meetings, had been unlawfully interrogated by President

Stranko concerning how he was going to vote in the election and promised there would be raises if the Union did not get in. Not only did Dick refuse to inform Stranko, pursuant to his inquiry, how he was going to vote in the union election, but after the Union won the election Stranko indicated his displeasure at Dick by remarking Dick had done that to him after all Stranko, who had previously rehired Dick when he quit his job, had done for him. For these reasons, including Dick's union activities, President Stranko's blaming Dick in part for the Union winning the election, and the unlawful interrogation of Dick by Stranko, coupled with the Respondent's union animus as established by its unlawful conduct herein found, and having rejected the Respondent's defense by finding Dick was discharged rather than quit his job, I am persuaded and find that on November 17 the Respondent discriminatorily discharged and thereafter refused to reinstate Ronald Dick because of his union activities and thereby violated Section 8(a)(3) and (1) of the Act.

The evidence herein found shows Richard Zeigler was active in the Union and instrumental in getting the union organizing campaign started. On December 20 he was suspended from work for 4 workdays without pay. Plant Superintendent Loy, who admittedly thought Zeigler had voted for the Union, had questioned Zeigler about whether the Respondent could do anything to keep the Union out and had instructed Zeigler, along with two other employees, not to campaign for the Union on company premises at any time. While Loy claimed Zeigler was suspended for failing to follow company policy by not calling in personally to be off from work or giving an excuse, and because he believed Zeigler had gone deer hunting instead while he was off from work, the evidence clearly refutes such reasons. Various employees testified and Loy admitted that in the past employees and other persons had called in for other employees who were sick. The credited testimony also shows that on November 19 Reisinger and on November 20 both Reisinger and Zeigler's sister, consistent with existing practices, had informed Loy that Zeigler would be off from work and the reasons, which included sickness and an eye injury, and not to go deer hunting.

Based on the foregoing evidence including Zeigler's union activities, Plant Superintendent Loy's belief Zeigler had voted for the Union and his questioning Zeigler about keeping the Union out and unlawfully prohibiting him from campaigning for the Union, the Respondent's union animus as established by its unlawful conduct herein found, and having rejected the Respondent's defense that Zeigler had failed to follow company policy in being off from work, I am persuaded and find on December 20 the Respondent discriminatorily suspended Richard Zeigler for 4 days without pay because of his union activities and thereby violated Section 8(a)(3) and (1) of the Act.

Insofar as Robert Mosier is concerned, the findings establish Mosier was an active union adherent of which the Respondent was aware. President Stranko, who discharged Mosier, had also unlawfully threatened him on September 30 with unspecified reprisals because the employees had selected the Union as their bargaining representative. While these factors, coupled with the Respondent's union animus as established by its unlawful conduct herein found, might give rise to a finding that Mosier's written warning dated October 24 and his discharge on October 31 were because of his union activities, I am persuaded and find based on the credited evidence that Mosier's written warning and discharge were not because of his union activities but rather for cause, including his insubordination on October 31 in deliberately walking away from his supervisor, Plant Superintendent Loy, while Loy was talking to him about the batteries.

The incidents for which Mosier received his written warning were all incidents acknowledged by Mosier to have occurred previously, and while Mosier attempted to discount their significance they were of a continuing nature and had been recorded in his work record and he had been reprimanded or warned about them at the time. Mosier had also previously been warned several times by President Stranko, including twice shortly before his discharge, about walking away from his supervisors while they were talking to him, and he had previously been fired for this same reason. Notwithstanding such warnings and his prior discharge for a similar offense, Mosier on October 31 again walked away from Plant Superintendent Loy while Loy was talking to him about the batteries, for which Stranko discharged him. Under these circumstances and for the reason indicated, I find the Respondent issued the written warning to Mosier dated October 24 and discharged him on October 31 for cause and did not discriminatorily take such action against him or refuse to reinstate him because of his union activities in violation of Section 8(a)(3) and (1) of the Act as alleged.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of the Respondent set forth in section III, above, found to constitute unfair labor practices, occurring in connection with the operations of the Respondent described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow thereof.

CONCLUSIONS OF LAW

1. Hilty Tank Corporation is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Teamsters Local Union No. 776 is a labor organzation within the meaning of Section 2(5) of the Act.

3. By interrogating an employee about which way he was going to vote in a Board-conducted election, by promising to give employees raises if they did not select the Union to represent them, by threatening employees with unspecified reprisals because the employees had selected the Union as their bargaining representative; by threatening employees with closing the plant and transferring work if they selected the Union to represent them, by threatening employees with transferring or sub-

contracting the road joint work if they selected the Union as their bargaining representative, by telling employees it could not give them a raise indicating it was because of the Union, by telling employees it would not negotiate with the Union, by indicating to employees it would be futile for employees to select the Union as their bargaining representative, and by unlawfully prohibiting employees from talking about the Union on company property at any time, the Respondent has interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act and has engaged in unfair labor practices in violation of Section 8(a)(1) of the Act.

4. By discriminatorily discharging Ronald Dick on November 17, 1983, and thereafter refusing to reinstate him because of his union activities; and by discriminatorily suspending Richard Zeigler on December 20, 1983, for 4 days without pay because of his union activities, the Respondent has engaged in unfair labor practices in violation of Section 8(a)(3) and (1) of the Act.

5. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act, I shall recommend it cease and desist therefrom and take certain affirmative action to effectuate the policies of the Act. Accordingly, the Respondent shall be ordered to offer immediate and full reinstatement to Ronald Dick to his former job or, if that job no longer exists, to a substantially equivalent job, without prejudice to his seniority and other rights and privileges, and to make him whole for any loss of earnings and other compensation he may have suffered as a result of the discrimination against him in his employment herein found by discriminatorily discharging him on November 17, 1983, and thereafter refusing to reinstate him. The Respondent shall also be ordered to make Richard Zeigler whole for any loss of earnings and other compensation he may have suffered as a result of the discrimination against him in his employment herein found by discriminatorily suspending him on December 20, 1983. Backpay shall be computed in accordance with the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as prescribed in *Florida Steel Corp.*, 231 NLRB 651 (1977). See generally *Isis Plumbing Co.*,138 NLRB 716 (1962).

The Respondent shall also be ordered to expunge from its files any references to the discriminatory discharge of Ronald Dick and the discriminatory suspension of Richard Zeigler herein found and to notify each of them in writing this has been done and evidence of its unlawful conduct will not be used as a basis for future personnel actions against them.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[22]

ORDER

The Respondent, Hilty Tank Corporation, Carlisle, Pennsylvania, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interrogating employees about which way they are going to vote in Board-conducted elections.

(b) Promising employees raises if they do not select the Union to represent them.

(c) Threatening employees with unspecified reprisals because they have selected the Union as their bargaining representative.

(d) Threatening employees with closing the plant and transferring work if they select the Union to represent them.

(e) Threatening employees with transferring or subcontracting the road joint work if they select the Union as their bargaining representative.

(f) Telling employees it could not give them a raise indicating it is because of the Union.

(g) Telling employees it will not negotiate with the Union.

(h) Indicating to employees it would be futile for them to select the Union as their bargaining representative.

(i) Unlawfully prohibiting employees from talking about the Union on company property at any time.

(j) Discouraging membership in and activities on behalf of Teamsters Local Union No. 776, or any other labor organization, by discharging, refusing to reinstate, suspending, or in any other manner discriminating against employees in regard to their hire or tenure of employment or any term or condition of employment.

(k) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer immediate and full reinstatement to Ronald Dick to his former job or, if that job no longer exists, to a substantially equivalent job, without prejudice to his seniority and other rights and privileges, and make him whole for any loss of earnings and other compensation he may have suffered by reason of the discrimination against him by discriminatorily discharging him on November 17, 1983, and thereafter refusing to reinstate him in the manner set forth in the section of this decision entitled "The Remedy."

(b) Make Richard Zeigler whole for any loss of earnings and other compensation he may have suffered by reason of the discrimination against him by discriminatorily suspending him on December 20, 1983, in the manner set forth in the section of this decision entitled "The Remedy."

(c) Expunge from its files any references to the discharge of Ronald Dick on November 17, 1983, and to the suspension of Richard Zeigler on December 20, 1983, and notify each of them in writing this has been done

[22] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

and evidence of its unlawful conduct will not be used as a basis for future personnel actions against them.

(d) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Post at its Carlisle, Pennsylvania plant copies of the attached notice marked "Appendix."[23] Copies of the notice, on forms provided by the Regional Director for Region 4, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that the amended consolidated complaint is dismissed insofar as it alleges unfair labor practices not specifically found herein.

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[23] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT interrogate our employees about which way they are going to vote in Board-conducted elections.

WE WILL NOT promise our employees raises if they do not select the Union to represent them.

WE WILL NOT threaten our employees with unspecified reprisals because they have selected the Union as their bargaining representative.

WE WILL NOT threaten our employees with closing the plant and transferring work if they select the Union to represent them.

WE WILL NOT threaten our employees with transferring or subcontracting the road joint work if they select the Union as their bargaining representative.

WE WILL NOT tell our employees we cannot give them a raise indicating it is because of the Union.

WE WILL NOT tell our employees we will not negotiate with the Union.

WE WILL NOT indicate to our employees it would be futile for them to select the Union as their bargaining representative.

WE WILL NOT unlawfully prohibit our employees from talking about the Union on company property at any time.

WE WILL NOT discourage membership in and activities on behalf of Teamsters Local Union No. 776, or any other labor organization, by discharging, refusing to reinstate, suspending, or in any other manner discriminating against employees in regard to their hire or tenure of employment or any term or condition of employment.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them in Section 7 of the Act.

WE WILL offer immediate and full reinstatement to Ronald Dick to his former job or, if that job no longer exists, to a substantially equivalent job, without prejudice to his seniority and other rights and privileges, and WE WILL make him and Richard Zeigler whole for any loss of earnings and other compensation they may have suffered by reason of our discrimination against them, with interest.

WE WILL expunge from our files any references to the discharge of Ronald Dick on November 17, 1983, and to the suspension of Richard Zeigler on December 20, 1983, and WE WILL notify each of them in writing this has been done and evidence of our unlawful conduct will not be used as a basis for future personnel actions against them.

HILTY TANK CORPORATION

Local 139, International Union of Operating Engineers, AFL–CIO (Wisconsin Chapter, Associated General Contractors of America, Inc.) *and* William J. Evans. Case 30–CB–2029

14 December 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS ZIMMERMAN AND DENNIS

On 30 December 1983 Administrative Law Judge George Norman issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] as modified, but not to adopt the recommended Order.

AMENDED CONCLUSIONS OF LAW

Delete Conclusions of Law 4 and 5, substitute the following, and renumber the subsequent Conclusion of Law accordingly:

"4. By charging, trying, and fining Evans and reporting him to the State of Wisconsin's Department of Industry, Labor and Human Relations on 7 June 1983 because Evans published the *Ethical Engineer*, the Respondent violated Section 8(b)(1)(A) of the Act."

ORDER

The National Labor Relations Board orders that the Respondent, Local 139, International Union of Operating Engineers, AFL–CIO, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Arbitrarily refusing to honor requests for information made by employees on the out-of-work register who have reasonable need for information pertaining to the exclusive referral system operated by the Respondent.

(b) Charging, trying, and fining members and reporting them to state agencies because they engage in Section 7 activity.

(c) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make Evans whole for all costs incurred in appealing the fine imposed against him at the 2 November 1982 union meeting.

(b) Remove from its files any references to the unlawful disciplinary action and notify Evans in writing that it has done so and that it will not use the disciplinary action against him in any way.

(c) Post at its meeting halls, offices, suboffices, and hiring halls throughout its jurisdiction copies

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[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

We disavow the judge's statement that there is evidence to support allegations of discrimination against Evans and corrupt handling of the referral system by President-Business Manager Shaw and his appointed subordinates. These matters were neither charged nor fully litigated.

[2] We agree with the judge that the Respondent's pattern of harassment of Evans included Shaw's internal union charge against Evans, the 2 November 1982 trial and fine, and the 7 June 1983 letter to Wisconsin's Department of Industry, Labor and Human Relations (DILHR) reporting Evans' alleged refusal to accept a job referral. We find that the Respondent harassed Evans because of his publication of the *Ethical Engineer*. Accordingly, we find it unnecessary to decide whether the harassment was also in retaliation for Evans' other dissident activities. We modify the judge's conclusions of law, recommended Order, and notice to accord with our finding.

The Respondent contends that its discipline of Evans did not violate the Act because the Respondent's International executive board sustained Evans' appeal and reversed the conviction and fine. In support, the Respondent cites *Transport Workers Local 100 (Liberty Coaches)*, 230 NLRB 526 (1977), enfd. sub nom. *Simms v. NLRB*, 99 LRRM 2633, 83 LC ¶ 10,301 (2d Cir. 1977). We find *Liberty Coaches* distinguishable. That case involved an isolated union charge against a member, while Shaw's charge was part of a pattern of harassment of Evans that continued even after the International sustained his appeal. Additionally, in *Liberty Coaches* the union's disciplinary action did not adversely affect the charging party, while Evans suffered the expense of traveling to the International's Washington, D.C. headquarters to appeal the verdict. See *Teamsters Local 162 (American Steel)*, 255 NLRB 1230, 1234 (1981); *Sachs Electric Co.*, 248 NLRB 669, 677 (1980), enfd. as modified sub nom. *NLRB v. Electrical Workers IBEW Local 453*, 668 F.2d 991 (8th Cir. 1982).

We shall not require the Respondent to mail a copy of the attached notice to each of its more than 5000 members, but shall order the Respondent to publish a copy of the notice in its newsletter. This remedy will adequately inform the Respondent's members of the violation. See *Peninsula Shipbuilders Assn. (Newport News Shipbuilding)*, 239 NLRB 831, 835 (1978).

The judge recommended ordering the Respondent to inform DILHR that its 7 June 1983 letter was in error because Evans did not refuse a job offer. We shall instead require the Respondent to send DILHR a copy of our decision, thus fully informing it of our findings and conclusions, and leave to the state agency's expertise whether Evans refused a job offer.

Member Dennis would not require the Respondent to reimburse Evans for lost unemployment benefits if, with knowledge of the circumstances surrounding his alleged referral refusal, DILHR determines it properly cut him off; if Evans did not qualify for benefits, reimbursement would be a windfall. Conversely, if DILHR improperly cut him off as a result of the Respondent's 7 June 1983 letter, Member Dennis would order the Respondent to make him whole if DILHR has not done so. She finds that this matter can best be resolved at the compliance stage of this proceeding.

The judge inadvertently stated that the Respondent sent the letter to DILHR 6 June 1982 rather than 7 June 1983.

We shall modify the judge's recommended Order to require the Respondent to expunge from its files any reference to its disciplinary charge and fine against Evans and to notify him in writing that it has done so and that the disciplinary action will not be used against him. See *Sterling Sugars*, 261 NLRB 472 (1982).

of the attached notice marked "Appendix."[3] Copies of the notice, on forms provided by the Regional Director for Region 30, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Publish, at its expense, the attached notice in any newsletter or newspaper it prepares and distributes to its members.

(e) Mail a copy of this Decision and Order to the State of Wisconsin's Department of Industry, Labor and Human Relations.

(f) Make Evans whole for any unemployment benefits lost as a result of its 7 June 1983 letter to DILHR.

(g) Provide Evans with a current list of the names, addresses, and telephone numbers of the 50 individuals above him and the 50 individuals below him on each of its four districts' hiring hall referral lists.

(h) Sign and return to the Regional Director sufficient copies of the notice for posting by Wisconsin Chapter, Associated General Contractors of America, Inc., if willing, at all places where notices to employees are customarily posted.

(i) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[3] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgement of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES AND MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT arbitrarily refuse to honor requests for information made by employees on the out-of-work register who have a reasonable need for information pertaining to the exclusive referral system we operate.

WE WILL NOT charge, try, and fine members and report them to state agencies because they engage in Section 7 activity.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL make William J. Evans whole for all costs incurred in appealing the fine we imposed against him at a 2 November 1982 union meeting.

WE WILL remove from our files any references to the unlawful disciplinary action and notify Evans in writing that we have done so and that we will not use the disciplinary action against him in any way.

WE WILL make Evans whole for any unemployment compensation benefits lost as a result of our 7 June 1983 letter to the State of Wisconsin's Department of Industry, Labor and Human Relations.

WE WILL provide Evans with a current list of the names, addresses, and telephone numbers of the 50 individuals above him and the 50 individuals below him on each of our four districts' hiring hall referral lists.

LOCAL 139, INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL–CIO

DECISION

STATEMENT OF THE CASE

GEORGE NORMAN, Administrative Law Judge. This case was tried in Milwaukee, Wisconsin, on June 8, 9, and 10 and on July 19, 1983. The original charge was filed on January 13, 1983, and an amended charge was filed on February 10, 1983, by William J. Evans, an individual, against Local 139, International Union of Operating Engineers, AFL–CIO (the Union). The complaint and notice of hearing based on the charge, was issued by the Regional Director for Region 30 on February 28, 1983, and on May 31, 1983, the Regional Director issued an amended complaint. The complaint, as amended, alleges that the Union has violated the National Labor Relations Act by engaging in a campaign of harassment against a member, Bill Evans, the Charging Party herein, to retaliate for Evans' "Section 7" activities. The complaint also alleges that the Union, in violation of the Act, is discriminatorily denying Evans' referral from the Union's hiring hall and has denied Evans' request for information from the referral list to investigate his claim of discrimination. The Union has denied and continues to deny Evans access to information which would permit him to check on the operation of the referral system.

Issues

The issues are:

1. Whether the Union acted unlawfully to restrain or coerce Evans in the exercise of his Section 7 rights?

2. Whether the Union's retaliatory actions and its refusal to provide hiring hall information violates Section 8(b)(1)(a) of the Act?

3. What constitutes an appropriate remedy if violations have indeed occurred?

Findings of Fact

I. BUSINESS OF THE EMPLOYERS

Wisconsin Chapter, Associated General Contractors of America, Inc. (AGC) is an organization of employers engaged in the construction of buildings within the State of Wisconsin. Associated Public Works Contractors of Greater Milwaukee, Inc. (Public Works) is an organization of employers engaged in water and sewer construction within the State of Wisconsin. Wisconsin Road Builders Association (Road Builders) is an organization consisting of employers engaged in the construction of highways and bridges within the State of Wisconsin. Distribution Contractors Association (Distribution) is an organization of employers engaged in the construction of underground pipeline within the State of Wisconsin.

During the past calendar year, which is a representative period, a number of member-employers of AGC, Public Works, Road Builders, and Distribution, purchased goods and material valued in excess of $50,000 directly from suppliers located outside the State of Wisconsin. AGC, Public Works, Road Builders, and Distribution have been and are now employers as defined in Section 2(2) of the Act, engaged in commerce or in an industry affecting commerce as defined in Sections 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION

The Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

The Union is a large construction union with its main office in Milwaukee, Wisconsin. The Union has geographical jurisdiction over the entire State of Wisconsin and, at the time of hearing, had over 5000 members. Besides Milwaukee, it has three additional district offices in Madison, EauClaire, and Appleton, and eight subdistrict offices throughout the State. The Union holds monthly meetings at each of its offices except during the months of January, April, July, and October, when it holds a statewide general membership meeting.

The Union is administered by President Business Manager Donald W. Shaw Sr. and by an elected executive board. Election for those and other union offices are held every 3 years. In addition to its 3-year officer elections, the Union hold a separate election every 4 years to name delegates to the International Convention. The most recent of these occurred in 1980.

President and Business Manager Shaw is responsible for the day-to-day administration of the local union, and has authority to hire all employees, appoint committees, and approve administrative expenditures. Shaw is also responsible for the administration of the Union's hiring hall. Shaw has held the position of business manager since September 1977, when he defeated his prdecessor, Joseph Goetz. He has held the combined president-business manager position since 1980, when the position was combined following the death of then-President Hiram Calkins. The Union employs, in addition to Shaw, several dispatchers and approximately 15 business agents, none of whom is elected, and all of whom serve at the pleasure of the president-business manager.

William J. Evans has been a member of the Union since 1964. He was hired by the Union in 1976 to serve as a business agent in the Madison District Office by then-business manager Joseph Goetz. Evans was employed as a business agent until Goetz' defeat in 1977, but was hired immediately by Shaw when Shaw began his administration.[1] Evans was assigned to train dispatcher Robert Fiege in the operation of the referral system. Evans testified that Shaw "wanted me to instruct the new referral officer, a dispatcher in the Milwaukee area, Robert Fiege, on proper conduct of referrals. It became apparent to me that Mr. Fiege was making improper referrals, and I discussed it with Don Shaw, he stated that at the time, that he had some political debts to pay, and he was going to refer men the way he felt. So I immediately quit, I wanted no part of it."

Starting September 1977, Evans and fellow member Russell Retzack policed the Shaw administration and, in November 1977, Evans started publishing a dissident newspaper *The Ethical Engineer*, to expose what he believed to be improper activities by Shaw and his fellow candidates during the 1977 campaign and the years that followed. Publication and distribution of *The Ethical Engineer* occurred at irregular intervals and was at Evans' own expense. The mailing list has grown to over 1500 union members. The following is a sampling of the topics discussed in *The Ethical Engineer:*

(1) New referral rules proposed by Shaw and the possibility that they are illegal under the Act.

(2) Alleged use by Shaw of the new rules to obtain jobs for his family and friends.

(3) Investigation of union officers by State of Wisconsin for alleged misuse of unemployment compensation during election campaign.

(4) Internal union charges filed against Evans.

(5) Administrative dues proposed by Shaw administration and their claimed violation of local bylaws.

(6) Local Union's negotiation of vacation fund made up of deductions from employees' paychecks deposited in a bank without interest, and possible abuses of such fund.

[1] Shaw denied that he hired Evans. Shaw's testimony was in direct contradiction to a prior deposition in which he stated with respect to Evans, "He was hired the following day, the same as the other people that I hired. He wasn't for the full term." (G.C. Exh. 33.)

(7) Shaw's previous discharge as business representative after member allegedly accused him of requiring grievance kickbacks.

(8) Claimed inadequacies in contracts negotiated by Shaw administration.

(9) Union threat to fine and expel Evans for publication of *The Ethical Engineer.*

(10) Dues increase proposed by Shaw.

(11) Union expenditures and salaries of local union officials.

(12) State of Wisconsin proposal to cut wages of highway construction employees.

(13) Evans' own candidacy for union office.

(14) Local union proposal to combine offices of president and business manager.

(15) Evans' protest of the 1980 delegate election.

(16) Alleged threats by Local union business agent to state official.

(17) Indictments of three union members, including Shaw's son and a former business agent; Shaw's own alleged advocacy of violence.

(18) Alleged shoplifting conviction of business agent.

(19) U.S. Department of Labor's audit of Local 139.

Evans urged that each recipient pass his copy along to other union members.

B. *Allegations of Unemployment Compensation Abuse*

In November 1977, Evans reported to the State of Wisconsin's Department of Industry, Labor and Human Relations (DILHR) that Shaw and other officers during the 1977 campaign, preceding their election in September 1977 registered for the Union's hiring hall but consistently refused to be referred when jobs were offered, instead, claiming unemployment compensation benefits. They used the referral system to determine the location of employees and the unemployment compensation system to finance their campaign activities during the daytime hours. Evans believed that the unemployment compensation benefits gave an unfair advantage to the challenging candidates because many of the incumbents were employed full time and did not have the time and funds to finance a full-time statewide campaign with daytime visits to union members' jobsites. Because of his belief that the alleged unemployment abuse affected the results of the election, Evans included that claim in the election protest he filed with the U.S. Department of Labor.

DILHR, in response to Evans' charge, subpoenaed referral records from the Union during its investigation. It also subpoenaed Evans and others to testify in March and May 1978. First the Union resisted production of documents but eventually produced the referral records at the May 1978 hearing. The DILHR investigation was closed in February 1979 finding that no fraudulent abuse had occurred, but that a loophole existed in the State's treatment of unemployment compensation beneficiaries who are registered at union hiring halls. Evans went to the State's Legislative Oversight Committee about the matter and, as a result, the committee continued to monitor DILHR's administration of unemployment compensation benefits for hiring hall registrants. In early 1982, at the urging of the legislative committee, DILHR reexamined its 1978 investigation of Shaw and other dissident candidates and concluded that the investigation had been terminated prematurely.

C. *Election Protest*

Evans has filed protests with the Union and with the U.S. Department of Labor concerning the 1977 and 1980 local officers' election and the 1980 election for delegates to the International convention.

In connection with Evans' 1980 protest of delegate elections, before 1980, when the president and business manager positions were separate offices, the Union sent seven delegates to the International convention. Of the seven, two, the president and business manager, were delegates by virtue of their offices and the remaining five were elected (two from the Milwaukee district and one from each of the other three districts). Evans claimed that following the merger of the offices of president and business manager, there should have been six proper delegates—the five elected delegates and Shaw. Evans learned from reading the convention minutes that seven delegates had attended on the local's behalf, including the six proper delegates and the seventh being one who was not even a candidate for the delegate position, Robert Bednarz. Evans also learned from reading the minutes that Bednarz was appointed to the adjustments committee by the International president after the convention began, and that Bednarz acted as a delegate, without having been elected delegate, seconding some nominations.

Evans had heard that Bednarz had been appointed to a committee before the convention but it was his understanding on reading the International constitution that only four committees could be appointed before the beginning of the convention—not including the adjustments committee to which Bednarz was appointed. The issue is particularly sensitive to Evans because he ran against Bednarz in the spring of 1980 for the position of financial secretary of the Union and had received the highest number of votes among the losing delegate candidates.

The Department of Labor investigators initially informed Evans that Bednarz was a legal delegate but on Evans' persistence they found that although Bednarz was a proper committee member his service as delegate was improper and was a violation of law because he was not elected as required by law. The Department of Labor further found that Bednarz' actions as delegate, however improper, did not effect the results of the elections for International union officers, and were thus not covered by the Labor Management Reporting and Disclosure Act provisions on internal union elections. Thus, the Department of Labor closed its case, not because Evans was wrong but because the impropriety of which Evans had complained did not bias the election of the International officers.

Finally, Evans protested the local officer's election of 1980. Evans was a candidate for financial secretary against Bednarz in that election and he alleged that the election had been improperly influenced by, among other things Bednarz' improper attendance at the International convention; an internal charge against him; a threat to expel him; the violence and threats to Retzack and other

candidates; a business agent's participation in the meetings of the election committee; and Retzack's exclusion from these meetings. The Department of Labor found "certain violations" but concluded that the violations did not effect the election results. LMSA Director Hunsucker stated that although there had been violence and threats of violence to some candidates none dropped out of the race as a result.

D. *Grand Jury Testimony*

In December 1979, at a union meeting in Milwaukee, Evans' ally and fellow union member Russell Retzack was physically beaten and in early 1980 two cars were fire bombed while parked adjacent to Retzack's house. Both Retzack and Evans testified before a grand jury concerning those incidents. Evans was also asked about the bombing of an employer's crane. The grand jury indicted Charles Sneed, ex-business representative of the Union, Shaw's son, and a third individual for bombing the crane. Evans' testimony was publicized in the press. In that connection Shaw later stated, "My son went to jail because some fink ratted on him." Shaw also told Retzack in January 1983, as testified by Retzack, "He said it was a shame that we told such wild tales to the grand jury."

Since late 1980 Evans protested Bednarz' trip to the International convention in Hawaii and requested that the Department of Labor conduct a financial audit of Local 139 and provide him with the figures on cost of the Bednarz' trip. The audit has been initiated and in connection with it Evans has had numerous conversations with representatives of the Department of Labor, up to the time of the hearing herein.

E. *The NLRB Charges*

Evans filed three NLRB charges since 1977. The first, in 1978, alleged discriminatory hiring hall fees and rules. The charge was withdrawn after Evans was informed by the Region that the charge had no merit. The second charge was filed by Evans in late 1982 in which he claimed that the Union had discriminatorily refused to refer him. Evans filed that charge after he had failed to receive a referral from the Union for over 2 years and had been informed by two individuals that the Union was deliberately refusing to refer him. Evans' second charge was dismissed for insufficient evidence.

In addition to filing the two charges discussed above, Evans wrote a letter to the Region in mid-1978 to determine whether the Union could refuse to grant name requests for nonmembers' names on its hiring hall list, while granting such requests for members' names. Evans believed that the practice of granting name requests for union members only was discriminatory. The Region responded to Evans' request for information stating that members and nonmembers must be treated equally. Evans made 200 copies of the Region's response to pass out at union meetings and publicized the response in his publication, *Ethical Engineer.*

F. *The Union's Retaliation for Evans' Activities*

In December 1977 member Ed Guthman filed a charge against Evans claiming that he had "published the paper creating dissension among the membership" in violation of article IX, sections 2(c) and 3(h) and (k) of the local bylaws. Guthman, who is now a business agent for the Union, had been chairman of the election committee during the 1977 campaign, and filed the charges against Evans because of Evans' first issue of the *Ethical Engineer* in protest of the conduct of the 1977 election. Business Representative Lewis Yuker agreed to speak on behalf of Guthman on his charge before the executive committee. David Waite, also a business representative and, according to Guthman, the "overseer" of the election committee, was also present at the pretrial hearing held on Guthman's charge before the executive board. Retzack defended Evans at that hearing. The executive committee meeting on Guthman's charge occurred in March 1978; however, no action was taken to dismiss the charge until July 1979 when the executive board, on Don Shaw's motion, unanimously voted to dismiss the charge.

G. *The Executive Board's 1979 Order*

In June 1979, without notice to Evans, the Union's executive committee voted to order Evans to cease publishing inflammatory material about any officers, executive board members or other members of the Union and to cease furnishing information about the Union's business, its members, or any Wisconsin building tradesmen to "outside interests." The letter informing Evans of the executive committee order also states that the executive board will expel him if he failed to comply with the Order. The letter was read to all members as part of the executive board minutes at the general membership meeting held in July 1979.

H. *The Smeaton Charge*

In January 1982, member William Smeaton filed a charge against Evans alleging that Evans' communications with state legislators about unemployment compensation abuse were undercutting the Union's efforts to improve unemployment benefits. Smeaton testified that, in October 1981, Don Shaw appointed him, then a business representative, and another member to a committee to help improve unemployment compensation benefits. The committee had been working with State Senator Burger on possible improvements. Burger's support vanished in December 1981, about the time Smeaton read newspaper accounts of Evans' report to Burger of union members' abuse of the hiring hall system while receiving unemployment compensation benefits. On the basis of the news accounts of Evans' reports, Smeaton decided to file the charge.

Without notice to Evans, the union executive board sent the Smeaton charge to trial before the membership. The trial was conducted, without Evans, by President-Business Manager Shaw. Evans was found guilty as charged and was notified that he had been fined $250 and expelled from membership. The finding of guilt and

fine were publicized in the Union's *Local 139 News*. Evans appealed the finding and the penalty was stayed pending appeal. Shaw and Business Representative Richard Mahal appeared before the general executive board of the International union in opposition to Evans' appeal and presented the entire "ding-a-ling file."[2] Evans' appeal was granted and the penalty overturned on September 1, 1982.[3]

I. *The Shaw Charge*

Before Evans' appeal had been granted on the Smeaton charge, Shaw filed his own charges against Evans on August 27, 1982, alleging that he was creating dissension among the members, destroying the interest and harmony of the local union and willfully slandering officers of the organization. Shaw testified that he filed the charges because of statements made in two issues of the *Ethical Engineer*. However, Evans testified that one of the issues was mailed after the charge was filed by Shaw.[4]

Shortly before Shaw filed his charges against Evans, Shaw's son and a former Local 139 business agent, as discussed above, had been indicted for bombing an employer's crane following a grand jury investigation in which both Evans and Retzack testified. Curiously, the pleading date for Evans on Shaw's charges was set for September 13, 1982, the date set for the criminal trial of Shaw, Jr. and Charles Sneed on the indictments. Evans' trial before the membership, on the Shaw charges, was set for November 2, 1982, the day before Shaw's appeal hearing on Evans' allegations of unemployment compensation abuse. It is obvious that the timing of these events is more than mere coincidence.

Evans and Retzack as Evans' representative were present for the November 2, 1982 trial of Evans on the Shaw charges. Shaw told the members that Evans had filed complaints with DILHR, the Department of Labor, the NLRB, FBI, and the Federal grand jury and that the Union had spent thousands of dollars defending those actions. Shaw produced the "ding-a-ling file" consisting of six green notebooks which Shaw claimed, among other things, contained all the documents filed concerning the actions. Shaw told the members that the International union had made it clear that he could not fine or expel Evans for his activities. Another way had to be found. Shaw suggested a "token reimbursement" by Evans to the Union of $5000, with $3000 being set aside if Evans attended the next 12 district meetings. Despite Evans' and Retzack's defense, the membership found Evans guilty and imposed the penalty requested by Shaw. At the end of the meeting, Shaw told the members that his son was in jail because someone had "ratted on him." The finding and penalty against Evans were published in the *Local 139 News*.

Evans appealed and the penalty against him was stayed and the conviction and penalty were eventually reversed by the International union. In connection with the appeal, Evans traveled to Washington, D.C. at his own expense.

J. *The Respondent Reports Evans to DILHR*

On June 6, 1983, 2 days before the hearing in the instant case was scheduled to begin, Evans received, for the first time in 3 years, a referral from the Respondent. Evans told the dispatcher that he would be unable to begin the job as requested on Wednesday, June 8, because of the scheduled NLRB hearing, but that he would be available on Thursday as he anticipated the hearing would be concluded by then. The dispatcher told Evans that he would give him the job for Thursday, if no one else could be found to start on Wednesday. The dispatcher also told Evans that 45 people had already turned down the job. The following evening at a union meeting, the dispatcher told Evans that he had filled the job.

On the day after the original conversation between Evans and the dispatcher, the dispatcher (Morris) sent a letter to the state agency (DILHR) alleging that Evans had refused the job offer. As a result of the letter, Evans' unemployment compensation benefits were immediately cut off and have not been reinstated as of the close of the hearing in this case.

President Don Shaw testified that he has never known an incident where referral information was reported to DILHR in the absence of a subpoena or court order. In that connection it has been Respondent's consistent position that its referral records are confidential documents which are not available for inspection by any member or any governmental agency, absent a court order requiring production thereof. I find Morris' letter to the DILHR to be a deviation from the Union's normal procedure and was for the sole purpose of harassing Bill Evans. I also find that the Respondent's referral system constitutes an exclusive hiring hall.

It should be noted that Evans' actions including the publication of the *Ethical Engineer*, considering the substantial assistance and cooperation from Retzack and the testimony both gave before the grand jury and Justice Department officials constitute concerted activity and, as such, protected by Section 7 of the Act. In that connection I agree with the General Counsel that even if Evans had taken the action alone, it would have been protected under the language of *Scofield v. NLRB*, 394 U.S. 423 (1969), and *Carpenters Local 22 (Graziano Construction)*, 195 NLRB 1 (1972). I find that the Union's conduct, by its August 1982 charge against Evans and the June 6, 1982 unemployment compensation letter, constitutes restraint and coercion of Evans' protected activities, not privileged by the 8(b)(1)(A) proviso, and therefore is a violation of that section of the Act. Evans had a right to protest Shaw's election activities inasmuch as he believed them to violate the state unemployment compensation law. Moreover, his publication of the *Ethical Engineer* newsletter falls within his Section 7 right to question the wisdom of his representatives or to take steps to align his

[2] The "ding-a-ling file" consisted of six green notebooks assembled by the Union concerning Evans which included his publications, information concerning his contacts with governmental agencies, charges, etc.

[3] Smeaton's charge was remanded to the local union for consideration as to retrial but has not been acted on to date.

[4] Shaw testified in an arrogant but guarded, hesitating, and cautious manner. On the other hand, Evans was open, candid, responsive, and unhesitating while testifying. In short, Evans was a credible witness and Shaw was not.

union with his own position. *East Texas Motor Freight*, 262 NLRB 868 (1982).

K. *The Respondent's Position*

Respondent attempts to portray Evans as a malcontent and somewhat of a crackpot. It collected and preserved copies of documents concerning Evans' various activities, and referred to it as the "ding-a-ling" file. It tries to portray Evans as harassing the Union and union oficials instead of the other way around. It claims that just because most of the charges brought against Evans were overturned on appeal and inasmuch as Evans has not paid any fines or otherwise been punished that Respondent should somehow be absolved of its illegal conduct.

Respondent also makes the incredible argument that Evans made no efforts on his own to contact union members directly for the information Evans requested in order to check on the operation of the referral system and therefore does not deserve the requested information. It is patently ridiculous to suggest that Evans could contact everyone who was on the referral list when he does not know and cannot know who is on the list. To suggest that Evans contact 5000 members throughout the State to find out who is on the list is equally absurd. Even if he were able to contact all the members, they would not know where they stand (order) in relation to others because the Union denies that information to all. Thus, it would be impossible for Evans to find out who is before him and who was after him on the list.

Respondent also contends that Evans has a mailing list containing the names and addresses of 1500 union members. So what! Again, those members are as ignorant as Evans as to who is above or below on the list. Respondent also makes the specious argument that Evans should have sent out questionnaires, as he has done in other matters with respect to the operations of the referral system. Again, in the circumstances, such an effort would be futile. What would he find out?

In response to Evans' request, the Union sent a letter to all individuals on the referral hall list. The letter advised the individuals of Evans' request and asked them to advise the Local whether they would authorize release of his name, address, and telephone number to Evans. It made no mention of Respondent's willingness to reveal the individual's standing on the list with respect to other members because Respondent is not willing to do that. Again, the information is worthless. The Union's action was a sham.

There is no legitimate reason for the Union to withhold from the membership, information concerning the referral list. I see no possibility of harm to the Union or to the employees. On the contrary, to withhold such information permits the union officers to discriminate and play favorites and deprives a member or nonmember of his right to know whether the referral list is being operated properly and fairly. The use of the "secret" list to reward supporters of the officers of the Union to the detriment of others is not just conjecture. The evidence reveals that very conduct. There is much evidence in this case to support the allegations of discrimination against Evans and the corrupt handling of the referral system by President-Business Manager Shaw and his appointed subordinates.

With respect to Evans being referred to a job on June 6, the Respondent claims that Evans declined the offer and the job service was so informed by Morris, a dispatcher. Respondent contends, "There was no legal action filed by the Union," and further that there was no showing that accommodations could not have been made by the employer or by the parties at the hearing with respect to this work assignment and to coordinate this work assignment. That contention does not square with the credible testimony that Evans was prepared to do just that and does not answer why, after years of being on the list, Evans, on the eve of the NLRB hearing, is referred to a job. Nor does it explain why on its own the Union revealed to the state unemployment compensation agency, information concerning such referral when such action was contrary to the policies and past practice of the Union. Shaw insisted that it was only revealed when subpoenaed (or on court order).

I find Respondent's actions to be part of the pattern of harassment by Respondent against Evans.

With respect to Evans' publication, *Ethical Engineer*, Respondent contends that the members voted to discipline a member for publishing false and defamatory material and that, inasmuch as the discipline was reversed on appeal, no violation of the Act occurred. Respondent says that Evans accused Shaw of being a thief, stealing union money, and getting payoffs; that none of these accusations of illegal conduct has ever been substantiated by Evans and "They are obviously liable *per se*." "Liable *per se*!" I find no evidence in the record that any liable action has been instituted against Evans for his "liable *per se*." The only evidence in the record is that the Respondent's officers attempted to discipline Evans for publishing the so-called false and defamatory material and that they were reversed on appeal. Respondent makes other arguments that do not even merit discussion.

L. *Conclusions*

Each of Evans' activities discussed herein is protected under Section 7 of the Act, including his opposition to Shaw's electioneering tactics and his complaints to the United States Department of Labor. Evans' publication of the *Ethical Engineer* newsletter is within his Section 7 rights to question his representatives and to persuade the Union to adopt his position.

As previously discussed, Respondent operates a referral system service or "hiring hall" out of its four district offices. Employers under union contract are required to hire their employees through the hiring hall and may hire "off the street" only if the Union is unable to provide qualified employees within 48 hours. I find that arrangement to be an "exclusive" hiring hall. The referral provisions in the Union contract state:

> ARTICLE XI
>
> REFERRAL
>
> Section 11.1. When the Contractor needs additional Journeymen or Apprentices for work within

the jurisdiction of Operating Engineers, Local No. 139, he shall give the Union first opportunity to dispatch such help, informing the Union of the location, nature and extent of the job, and shall allow forty-eight (48) hours for referral of prospective employees.

Section 11.2. A Contractor's request for an individual operator by name will be honored, provided the operator requested is presently on the out-of-work list five (5) days, or is employed regularly on a season-to-season basis by the requesting Contractor.

Section 11.3. In the event the Contractor is notified that such help is not available, or in the event the employees called for do not appear for work at the time designated by the Contractor, the Contractor may hire from any other available source.

Section 11.4. Any employee who is hired in violation of this Article shall be discharged by the Contractor when the violation has been brought to his attention in writing by the Business Representative.

Section 11.5. The Contractor shall have the right to employ or not to employ any applicant referred by the Union.

Section 11.6. EMERGENCY EMPLOYMENT: In the event an employee fails to report for work, becomes sick during the course of the day, or for some other reason disrupts the Contractor's work routine by not working, the Contractor shall immediately contact the Union Office to obtain a qualified replacement. While the Contractor is waiting for the replacement to arrive, he shall have the right to place a qualified man on the equipment in order to keep the other tradesmen working.

Evans and Shaw testified that the Union operates an exclusive hall, and the employers are obligated to hire through the hall. Shaw also testified that in Local 139 contracts which do require employers to hire through the hall, the Union may grieve an "off the street" hiring, obtain backpay for the person at the top of the referral list, and perhaps even have the person discharged who is hired off the street. Shaw further testified that, although there are contracts through the exclusive referral provisions, it is "not in all contracts." However, he could recall no contracts without exclusive referral provisions and none were produced by the Union. As previously stated I find the Union operated an exclusive hiring hall within the meaning of *Teamsters Local 357 v. NLRB*, 365 U.S. 667 (1961), and *Laborers Local 889 (Anthony Ferrante & Sons, Inc.)*, 251 NLRB 1579 (1980).[5]

Respondent's duty of fair representation requires supplying Evans with job referral information. It is inherent in a union's duty of fair representation to deal fairly with an employee's request for information as to his relative position on the out-of-work register for purposes of job referral through an exclusive hiring hall. Evans' request of Respondent for the 50 names, addresses, and telephone numbers of individuals above and below his name on the four out-of-work registers is a reasonable request that clearly involves a matter affecting his employment.

Evans has been completely dependent on Respondent for the protection of his referral rights. Respondent's refusal to give Evans the requested information deprives Evans of the only means whereby he could fully ascertain whether or not his referral rights were being protected. In spite of Respondent's protestations, Evans had no other means at his disposal. Respondent's refusal to supply the job referral information under the guise that it had a duty to preserve the anonymity or privacy of its members is totally lacking in merit. The members are part of the Union in which all have a common cause. It is not as though the information were being released to the public or to some other interest that might be inimical to the members. Here, we have a fraternity of individuals, many of whom are in the same boat. The interest of a member to make sure that his rights are being protected far outweigh any right of privacy considerations which may exist between members. I therefore reject the maintenance of privacy argument and conclude that Respondent unjustifiably refused to furnish Evans job referral information in violation of Section 8(b)(1)(A) of the Act. *Operating Engineers Local 324 (AGC of Michigan)*, 226 NLRB 587 (1976).

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent as set forth above have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States, and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Having found that Respondent has engaged in unfair labor practices in violation of Section 8(b)(1)(A) of the Act, I shall recommend that it be ordered to cease and desist therefrom and to take affirmative action designed to effectuate the policies of the Act. I shall recommend that Respondent be ordered to cease interfering with the Charging Party's Section 7 rights by harassing him and bringing charges against him which impair his rights guaranteed by Federal labor laws. I shall also recommend that Respondent be ordered to refrain from arbitrarily denying referral information to registrants. I shall also recommend that Respondent be ordered to post and mail appropriate notices to all its members because of the wide geographical spread of Respondent's jurisdiction and the extensive publicity already mailed to members concerning the Charging Party and this case. I shall also recommend that Respondent be ordered to notify Wisconsin DILHR that the Union's June 1983 letter concerning Charging Party Evans was an error; that Evans did not refuse a job offer; and to reimburse Evans for

[5] The exclusivity of the hiring hall herein is not affected by the fact that in sec. 11.2 of the contract quoted above, the contractor's request for an individual operator whom he names will be honored because it is conditioned on the operator requested must, at the time, be on the out-of-work list for 5 days or is employed regularly on a season-to-season basis by the requesting contractor See *Plasterers Local 299 (Wyoming Contractors)*, 257 NLRB 1386 (1981).

any unemployment compensation benefits lost as a result of that letter.

I shall also recommend that Respondent be ordered to produce for Charging Party Evans the names, addresses, and telephone numbers (in order) of the 50 employees above and below him on each of the 4 district referral lists, as of December 1982, so that Evans can determine whether the Union has been discriminating against him regarding referrals. Finally, I shall recommend that Respondent be ordered to make Evans whole for his costs incurred in appealing the Shaw charge.

CONCLUSIONS OF LAW

1. A number of member-employers of AGC, Public Works, Road Builders and Distribution are engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Respondent is a labor organization within the meaning of Section 2(5) of the Act.

3. By refusing to supply William J. Evans the list of names, addresses, and telephone numbers of 50 employees above and 50 employees below his name in registers of 4 districts of Respondent's jurisdiction, Respondent breached its duty of fair representation and interfered with, restrained, and coerced Evans in the exercise of his rights under Section 7 of the Act, thereby violating Section 8(b)(1)(A) of the Act.

4. By filing the internal union charges against Charging Party Evans on August 27, 1982, Respondent violated Section 8(b)(1)(A) of the Act.

5. By fining Charging Party Evans to reimburse Respondent $5000 for legal costs incurred in defending itself against the activities engaged in by Charging Party, Respondent violated Section 8(b)(1)(A) of the Act.

6. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) of the Act.

[Recommended Order omitted from publication.]

Burger Pits, Inc., and Self Serv Food Corp., Inc. *and* Hotel, Motel and Restaurant Employees and Bartenders Union, Local No. 19, Hotel and Restaurant Employees and Bartenders International Union AFL–CIO. Cases 32–CA–2812 and 32–CA–3009

14 December 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS ZIMMERMAN AND DENNIS

On 27 May 1981 Administrative Law Judge Roger B. Holmes issued the attached decision. The Respondent filed exceptions and a supporting brief, and the Charging Party filed a brief in opposition to the Respondent's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order as modified and set forth in full below.

The Union represents a unit of full-time and regular part-time employees in the Respondent's chain of 15 restaurants. The record does not disclose whether the Union was certified by the Board or voluntarily recognized by the Respondent. However, the parties did enter into a series of collective-bargaining agreements, the most recent of which was effective by its terms from 1 June 1977 until 31 May 1980.[1] The contract required, inter alia, that the Respondent make contributions to a health and welfare trust fund and to a pension plan. The contract also granted union representatives reasonable access to the Respondent's facilities to conduct interviews with employees. On 29 May, during negotiations for a new contract, the parties agreed to extend the existing contract until 30 June.[2]

On 3 June employee Robbins gave the Respondent's vice president Berger[3] a petition indicating that the 180 signers (a majority of the unit employees) no longer wished to be represented by the Union.[4] On 6 June the Union received notice that the Respondent no longer recognized it as the employees' bargaining representative. After 6 June, but before the expiration of the contract on 30 June, the Respondent unilaterally instituted new health and welfare coverage and unilaterally ceased making the contractually required contributions to the existing health and welfare fund and pension plan. On 11 August the Respondent refused the Union's request for a list of employees. The judge also found that after 31 May the Respondent refused to grant union representatives access to the kitchen areas of its facilities.

The judge observed that the Union enjoyed a presumption of majority status during the term of the contract, and he concluded that because of the contract the Respondent was not free to withdraw recognition when it received the employee petition. The judge also found that the Respondent's unilateral conduct was unlawful, and he concluded that the Respondent was bound to continue to apply the contract after its expiration.[5] The judge issued a bargaining order and a make-whole remedy which extended beyond the expiration date of the contract. We shall modify the judge's findings for the reasons below.

It is well settled that absent unusual circumstances a union enjoys an irrebuttable presumption of majority status during the first year following its certification.[6] After the certification year the presumption of majority status becomes rebuttable.[7] Whether certified or voluntarily recognized,[8] a union also enjoys a rebuttable presumption of majority status upon the expiration of a collective-bargaining agreement.[9] An employer who refuses to bargain with an incumbent union may rebut the presumption of majority status by establishing either (1) that at the time of the refusal to bargain the union in fact did not enjoy majority status, or (2) that the refusal was predicated on a good-faith and reasonably grounded doubt, supported by objective considerations, of the union's majority status.[10] It is also established that within a reasonable time prior to the expiration date of a collective-bargaining agreement, an employer who establishes a good-faith doubt of a union's majority status may announce that it does not intend to negotiate a new agreement.[11] An employer who does so may then lawfully implement unilateral changes upon the expiration of the contract.[12]

[1] Unless otherwise specified, all dates herein refer to 1980.

[2] The Respondent has not excepted to the judge's finding that Castle, the individual who agreed to the extension, was authorized to negotiate on the Respondent's behalf.

[3] Berger was the vice president of Burger Pits, Inc., and the president of Self Serv Food Corp., Inc. It is admitted that the two entities constitute a single and joint employer.

[4] The judge found that the petition contains 198 signatures, but it in fact contains only 180.

[5] In view of the result we reach herein, we find it unnecessary to consider the judge's discussion of *Bay Area Sealers*, 251 NLRB 89 (1980).

[6] *Master Slack Corp.*, 271 NLRB 78, 84–85 (1984).

[7] *Master Slack Corp.*, supra, 271 NLRB at 84–85; *Bennington Iron Works, 267 NLRB 1285 (1983); Terrell Machine Co.*, 173 NLRB 1480, 1481 (1969).

[8] *Cobb Theatres*, 260 NLRB 856, 859 (1982).

[9] *Master Slack Corp.*, supra, 271 NLRB at 84–85.

[10] *Master Slack Corp.*, supra, 271 NLRB at 84–85; *Bennington Iron Works*, supra; *Terrell Machine Co.*, supra at 1480–1481.

[11] *Master Slack Corp.*, supra; *Bennington Iron Works*, supra.

[12] *Bennington Iron Works*, supra.

We find at the outset that the employee petition provided the Respondent with a sufficient basis for a good-faith, reasonable doubt of the Union's majority status.[13] There were 276 employees in the unit, and the petition expressly stated that the 180 signers no longer wished to be represented by the Union.[14] Employee Robbins solicited the signatures on his own initiative, and there is no evidence that the petition was tainted by unfair labor practices.[15]

The Respondent received the petition on 3 June, several weeks prior to the expiration of the 1-month extension of the collective-bargaining agreement. In accordance with the principles outlined above, we find that on 3 June the Respondent would have been privileged to announce an intention not to negotiate for a new collective-bargaining agreement. However, we find that while the contract was in effect the Respondent was not privileged to withdraw recognition from the Union or unilaterally to implement contractual changes. Rather, we conclude that it is consistent with our well-established rules, outlined above, to find that the Respondent was obligated to administer the collective-bargaining agreement until its expiration.

Consequently, we agree with the judge that the Respondent violated Section 8(a)(5) and (1) when it withdrew recognition from the Union[16] and unilaterally implemented a new health and welfare fund, ceased making contractually required contributions to the existing health and welfare fund and pension plan, and refused to grant union representatives access to its kitchen areas.[17] Contrary to the judge, however, we shall not order the Respondent to recognize and bargain with the Union, and we shall not extend the make-whole remedy beyond the expiration date of the contract. In view of its reasonable, good-faith doubt of the Union's majority status, the Respondent would have been privileged to announce an intention not to bargain with the Union for a new contract, and it was only obligated to administer the old contract until its expiration date. In addition, the Respondent would have been privileged to withdraw recognition from the Union and implement unilateral changes upon the expiration of the contract on 30 June. The Respondent's misconduct consisted simply of taking those measures prematurely, and we therefore find it appropriate not to extend the remedy beyond the date when it lawfully could have taken those measures.[18]

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The following employees of the Respondent constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time employees employed by Burger Pits, Inc. and Self Serv Food Corp., Inc., at their various facilities located within Santa Clara County, California, performing work set forth in the Wage and Classification Schedule contained in the collective-bargaining agreement between Burger Pits, Inc. and Self Serv Food Corp., Inc. and the Union effective during the period June 1, 1977, through June 30, 1980; excluding all other employees, guards, and supervisors as defined in the Act.

4. The Union was the exclusive collective-bargaining representative of the employees in the appropriate unit until 30 June 1980.

5. The Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(5) and (1) by:

[13] In view of our finding with respect to the petition, we find it unnecessary to consider the other factors discussed by the judge.

[14] The Board has found that similar petitions constituted support for a good-faith, reasonable doubt of majority status. *Master Slack Corp.*, supra; *Industrial Waste Service*, 268 NLRB 1180 (1984).

[15] The judge found that after 31 May the Respondent unlawfully refused to grant union representatives access to its kitchen areas. We note that this misconduct began prior to the submission of the petition on 3 June, and prior to employee Robbins' collection of the signatures between 1 and 3 June. However, we think it clear that this misconduct was unrelated to the massive disaffection with the Union which the petition reflects. We conclude that this unfair labor practice "was not of such a character as to either affect the Union's status, cause employee disaffection, or improperly affect the bargaining relationship itself." *Colonial Manor Convalescent Center*, 188 NLRB 861 (1971). See also *Master Slack Corp.*, supra; *Guerdon Industries*, 218 NLRB 658, 661 (1975). We also emphasize that the Respondent's other unilateral changes occurred after it received the petition.

[16] Requiring an employer to administer a contract carries the inherent obligation to recognize, until the expiration date, the union with whom the contract is made. Consequently, we also find that the Respondent's withdrawal of recognition was unlawful. This result is not inconsistent with *Bennington Iron Works*, supra. In that case an employer with a reasonable doubt of majority status simply announced its refusal to negotiate a new contract. Although the Board characterized the refusal as a lawful "withdrawal of recognition," the employer did not expressly withdraw recognition and it did not implement unilateral changes until after the expiration of the contract.

[17] We shall dismiss the allegation that on 11 August the Respondent unlawfully refused to furnish the Union with the names of the employees in the unit. This conduct occurred well after the expiration of the contract.

[18] In joining his colleagues in finding that the remedy does not extend beyond the expiration of the contract, Member Zimmerman notes that there is evidence that the Union had actually lost its majority status before recognition was withdrawn.

(a) Withdrawing recognition from the Union about 3 June 1980, prior to the expiration of the collective-bargaining agreement.

(b) Refusing to administer the collective-bargaining agreement until its expiration on 30 June 1980.

(c) Unilaterally ceasing to make contractually required contributions to the health and welfare fund and the pension plan, while the collective-bargaining agreement was still in effect.

(d) Unilaterally implementing a new health and welfare fund, while the collective-bargaining agreement was still in effect.

(e) Unilaterally refusing to grant union representatives access to the kitchen areas of its facilities, while the collective-bargaining agreement was still in effect.

6. The unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist from engaging in such conduct, and that it take certain affirmative action designed to effectuate the policies of the Act.

We shall order that the Respondent make whole its employees for any losses they may have suffered as a result of the Respondent's unlawful unilateral changes. The make-whole order shall extend from the date that the unilateral changes were implemented until 30 June, the expiration date of the collective-bargaining agreement.

In this connection the Respondent has excepted to the judge's failure to provide for a comparison of the health and welfare fund of the Union and the Respondent, in order to determine whether the employees suffered any losses as a result of the Respondent's unilateral changes. We note that the judge provided for such a comparison in his discussion of the appropriate remedy, and we conclude that he inadvertently omitted the provision from his recommended Order. We have therefore modified his recommended Order accordingly.

ORDER

The National Labor Relations Board orders that the Respondent, Burger Pits, Inc., and Self Serv Food Corp., Inc., Santa Clara County, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Withdrawing recognition during the term of a collective-bargaining agreement from Hotel, Motel and Restaurant Employees and Bartenders Union, Local No. 19, Hotel and Restaurant Employees and Bartenders International Union, AFL–CIO as the exclusive collective-bargaining representative of the employees in the following appropriate unit.

> All full-time and regular part-time employees employed by Burger Pits, Inc. and Self Serv Food Corp., Inc., at their various facilities located within Santa Clara County, California, performing work set forth in the Wage and Classification Schedule contained in the collective-bargaining agreement between Burger Pits, Inc. and Self Serv Food Corp., Inc. and the Union effective during the period June 1, 1977, through June 30, 1980; excluding all other employees, guards, and supervisors as defined in the Act.

(b) Refusing to administer, until the date of expiration, its collective-bargaining agreement with the Union.

(c) Unilaterally ceasing to make contractually required contributions to the health and welfare fund and the pension plan, while the collective-bargaining agreement was still in effect.

(d) Unilaterally implementing a new health and welfare fund, while the collective-bargaining agreement was still in effect.

(e) Unilaterally refusing to grant union representatives access to the kitchen areas of its facilities, while the collective-bargaining agreement was still in effect.

(f) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) After a comparison is made between its health and welfare fund and that of the Union to determine whether its employees suffered any loss, make whole the employees in the appropriate unit by transmitting the contributions owed to the Union's health and welfare fund and pension plan pursuant to the terms of its collective-bargaining agreement with the Union, and by reimbursing unit employees for any medical, dental, or any other expenses ensuing from the Respondent's failure to make such required contributions. This shall include reimbursing employees for any contributions they themselves may have made for the maintenance of the Union's health and welfare fund and pension plan after the Respondent unlawfully discontinued contributions to those funds; for any premiums they may have paid to third-party insurance companies to continue medical and dental coverage in the absence of the Respondent's required contri-

butions to such funds; and for any medical or dental bills they have paid directly to health care providers that the contractual policies would have covered. All payments to employees shall be made with interest. The Respondent shall make its employees whole from the date on which it implemented unilateral changes in the health and welfare fund and pension plan, until the collective-bargaining agreement expired on 30 June 1980.[19]

(b) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Post at all of its restaurants in Santa Clara County, California, copies of the attached notice marked "Appendix."[20] Copies of the notice, on forms provided by the Regional Director for Region 32, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employes are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[19] Because the provisions of employee benefit fund agreements are variable and complex, the Board does not provide at the adjudicatory stage of a proceeding for the addition of interest at a fixed rate on unlawfully withheld fund payments. Therefore, the interest owed with respect to the health and welfare fund and pension plan shall be determined in accordance with the procedure set forth in *Merryweather Optical Co.*, 240 NLRB 1213, 1216 fn. 7 (1979). However, the interest owed with respect to the reimbursement of individual employees for their expenses and contributions shall be computed in the manner prescribed in *Florida Steel Corp.*, 231 NLRB 651 (1977). See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962). See also *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980).

[20] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT, during the term of our collective-bargaining agreement, withdraw recognition from Hotel, Motel and Restaurant Employees and Bartenders Union, Local No. 19, Hotel and Restaurant Employees and Bartenders International Union, AFL-CIO as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

> All full-time and regular part-time employees employed by Burger Pits, Inc. and Self Serv Food Corp., Inc., at their various facilities located within Santa Clara County, California, performing work set forth in the Wage and Classification Schedule contained in the collective-bargaining agreement between Burger Pits, Inc. and Self Serv Food Corp., Inc. and the Union effective during the period June 1, 1977 through June 30, 1980; excluding all other employees, guards, and supervisors as defined in the Act.

WE WILL NOT refuse to administer, until the date of its expiration, our collective-bargaining agreement with the above Union.

WE WILL NOT unilaterally cease to make contractually required contributions to the health and welfare fund and the pension plan while the collective-bargaining agreement is in effect.

WE WILL NOT unilaterally implement a new health and welfare fund, while the collective-bargaining agreement is in effect.

WE WILL NOT unilaterally refuse to grant union representatives access to the kitchen areas of our restaurants, while the collective-bargaining agreement is in effect.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL make our employees whole for any losses they may have suffered as a result of our unfair labor practices in the manner required by the National Labor Relations Board.

BURGER PITS, INC., AND
SELF SERV FOOD CORP., INC.

DECISION

ROGER B. HOLMES, Administrative Law Judge. Based on an unfair labor practice charge in Case 32–CA–2812 filed on June 16, 1980, by Hotel, Motel and Restaurant Employees and Bartenders Union, Local No. 19, Hotel and Restaurant Employees and Bartenders International Union, AFL–CIO and based on an unfair labor practice charge in Case 32–CA–3009 filed on August 25, 1980, by the Union, the General Counsel issued on September 30, 1980, a consolidated complaint alleging violations of Section 8(a)(1) and (5) of the Act by Burger Pits, Inc., and Self Serv Food Corp., Inc. The General Counsel made two amendments to his consolidated complaint during the course of the trial proceedings. (Tr. 6–7 and 125–127.)

The trial was held on January 15, 1981, at Oakland, California. Posthearing briefs were due by February 19, 1981.

FINDINGS OF FACT

I. THE EMPLOYER AND THE UNION

The Board's jurisdiction is not in issue in this proceeding. At the times material herein, Burger Pits, Inc., and Self Serv Food Corp., Inc., have operated restaurants located in Santa Clara County and at other locations in California. Both corporations are affiliated business enterprises with common ownership, common officers, and directors, common officers and directors, common control and direction of operations, common control of labor relations policies, and shared equipment and facilities. It was admitted that the two corporations are an integrated enterprise, and/or a single employer, and/or a joint employer. The Respondent meets the Board's discretionary and statutory jurisdicitional standards for retail enterprises.

The status of the Union as a labor organization within the meaning of the Act was admitted.

II. THE WITNESSES

Four witnesses were called to testify at the trial in this proceeding. Two of those witnesses were identified with the interest of the Charging Party. They are Frank C. Marolda, who is the president and the business manager of the Union, and Steven L. Stemerman, who is an attorney in the law firm of Davis, Cowell & Bowe, which firm represents the Charging Party in this case. Two witnesses were identified as having interests with the Respondent. They are Albert A. Berger, who is president of Self Serv Food Corp., Inc., and vice president of Burger Pits, Inc., and Andrew Frank Castle, who is president of Triangle Consulting Company, and who has been representing employer associations and individual employers in labor relations matters since 1955.

The findings of fact to be made herein will be based on portions of the testimony of each one of the four witnesses. The findings will reflect the portions of their testimony, which in my view are accurate and reliable, after reviewing the entire record and considering the arguments made by the parties. The testimony of Marolda and Stemerman contradicts the testimony of Castle regarding the events which occurred on May 29, 1980, and which led to the signing of Respondent's Exhibit 3. After listening to all of the witnesses testify, and based on their demeanor on the witness stand, I credit the testimony of Marolda and Stemerman. The findings of fact to be set forth in section 5 will be based on their credited accounts.

The General Counsel points in his brief to several errors and inconsistencies in the testimony offered by Berger. Some of those matters were corrected by Berger during the course of his direct examination and cross-examination. There are some other matters which are difficullt to reconcile. For example, note Berger's testimony at transcript 25 regarding his conversation with Castle at a meeting of employers at a restaurant in March 1980. Contrast that version with Berger's subsequent testimony at transcript 69–70 and transcript 73–75 regarding Castle's alleged lack of bargaining authority. At transcript 25 Berger indicated that he said to Castle at the restaurant meeting, "I told him we'd go along with what he did in negotiating the contract for us." At transcript 28 Berger indicated uncertainty as to whether he had signed a written authorization to Castle. However, he finally testified, "I believe I did, I'm not sure, but I can't say for sure. But I'm pretty sure I did." Nevertheless, Berger subsequently asserted at transcript 69–70 and transcript 73–75 that Castle did not have any authority to negotiate for the Respondent in 1980 nor to sign any agreement for the Respondent. The former testimony, rather than the latter version, seems more accurate in view of Castle's actions to be described herein, and in view of the Respondent's past practice regarding its contracts with the Union. Accordingly, I shall credit the earlier version given in Berger's testimony. See the Board's decision in *Krispy Kreme Doughnut Corp.*, 245 NLRB 1053 fn. 1 (1979).

In addition to basing the findings of fact upon portions of the witnesses' testimony, I shall also base certain findings of fact upon documentary evidence which was introduced by the parties at the trial.

III. THE COLLECTIVE-BARGAINING HISTORY BETWEEN THE RESPONDENT AND THE UNION

The Respondent's business was founded on March 13, 1953. From 1953 to 1977 the Respondent did not employ anyone outside of the Company to handle their labor relations matters. Instead, the practice was for the Respondent to accept the terms and conditions of the collective-bargaining agreement which the Union or its predecessor negotiated with the employer associations, and then the Respondent would negotiate separately with the Union for a wage agreement.

In 1977 the Respondent retained Andrew Frank Castle to negotiate a contract on the Respondent's behalf with the Union. Introduced into evidence as Charging Party's Exhibit 1 was a copy of a letter dated June 2, 1977, from Berger to Castle. In pertinent part it states, "This letter is your authorization to represent Self Serv Food Corporation and Burger Pits, Inc. in negotiations with Local 19. This further authorizes you to conclude a contract in our behalf."

The General Counsel's Exhibits 2(a) and 2(b) comprise the collective-bargaining agreement between the Respondent and the Union. The General Counsel's Exhibit 2(a) is the printed booklet form, which was negotiated with the employer association, and the General Counsel's Exhibit 2(b) is the one-page wage addendum which was agreed to between the Respondent and the Union. Section 2 of the General Counsel's Exhibit 2(a) pertains to "union membership and employment.". That section contains, among other things, a union-security clause. Section 10 of the General Counsel's Exhibit 2(a) pertains to "interviews" It provides:

> Sec. 10. INTERVIEWS: Duly authorized representatives of the Union shall be permitted to investigate the standing of all employees and investigate conditions to see that the Agreement is being enforced, provided that no interview shall be held during the rush hours, or unreasonably interrupt the duties of any employee. The employer shall be notified by the Union representative before he shall take action with the person involved. If the employer is absent the representative of the Union shall contact the person in charge of the shift and inform him of the circumstances. The employer and the Union representative shall conduct themselves in such a manner as to carry out the intent and spirit of this section.

Section 21 of the General Counsel's Exhibit 2(a) provides, among other things, for employer contributions on behalf of its employees to a health and welfare trust fund and to a pension plan. Section 32 of the contract contains the provisions relating to the effective dates of the agreement. It provides:

> Sec. 32. PERIOD OF AGREEMENT: This Agreement, including the attached wage scale and working conditions, shall be effect as of June 1, 1977. Said Agreement shall continue in full force and effective through May 31, 1980.
>
> It is further understood that either party may reopen this contract at least sixty (60) days prior to its expiration on May 31, 1980, and give notice of its desire to change, modify, or alter this Agreement. In the event no such notice is given prior to March 31, 1980, this contract shall be automatically extended from year to year beyond the expiration date set forth, said contract being this contract as it may be amended and as it is in effect with any such amendments on the 31st day of May, 1980.

The description of the appropriate collective-bargaining unit is set forth in paragraph 6 of the General Counsel's consolidated complaint. That paragraph was admitted in the pleadings. It provides:

> All full-time and regular part-time employees employed by Burger Pits, Inc. and Self Serv Food Corp., Inc., at their various facilities located within Santa Clara County, California, performing work set forth in the Wage and Classification Schedule contained in the collective-bargaining agreement between Burger Pits, Inc. and Self Serv Food Corp., Inc. and the union effective during the period June 1, 1977, through May 31, 1980; excluding all other employees, guards, and supervisors as defined in the Act.

After the 1977 collective-bargaining agreement was concluded between the Respondent and the Union, the Respondent continued to retain Castle to handle its labor relations matters. Berger testified, "We gave him complete authority—any grievances or anything that came up, we called him on it." Castle continued to be retained by the Respondent at the time of the trial. His retainer was not in writing, but instead it was a verbal agreement. Berger had no contact with the Union with regard to the administration of the collective-bargaining agreement between 1977 and 1980. He said that Castle handled the Respondent's case involving an employee grievance and also the Respondent's interest in an alleged discrimination case.

On January 23, 1980, Ron Davis, the financial secretary-treasurer of the Union, wrote a letter to Castle and requested a complete list of the association members and addresses. (See G.C. Exh. 3(a).) In response to that request, the General Counsel's Exhibit 3(b) was furnished. Included among the numerous businesses on the General Counsel's Exhibit 3(b) was Berger's name and Self Serv Food Corp.'s name and address. There were also serveral meetings and telephone calls between Castle and Frank C. Marolda, the president and the business manager of the Union, regarding the upcoming contract negotiations. Marolda said that he spoke with Castle "numerous times" regarding the terms of a new contract and other matters.

In March 1980 Castle held a meeting at Roger's Restauraunt in Santa Clara with several employers. Berger was one of the employers who attended that meeting. Berger testified:

> Q. Did you talk to Mr. Castle at that meeting about the renewal or renegotiation of the Burger Pits contract?
>
> A. Yes, I did.
>
> Q. And what did you tell Mr. Castle?
>
> A. I told him we'd go along with the association on—I'm sorry, I told him we'd go along with what he did in negotiating the contract for us.
>
> Q. You told Mr. Castle that you would go along with letting him negotiate the contract for you?
>
> A. That's right, yes, sir.
>
> Q. Did you discuss the employer—employee sentiment within your stores regarding the Union with Mr. Castle?
>
> A. Yes, I did.
>
> Q. And what did you tell Mr. Castle?
>
> A. I told him that only about five stores out of the chain had ever been contacted within the last year or two by a union representative. And that if all my busboys had to join the Union, under the present terms, they would probably quit.
>
> Q. And what did Mr. Castle tell you if anything, in response?

A. He just said that I believe, he said that he'd negotiate the best contract he could.

Q. Did you express to Mr. Castle whether or not you had any doubts about majority support for the Union among your employees?

A. Yes, I did.

Q. And what did you express to him? In that regard?

A. I told him that inasmuch as only about 70 – about 30 percent of the people in our company were actually paying Union dues, that it was—that they just weren't in favor of the Union.

On March 18, 1980, Castle wrote a letter to Marolda on the letterhead of the "Restaurant & Hotel Owners Association." A copy of that letter was introduced into evidence as Respondent's Exhibit 2. In pertinent part it states, "This is to advise you that Burger Pits, because of their different contract, will not be represented by the Association, but will be represented by me personally." Castle stated at the trial that he wrote Respondent's Exhibit 2 in response to an inquiry by Marolda as to whether Castle would be representing the Respondent.

Some time in April, Castle sent Berger a paper requesting written authorization for Castle to represent the Respondent in the upcoming contract negotiations with the Union. As indicated on page 28 of the transcript, Berger revealed some uncertainty as to whether he had actually signed such an authorization. However, he testified with regard to that matter, "I believe I did, I'm not sure, but I can't say for sure. But I'm pretty sure I did." Berger did recall a telephone conversation between him and Castle in May 1980, and that Castle sent Berger a copy of the Union's contract demands. Castle said that he never received a written authorization from the Respondent in 1980. He said that his practice had been to submit to the Union a copy of all of the written authorizations which Castle had received from employers.

On April 22, 1980, the first meeting was held for negotiation of a new collective-bargaining agreement between the Union and the employer association. At that time Marolda discovered that the Union had not received a copy of a written authorization for Castle to represent Burger Pits. Marolda testified with regard to his inquiry of Castle, "I asked him where are the authorizations from Burger Pits. And he couldn't give me an answer."

With regard to whether either the Union or the Respondent gave notice to the other party to change, modify, or alter their collective-bargaining agreement as provided for in section 32 of the contract, Berger testified at transcript 11:

Q. Prior to May 31, 1980, did Local 19 give Respondent notice under section 32 of the collective bargaining agreement which we've just introduced into evidence?

A. No they didn't.

Q. Let me finish the question, that Local 19 wished to change, modify, or alter that agreement?

A. Not to the best of my knowledge.

Q. And did Respondent, that's you, give such notice to Local 19 that Respondent wished to change, modify, or alter that agreement under section 32 of the collective-bargaining agreement?

A. No, we didn't.

However, at transcript 46 and 47 Berger subsequently testified:

Q. Mr. Berger, you testified on your direct examination, or direct examination by Mr. Pernal, that you didn't give authorize—that you did not give notice to the Union of you intention to alter, amend or renew the contract. Did anybody give such notice to the Union on your behalf?

A. Yes, Mr. Castle did.

Q. Do you know when Mr. Castle did that?

A. I think that was in March sometime, I'm not sure, but I think it was in March. I know that Mr. Castle has a copy of the letter.

Berger acknowledged at transcript 62 that he made the following statement, among others, in his pretrial affidavit which he gave on July 17, 1980:

Burger Pits did not receive any notice from the Union that it wished to negotiate a new contract. Similarly Burger Pits did not send any letter to Local 19 requesting a meeting to negotiate a new contract. However, I did know that Local 19 was bargaining with the Santa Clara Hospitality Industry Inc. - The Association. Andy Castle is the executive secretary of the Association. Burger Pits had never been a member of the Association. It has only signed separate agreements with Local 19, that are in essence the Association's contract with a different wage scale.

The Respondent operates 15 restaurants and a commissary in Santa Clara County. The Respondent also has a restaurant in Santa Cruz County, but that restaurant is not within the geographical jurisdiction of the Union, and it is not part of the bargaining unit in this proceeding. On June 1, 1980, the Respondent had 276 employees in the bargaining unit.

IV. MATTERS PERTAINING TO UNION SUPPORT AMONG RESPONDENT'S EMPLOYEES DURING THE PERIOD PRIOR TO JUNE 1980

For "at least a year, or maybe two" Berger received reports at every Monday meeting with his supervisors that most of the Respondent's busboys and dishwashers would not join the union. In addition, Berger talked with some of the unit employees who told him that they had received warning notices about their union dues. Berger told those employees that they would have to pay the dues, or he would let them go.

Based on the information which Berger received from his supervisors, and based on Berger's having spoken with certain employees, Berger said that 10 of the Respondent's restaurants had not received a visit from a union agent in some cases for as long as 3 years. Berger said that at one location the Respondent had 16 unit employees, only 1 of whom was in the Union. At another

location on Bascom Avenue, Berger said that the Respondent had 17 unit employees, only 2 of whom were in the Union.

Berger acknowledged that the Respondent had five restaurants where those employees "were very well organized." Those were the restaurants serviced by union agent Gerber.

V. THE EVENTS ON MAY 29, 1980

There had been a number of negotiating sessions between the Union and the Santa Clara County Hospitality, Inc., an employer association, prior to the final negotiating session on May 29, 1980. On that date the Union and the employer representatives met at the Le Baron Hotel in San Jose, California. The bargaining session began about 1 or 2 p.m., and it continued until about 11:30 p.m. when final initialing and signing of the documents had been concluded.

Present at that bargaining session for the Union were Attorney Stemerman, Union President and Business Manager Marolda, Union Financial Secretary-Treasurer Ron Davis, and Union Executive Vice President Vince Curce. Present for the employer association were Castle, his assistant Michael Gubner, and four or five employer representatives.

During the course of that bargaining session, the final details of a complete master agreement were agreed to by the parties to those negotiations. The agreement consisted of about 50 legal size pages, and it was typed double spaced. The Union and the employer representatives went through each paragraph of the agreement line by line to assure themselves that the document accurately reflected the agreements reached by those parties. Marolda and Castle initiated each paragraph as they proceeded through the document, and they signed the document at the conclusion of the agreement. Stemerman recalled that while the signing was taking place, Castle mentioned "that he had other concerns that he wanted to take care of before we left." Following the execution of the document, Marolda said that the following occurred:

> Q. Now after Mr. Castle and Mr. Gubner had gone through the initialled agreement, what then took place?
>
> A. Well after we initialled them, Mr. Castle and I sat down next to each other. And Mr. Stemerman was there assisting us. And after the contracts were initialled and also signed Mr. Castle had raised the initial about Bob's Big Boy, about getting a separate agreement for Bob's Big Boy in terms of a special rate for learners and trainees. He also was very concerned about the Western Chef-Air—which is a subsidiary of Marriot. And he also raised the issue of the Burger Pits.
>
> Q. And would you state what was said with respect to Burger Pits? And by whom?
>
> A. Well Mr. Castle had raised the issue that he wants to have an agreement where he extends the contract for thirty days. I of course referred to Mr. Stemerman since Mr. Stemerman was my spokesperson at all the meetings we had—other than the ones he might have missed. And he thought it was okay. So then upon my instructions I told them it was okay'd. And put together what Mr. Castle wanted in terms that he put together.
>
> Q. And did then you and Mr. Castle execute the agreement?
>
> A. Yes, we did.
>
> Q. And at the time that Mr. Castle executed the agreement did he make any qualifications as to the scope of his authority with respect to executing that one month extension?
>
> A. No, Sir.

A copy of the handwritten document executed by the parties that evening was introduced into evidence as Respondent's Exhibit 3. It provides:

> The contract between Burger Pits and Local 19 shall be continued from and after June 1, 1980 throught June 30, 1980.

The document is dated May 29, 1980, and it shows the signature of A. F. Castle for the Employer, and F. C. Marolda for the Union.

VI. THE EVENTS ON JUNE 3, 1980

A relief cook named Turrick Robbins presented a petition to Berger on June 3, 1980, in Berger's office in Campbell, California. A copy of that petition was introduced into evidence as Respondent's Exhibit 1. According to Berger's count, the petition reflects 198 names of Respondent's employees.

At the point in time Robbins worked in six of the Respondent's restaurants. He told Berger that he had started the petition on his own initiative because of the problems which the Respondent was having in retaining employees. According to Berger, Robbins also told him that the employees willingly signed the petition at almost every location to which Robbins went.

Berger immediately telephoned Castle. Berger informed Castle that he had received a petition from a majority of his employees that they wished to withdraw from the Union. Castle advised Berger to call Attorney Armon Cooper. Castle also advised Berger that, since the Union did not represent a majority of the employees, Berger could not talk to anyone. Castle further told Berger "to get some good legal advice." Castle also told Berger that the had signed an extension agreement to the 1977–1980 contract. Berger told Castle that Berger had never given Castle authority to sign any agreements or to negotiate for the Company. According to Castle, that was the first time that such question had ever been raised. (See Tr. 92.) Berger telephoned Attorney Cooper, and he instructed Cooper to notify the Union. On June 6, 1980, the Union received notification from Cooper that the Respondent was withdrawing recognition from the Union.

In addition, Castle sent a letter dated June 3, 1980, to Marolda. A copy of that letter was introduced into evidence as Respondent's Exhibit 4. In pertinent part, it states:

> As I was informed by Mr. Berger today that I would not be receiving authorization to represent him in upcoming negotiations at this time. I am enclosing the original copy of a signed letter that you and I signed giving him a thirty (30) day extension. As I did not have the authority then, nor do I have the authority now to sign such a letter.
>
> What the problem is I do not know!

After Marolda received Respondent's Exhibit 4, he telephoned his attorney Stemerman, and he also telephoned Castle whom he told that he felt that Castle had "sandbagged" the Union.

VII. THE EVENTS SUBSEQUENT TO THE WITHDRAWAL OF RECOGNITION

There is no dispute that the Respondent unilaterally implemented new health and welfare coverage for its employees after the Respondent had withdrawn recognition from the Union. There is also no dispute that the Respondent did not unilaterally implement a new pension plan as alleged in paragraph 9(c) of the General Counsel's complaint. In his posthearing brief, the General Counsel states in footnote 3, which appears on page 10 of his brief, the following, "General Counsel acknowledges that no new pension plan was unilaterally put into effect by Respondent, but of course contends that unilaterally ceasing contributions to the existing pension plan violates Section 8(a)(5) in any event."

Prior to May 31, 1980, union representatives had access to the kitchen areas of the Respondent's facilities but, after that date, the Respondent changed its practice. Berger stated at the trial that union representatives were no longer permitted in the kitchen areas after May 31, 1980. Berger acknowledged that it was a unilateral decision.

It was admitted in the pleadings that the Union had requested about August 11, 1980, that the Respondent furnish the Union with the names of Respondent's employees. It was further admitted that since that date the Respondent has refused to furnish the Union with that requested information. (See 11(a) and 11(c) of the General Counsel's consolidated complaint and the Respondent's answer.)

VIII. CONCLUSIONS

To determine whether the collective-bargaining agreement between the Respondent and the Union automatically renewed itself for another year, I have looked for guidance to section 32 of the contract. If Castle's letter of March 18, 1980, is read literally, I conclude that, by itself, the letter does not meet the notice requirements agreed to by the parties in section 32. (See R. Exh. 2 and see sec. 32 of G.C. Exh. 2(a), both of which are quoted in sec. III, herein.) That letter is the only document which conceivably could be construed as a written notice, and there is no evidence that a verbal notice was given. Furthermore, it was undisputed that the Union gave no notice of any kind to the Respondent of "its desire to change, modify, or alter this Agreement."

Nevertheless, if that letter is placed in the context of the events which were occurring during that period of time, and in the context of the subsequent actions of the parties, I conclude that the letter may be construed to meet the notice requirements of section 32. The contemporaneous events reveal that the Union and Castle were preparing for negotiations for a new contract. Without repeating here the findings of fact set forth in section III, herein, it will be remembered that the Union, understandably, was interested in knowing exactly which employers Castle was purporting to represent in the upcoming negotiations. (See G.C. Exh. 3, for example, and Marolda's verbal inquiries on this subject. Note also Castle's past practice in submitting copies of his written authorizations to the Union.) Thus, Castle's letter was sent in that context.

In addition, the past collective-bargaining history described in section III herein shows that the practice had been for the Respondent to accept the terms negotiated by the Union with the employer association and to sign a wage rate addendum. (See, for example, G.C. Exhs. 2(a) and 2(b).)

Finally, as described in section V herein, the Respondent and the Union agreed to extend their collective-bargaining agreement for an additional 30 days. If those parties had really considered that their contract had renewed itself automatically for another year, then the 30-day extension agreement signed by the parties on May 29, 1980, would have been superfluous.

The foregoing suggests that the Respondent's Exhibit 2 was, in fact, considered by the parties to be notice of a desire to change, modify, or alter the then-existing collective-bargaining agreement, notwithstanding the fact that the letter literally did not say so. Accordingly, I conclude that the collective-bargaining agreement between the parties did not automatically renew itself for another year. Since I have reached that conclusion, I further conclude that the portion of the allegations in paragraph 9(b) of the General Counsel's consolidated complaint which refer to a "Renewed Agreement" lacks merit. As I will discuss in the paragraphs to follow, I conclude that the collective-bargaining agreement did not renew itself, but instead that the parties agreed to extend their contract for another 30 days.

In the circumstances described in sections III and V, herein, I cannot accept Berger's assertion that Castle lacked any authority to negotiate and to sign Respondent's Exhibit 3 on the behalf of the Respondent. It will be remembered that Berger testified at transcript 25, "I told him we'd go along with what he did in negotiating a contract for us." The next question and answer reaffirmed Berger's testimony on that point. Without repeating the findings of fact in section III, herein, it is significant that the Respondent has never repudiated or disavowed Respondent's Exhibit 2, which is the lefter dated March 18, 1980, from Castle to Marolda. In that letter Castle informed the Union that the Respondent "will be represented by me personally." Furthermore, Castle was the one who had negotiated the 1977 contract on behalf of the Respondent (G.C. Exhs. 2(a) and 2(b)), and Castle had handled a written grievance and an alleged discrimi-

nation case on behalf of the Respondent. In addition, Castle continues to be retained by the Respondent.

Thus, I conclude that the Respondent was bound by the execution of Respondent's Exhibit 3, which was initiated by the Respondent's agent. Therefore, the collective-bargaining agreement, which is the General Counsel's Exhibits 2(a) and 2(b), was extended by written agreement of the parties from June 1 through 30, 1980. The Respondent's decision to withdraw recognition from the Union was made on June 3, 1980, after the petition was received. The notice of that decision was received by the Union on June 6, 1980. The Respondent's withdrawal of recognition was made at a time when the Respondent had a valid existing collective-bargaining agreement with the Union. In such circumstances, there existed "a presumption that the union was the majority representative at the time the contract was executed, and a presumption that its majority continued at least through the life of the contract. "*Bartenders, Hotel, Motel & Restaurant Employers Bargaining Association of Pocatello, Idaho*, 213 NLRB 651 (1974) (cases cited in the footnotes omitted). See also *Burns Security Services*, 225 NLRB 271 (1976); *Pioneer Inn Associates v. NLRB*, 578 F.2d 835 (9th Cir. 1978); *NLRB v. Cornell of California*, 577 F.2d 513 (9th Cir. 1978), and *NLRB v. Vegas Vic, Inc.*, 546 F.2d 828 (9th Cir. 1976). Having agreed on May 29, 1980, to extend its 3-year contract for an additional 30 days, I conclude that the Respondent was not free 5 days later on June 3, 1980, to withdraw recognition from the Union because of the existence of a valid collective-bargaining agreement. Thus, I conclude that the matters set forth in section 4 herein and the petition described in section 6 herein do not justify the Respondent's withdrawal of recognition during the existence of a valid collective-bargaining agreement. Therefore, I conclude that the Respondent has thereby violated Section 8(a)(1) and (5) of the Act. In *United Supermarkets*, 214 NLRB 958, 959 (1974), the Board stated, "We have repeatedly emphasized that stabilization in industrial relations is the ultimate objective of all provisions in the Act."

With regard to the Respondent's postwithdrawal-of-recognition actions regarding: (1) the cessation of contributions to the contractual health and welfare fund and pension plan; (2) the implementation of a new health and welfare plan; (3) the prohibition of access by union representatives to Respondent's employees in the kitchen areas of the Respondent's restaurants, and (4) the refusal of the Union's request to furnish the Union with the names of unit employees—all those were changes unilaterally made by the Respondent from the past practice and contractually established obligations. The fact that the contract expired on June 30, 1980, would not justify the Respondent's unilateral actions described in Section VII herein, nor would it limit the remedial action required by the Board in such circumstances. In *Bay Area Sealers*, 251 NLRB 89, 89–90 (1980), the Board held:

> 2. As found by the Administrative Law Judge, the contract in this case terminated on October 1, 1978. Because of the contract's expiration, the Administrative Law Judge limited Respondent's obligation to honor the terms and conditions of the contract to the period following Respondent's unilateral repudiation of the contract and the contract's expiration date. Respondent's obligation to make the employees whole for any loss of pay or fringe benefits occasioned by Respondent's unlawful repudiation of the agreement therefore ceased as of the contract's expiration date. For the reasons set forth below, we disagree with this portion of the administrative law judge's remedy.
>
> Although an employer's contractual obligations cease with the expiration of the contract, those terms and conditions established by the contract and governing the employer-employee, as opposed to the employer-union, relationship survive the contract and present the employer with a continuing obligation to apply those terms and conditions, unless the employer gives timely notice of its intention to modify a condition of employment and the union fails to timely request bargaining, or impasse is reached during bargaining over the proposed change. See *Sir James, Inc*, 183 NLRB 256 (1970); *Waynes Dairy*, 223 NLRB 260 (1976); *Sioux Falls Stock Yards Company*, 236 NLRB 543 (1978); *James A. McBrady, Inc., and Maine Erection, Inc.*, 238 NLRB No. 113 (1978). See also *NLRB v. Haberman Construction Company*, 618 F.2d 288 (5th Cir. 1980).

In this connection, see also the Board's decisions in *Pacific Intercom Co.*, 255 NLRB 184 (1981); *Peerless Roofing Co.*, 247 NLRB 500 (1980), and *Crest Beverage Co.*, 231 NLRB 116 (1977).

Based on the foregoing Board decisions, I further conclude that the Respondent's unilateral actions described above violated Section 8(a)(1) and (5) of the Act. However, as pointed out in Section 7 herein, the Respondent did not implement a new pension plan, so I conclude that a portion of the allegations in section 9(c) of the General Counsel's consolidated complaint lacks merit. Accordingly, the reference to that particular portion in section 9(c) of the consolidated complaint is hereby dismissed.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The following employees of the Respondent constitute a unit appropriate for the purposes of collective-bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time employees employed by Burger Pits, Inc. and Self Serv Food Corp., Inc., at their various facilities located within Santa Clara County, California, performing work set forth in the Wage and Classification Schedule contained in the collective bargaining agreement between Burger Pits, Inc. and Self Serv Food Corp., Inc. and the union effective during the period June 1, 1977 through June 30, 1980; excluding all other

employees, guards, and supervisors as defined in the Act.

4. At all times material herein, the Union has been the exclusive collective-bargaining representative of all of the employees in the above-described unit.

5. The Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) and (5) of the Act by the following acts and conduct:

(a) Withdrawing recognition about June 3, 1980, from the Union as the exclusive collective-bargaining representative of the employees in the appropriate unit described above.

(b) Refusing to abide by, and give effect to, the provisions of the collective-bargaining agreement which the Respondent and the Union agreed to extend through June 30, 1980.

(c) Ceasing unilaterally to make contributions to the contractually established health and welfare fund for its unit employees and the pension plan for its unit employees.

(d) Implementing unilaterally a new health and welfare plan for its unit employees.

(e) Prohibiting access by union representatives to its employees in the kitchen areas of the Respondent's restaurants.

(f) Refusing the Union's request to furnish the Union with the names of the employees in the unit.

6. The unfair labor practices set forth above effect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Since I have found that the Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) and (5) of the Act, I shall recommend to the Board that the Respondent be ordered to cease and desist from engaging in those unfair labor practices.

I shall recommend to the Board that the Respondent take certain affirmative action in order to effectuate the policies of the Act. Such affirmative action will include an order to make whole the unit employees who have lost wages, benefits, or incurred expenses as a result of the Respondent's unfair labor practices. Backpay, together with interest on such amounts of money, will be computed in accordance with the Board's decisions in *F. W. Woolworth Co.*, 90 NLRB 289 (1950); *Isis Plumbing Co.*, 138 NLRB 716 (1962), and *Florida Steel Corp.*, 231 NLRB 651 (1977).

The Respondent points to the fact that the Respondent implemented a new medical plan for its employees after the Respondent withdrew recognition from the Union. However, as the attorney for the Respondent correctly notes in the Respondent's brief at 13 and 14, "There is nothing in the record which indicates what the comparative benefits of the union's and the respondent's plans were." Because there is no basis on which a comparison of the benefits of the plans may be made, and because there is no evidence at this point as to whether any unit employees suffered any losses as a result of the change in the health and welfare plans, I shall include a make-whole remedy in the order, and leave the monetary determination to the compliance stage of the proceeding. I shall follow the Board's order in its decision in *Kraft Plumbing*, 252 NLRB 891 (1980).

In accordance with the Board precedents cited above in section VIII, I shall not limit the time period for the Respondent's contributions to the pension plan to the 30-day extension of time period agreed to by the parties. The amount of interest, if any, due on such payments will be determined in the compliance stage.

The Respondent asked that a bargaining order not be imposed on the Respondent even if unfair labor practices are found in this proceeding. In view of the findings and conclusions that the Respondent violated Section 8(a)(1) and (5) of the Act in withdrawing recognition from the Union as the exclusive collective-bargaining representative of the unit employees, and further in view of the unilateral actions taken by the Respondent following the withdrawal of recognition, I conclude that a bargaining order is an appropriate remedy in such circumstances.

In *Hickmott Foods*, 242 NLRB 1357 (1979), the Board held that a broadly worded cease-and-desist order "is warranted only when a respondent is shown to have a proclivity to violate the Act, or has engaged in such egregious or widespead misconduct as to demonstrate a general disregard for the employees' fundamental statutory rights." While the unfair labor practice violations in this case are serious, I conclude that the Board's standard stated in *Hickmott Foods* has not been met. Accordingly, I shall recommend to the Board that a narrowly worded cease-and-desist order be imposed.

[Recommended Order omitted from publication.]

Gibraltar Steel Corporation, Seneca Steel Division *and* Jack W. Jochum. Case 3–CA–11440

14 December 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS ZIMMERMAN AND HUNTER

On 13 April 1984 Administrative Law Judge D. Barry Morris issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed a cross-exception and a brief in support of its cross-exception and in opposition to the General Counsel's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings,[1] findings,[2] and conclusions[3] and to adopt the recommended Order.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

[1] In view of the dismissal of the complaint in its entirety, we find it unnecessary to decide whether the judge properly admitted into evidence over the Respondent's objection newspaper articles relating to the work stoppage of the Independent Truckers Association.

[2] Because we agree with the judge that the General Counsel has failed to establish that Jochum's working conditions were abnormally dangerous within the meaning of Sec. 502 of the Act, we find it unnecessary to determine whether Sec. 502 would have otherwise applied to Jochum's refusal to drive.

[3] Member Zimmerman agrees with the result reached, noting that employee Jochum's admission that he did not discuss the alleged unsafe working conditions with other employees and his statement that he was a "spokesman for himself" indicate that he acted specifically in his own self-interest and thus renders his conduct unprotected.

DECISION

STATEMENT OF THE CASE

D. BARRY MORRIS, Administrative Law Judge. This case was heard before me in Buffalo, New York, on November 2 and 3, 1983.[1] On a charge filed on February 8, a complaint was issued on June 27 and amended on August 25,[2] alleging that Gibraltar Steel Corporation, Seneca Steel Division (Respondent) violated Section 8(a)(1) of the National Labor Relations Act (the Act). Respondent filed an answer denying the commission of the alleged unfair labor practices.

The parties were given full opportunity to participate, produce evidence, examine and cross-examine witnesses, argue orally, and file briefs. Briefs were filed by the General Counsel and by Respondent.

On the entire record of the case, including my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a New York corporation, with a place of business in Buffalo, New York, is engaged in the manufacture, sale, and distribution of cold-rolled steel and related products.[3] It annually sells goods valued in excess of $50,000 to consumers located outside of New York State. Respondent admits that it is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and I so find.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Issues*

The issues are:

1. Was the Charging Party engaged in "concerted" protected activity when he refused to drive to Corry, Pennsylvania, on February 2, 1983?

2. When the Charging Party refused to drive, did "abnormally dangerous conditions" exists, within the meaning of Section 502 of the Act?

B. *The Facts*

1. Background

Jack Jochum, the Charging Party, was employed by the Seneca Steel Division of Respondent since April 1981 as a truckdriver. His duties were to deliver steel from Respondent's plant in Buffalo to customers located in New York State and Pennsylvania. He was the only truckdriver employed by Seneca Steel Division and his position as driver was not covered by any collective-bargaining agreement. It was stipulated that, between January 31 and February 13, certain owner-operators of trucks under the auspices of the Independent Truckers Association engaged in a work stoppage to protest certain United States Government policies.

2. Refusal to drive

On the afternoon of February 2, Jochum learned that he was scheduled to take a load to Corry, Pennsylvania, the next day. Corry is approximately 8 miles south of the New York State border. Jochum testified that his normal route from Buffalo to Corry would be to take Interstate 90 until North East, Pennsylvania, and then Route 426 to Corry. Route 426 goes in a southeasterly direction, cutting through New York State.

Jochum credibly testified that he told Bob Jans, Respondent's dispatcher, that he was not taking the load to

[1] All dates refer to 1983 unless otherwise specified.

[2] The complaint was further amended at the hearing to allege that the vehicle that the Charging Party was assigned to drive was overloaded.

[3] It was stipulated that Gibraltar Steel Corporation and Seneca Steel Division constitute a single employer, within the meaning of the Act.

Pennsylvania because "it was unsafe and that it was way overloaded." Jochum then proceeded to the office of Kenneth Martin, Respondent's general foreman, and testified as follows:

> A. And I told Kenny that I was not going to take that load down there on account of the unsafe conditions down there.
> Q. Unsafe conditions caused by what?
> A. By the truckers' strike, Independent Truckers' strike.

Jochum testified that he then turned in his credit card. Later that afternoon Jochum testified that he a telephone call from William Vicaretto, a truckdriver employed by Respondent's strip and strap division. Vicaretto told Jochum that after Jochum refused to take the load, Respondent called Gary Ellis, who had last worked for Respondent in 1981, but that Ellis had also refused to drive.

The next morning Jochum returned to the plant. Jochum testified that he asked Martin "what my status was and he said to me that I had quit." Jochum further testified:

> At that I told him that I had not quit and that I'm here for work. He told me that I was a truckdriver and that he didn't have any work for a truckdriver.

Ellis testified that when he was called by Respondent's foreman and asked if he would take a load for Seneca Steel into Pennsylvania, he refused. He told the foreman, "as far as I'm concerned, it was too dangerous and hazardous to my health." He further testified that he did not speak to Jochum on the day that Jochum refused to take the load. Jochum conceded that he did not discuss his refusal to take the load with any other employee. He testified, as follows:

> Q. Now, prior to your telling Company representatives on February 2nd, I believe that's the day that the 3:30 p.m. conversation roughly took place?
> A. Right.
> Q. Prior to that, did you discuss that matter with anybody else?
> A. No, I didn't.
> Q. Did anyone else urge you "Jack, I want you to refuse that load" or say that you should refuse the load?
> A. No. . . .
> Q. Were you acting as a spokesman for anybody else? . . .
> [A]. I thought it was unsafe to go down there.
> Q. . . . I didn't ask that. I asked if you were acting as a spokesman for anyone else at that time?
> A. A spokesman for who?
> Q. For anyone?
> A. Not that I know of. A spokesman for myself. I did refuse the load.

3. Vehicle overload

Jochum testified that on February 2, when he look at the freight bill for the Corry shipment, it showed a load of 51,000 pounds of steel. This would have been approximately 8000 pounds overweight. He further testified, and the record indicates, however, that in late 1982 he took a number of shipments to Pennsylvania which were overweight. On November 12, 1982, he took a load to Pennsylvania which weighed 47,530 pounds, approximately 4500 pounds overweight. At that time he checked the following box on the driver's vehicle inspection report, "I detect no defect or deficiency in this motor vehicle as would be likely to affect the safety of its operation or result in its mechanical breakdown." Similarly, on September 16, 1982, he took a load to Pennsylvania which weighed 58,540 pounds, approximately 15,000 pounds overweight. Again, he checked the box indicating no defect or deficiency in the motor vehicle "as would be likely to affect the safety of its operation." On November 11, 1982, he took a shipment to Pennsylvania which weighed 73,010 pounds. In connection with this load Jochum testified:

> Q. How much overweight was that load, Mr. Jochum?
> A. That was 30,000 pounds.
> Q. Did you regard that as unsafe?
> A. No, I did not.
> Q. That's significantly overweight, isn't it?
> A. Yes, sir.

The shipment which Jochum refused to take was delivered on February 3 by another driver, Ron Barber. Richard Fern, Seneca's billing clerk, credibly testified that the weight of that shipment was 42,340 pounds. Jochum testified that any load to Pennsylvania at that time exceeding 43,280 pounds would have been overweight. Accordingly, the shipment delivered by Barber was not overweight.

4. Conditions in Pennsylvania

Jochum was questioned as to how he became aware of "abnormally dangerous conditions" existing in Pennsylvania around February 1. He testified that he was informed through "newspaper articles, television, radio; also CB radio talk." When asked what he was told, he replied:

> That they were throwing bricks around in Erie, Pennsylvania; which I had already read in the newspapers, and stuff like that. Trucks were being shot at, tires shot out, radiators were being shot at.

The General Counsel introduced newspaper articles relating to the work stoppage. Representative of the articles is General Counsel's Exhibit 5, which is an article from The Buffalo News, dated January 31, entitled "Truck Strike Begins Amid Violence." General Counsel's Exhibit 8 is an article in The Buffalo News of February 1 entitled "Driver Killed, Seven Wounded in Nationwide Truck Strike." Similarly, General Counsel's Exhibit 13 is an article from the same newspaper dated February 2, entitled "Highway Violence Spreads to 27 States in Trucker Strike."

Vicaretto was questioned as to what he heard about driving conditions for truckers in Pennsylvania during the first few days of February. He testified:

> A. There were all kinds of news.
>
> Q. Well, what type of news did you hear or [see] in the newspaper?
>
> A. Guys being, you know, beat up, and their trucks torn up. A few shootings. But again, that all depended where you are in Pennsylvania. It doesn't mean the whole state of Pennsylvania was in turmoil. If you're talking—you're talking about mills, you know, when you're talking about truckers strikes in Pennsylvania, you're talking down at the mills; you're not talking about the whole state of Pennsylvania.

Vicaretto testified that Corry is not located in the mill area, nor is it in a particularly dangerous area known as the combat zone. The load which Jochum refused to take was delivered by Barber to Corry, without incident, on February 3. Similary, Ellis testified that employees working for the trucking company he then worked for did drive into Pennsylvania during the work stoppage. The parties also stipulated that Seneca Steel Division received shipments by truck from Cleveland, Ohio, on February 2, 3, and 4.

C. *Discussion and Analysis*

1. Concerted activity

In *Myers Industries*, 268 NLRB 493, 497 (1984), the Board stated: "In general, to find an employee's activity to be 'concerted,' we shall require that it be engaged in with or on the authority of other employees, and not solely on behalf of the employee himself." Before a violation of Section 8(a)(1) can be found, it must first be determined that the protected activity was "concerted." As the Board has stated in *Myers* if any employee acts alone, where no collective-bargaining agreement is involved, it does not constitute concerted activity.

Ellis, who had not worked for Respondent since 1981, testified that he did not speak to Jochum on the day Jochum refused to drive. Jochum clearly and unequivocally testified that he did not discuss his intended action with anyone prior to his refusal to take the load. When asked whether he was acting as a spokesman for anyone else he testified, "Not that I know of. A spokesman for myself."

It is clear that Jochum acted by himself and only on his behalf. Under the *Myers* decision, supra, the General Counsel has not shown that the Charging Party was engaged in "concerted" activity.

2. Abnormally dangerous conditions

The complaint, as amended at the hearing, alleges that, on February 2, "pursuant to Section 502 of the Act," the Charging Party "refused to make deliveries of goods and products to the State of Pennsylvania because of the abnormally dangerous and unsafe working conditions resulting from the violence associated with the national strike of the Independent Truckers and the overload of the vehicle in which he was assigned to drive."

I believe that this case must be decided under Sections 7 and 8(a)(1) of the Act, not under Section 502. As Administrative Law Judge Giannasi stated in *Myers Industries*, supra, 268 NLRB at 508 fn. 6:

> Sec. 502 offers no particular help in defining the contours of protected concerted activity in the circumstances of this case. Sec. 502 does not define either an unfair labor practice or concerted protected activity. And it adds nothing to the existing body of law interpreting the phrase "protected concerted activity."

Instead, Section 502 deals with the rights of employees who refuse to perform work in unsafe conditions where a contractual no-strike provision would make such activity unprotected. See *Whirlpool Corp. v. Marshall*, 445 U.S. 1, 17–18 fn. 29 (1980); *NLRB v. Tamara Foods*, 692 F.2d 1171, 1183 (8th Cir. 1982), cert. denied 103 S.Ct. 2089 (1983). In such a case Section 502 may be utilized to rebut an employer's defense that such rfusal is unprotected because it is a "strike" in violation of a contractual no-strike clause. See *Banyard v. NLRB*, 505 F.2d 342, 348 (D.C. Cir. 1974).

Even were Section 502 to be applicable, I believe that the General Counsel has not sustained his burden. The test for determining if conditions are "abnormally dangerous" under Section 502 is an objective one. *Gateway Coal Co. v. United Mine Workers*, 414 U.S. 368, 386–387 (1974); *Redwing Carriers, Inc.*, 130 NLRB 1208, 1209 (1961), enfd. as modified 325 F.2d 1011 (D.C. Cir. 1963), cert. denied 377 U.S. 905.

In *Redwing Carriers*, the Board stated, in construing the term "abnormally dangerous conditions" (130 NLRB at 1209):

> We are of the opinion the term comtemplates, and is intended to insure, an objective, as opposed to a subjective, test. What controls is not the state of the mind of the employee or employees concerned, but whether the actual working conditions shown to exist by competent evidence might in the circumstances be considered "abnormally dangerous."

Similarly, in *Gateway Coal*, supra, the Supreme Court stated that the honest belief of employees that conditions were unsafe was insufficient to meet the criteria of Section 502.

With respect to the allegation that the load was abnormally dangerous because it was overweight, I find that the General Counsel has not shown by objective evidence that an abnormally dangerous condition existed. In uncontradicted testimony, Fern testified that the shipment which Barber delivered to Corry on February 3 weighed 42,340 pounds, which was not overweight. There was no corroboration for Jochum's testimony that a weight of 51,000 pounds was written on the freight bill. In addition, the record contains several instances of Jochum having taken loads to Pennsylvania which exceeded the maximum weight. Jochum signed reports

concerning those deliveries that the loads were not unsafe. Jochum also testified that a load of 73,010 pounds, 30,000 pounds overweight, was not unsafe.

With respect to conditions being abnormally dangerous because of violence attending the Independent Truckers' work stoppage, the General Counsel has not shown by objective evidence that conditions on the route to Corry, Pennsylvania, were abnormally dangerous. While I have no doubt of the Charging Party's good faith and the fact that he was genuinely concerned for his health and safety, as the above-cited cases indicate, that is insufficient to meet the criteria of Section 502. While there was testimony that there was violence around the mills, the testimony also indicated that Corry was not in the mill area. And, although the newspaper articles spoke of violence in various places, there is no indication that such violence was present on the routes which the Charging Party would have taken to Corry. Accordingly, I conclude that the General Counsel has not shown by objective standards that abnormally dangerous conditions existed at the time the Charging Party refused to deliver the load.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. Respondent has not engaged in the unfair labor practices alleged in the complaint.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[4]

ORDER

The complaint is dismissed.

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[4] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

F. Mullins Construction, Inc. *and* Local Lodge 30, International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers, AFL–CIO. Cases 11–CA–10124 and 11–CA–10250

14 December 1984

DECISION AND ORDER

BY MEMBERS ZIMMERMAN, HUNTER, AND DENNIS

On 1 April 1983 Administrative Law Judge Howard I. Grossman issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] and to adopt the recommended Order as modified.

The judge found, inter alia, that the Respondent violated Section 8(a)(1) by coercively interrogating employee Rodney Gibbs and thereafter violated Section 8(a)(3) by laying off Gibbs because he engaged in union activity. In reaching this conclusion, the judge relied on his finding that Robert McMillan was acting as the Respondent's agent when he interrogated Gibbs and thus learned that Gibbs supported the Union. The Respondent excepts contending that McMillan was not its agent. We find merit in the Respondent's exception.

The Respondent is a corporation engaged as a general contractor at the North Carolina Phosphate jobsite in Aurora, North Carolina. The project requires the use of earthmoving equipment that has to be constructed at the jobsite. North Carolina Phosphate purchased a large piece of equipment, called a dragline, from the Marion Power Shovel Company. The Respondent contracted to install the equipment.

McMillan, an employee of Marion Power Shovel Company, worked at the site as a field weld specialist. McMillan's primary reason for being at the site was to serve as a representative of Marion Power and to recommend to Marion Power whether the welds were done in a manner so that Marion Power could warrant the equipment.

McMillan did make requests to the site superintendent that welds not done in accordance with the specifications be corrected. Additionally, McMillan participated in the testing of welders. He signed the test results on the signature line for "welding engineer, supervisor, or erection engineer." Based on the test results, McMillan made recommendations for or against a welder's employment. Most of his recommendations were followed. The only evidence that McMillan issued direct instructions to employees consists of McMillan's request to Rodney Gibbs that he get a union card from his car. Gibbs ignored the first such request but complied the second time the request was made.

As the judge correctly noted, McMillan's recommendations carried weight with respect to the employment of welders. While this evidence ordinarily would tend to establish that the Respondent had made McMillan its agent, we find that it is insufficient to support such a finding under the circumstances of this case. McMillan's role was to ensure that the Respondent was performing the welding in accordance with the standards established by his employer, Marion Power. Thus, in testing and making recommendations about welders, McMillan was acting solely on behalf of Marion Power. In following McMillan's recommendations the Respondent was simply seeking to satisfy him so that Marion Power would issue a warranty on the

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[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

We have examined the judge's findings that the Respondent violated Sec. 8(a)(1) by interrogating employees in light of the Board's decision in *Rossmore House*, 269 NLRB 1176 (Apr. 25, 1984), and find, in agreement with the judge, that the interrogations were unlawful.

In finding Jones and Brooks to be supervisors, we do not rely on the judge's finding that welding constituted skilled work.

The judge inadvertently concluded that it was Douglas Lee who spoke to Heath about the Union in the beginning of September. It is clear from Heath's affidavit that the judge was referring to Jones, not Lee. However, it is not clear whether Jones' questioning of Heath regarding whether Heath was going to join the Union occurred prior to or after Mullins' takeover. Accordingly, we do not pass on this complaint allegation since, in any event, it would be cumulative.

The judge incorrectly cites *Cumberland Farms Dairy*, 258 NLRB 900 (1981), as being enforced at 674 F.2d 943 (1st Cir. 1982). That Board decision has not been addressed by the circuit court of appeals. The Board decision that was enforced in the First Circuit's 1982 decision is reported at 250 NLRB 1204 (1980).

[2] In finding that Welding Foremen Jones and Brooks are supervisors as defined by the Act, Member Hunter does not rely on the judge's conclusion that the Respondent would be responsible for their actions even in the absence of evidence that they possessed such authority or his reference to *Sambo's Restaurant*, 247 NLRB 777, 782 (1980).

Member Hunter agrees with the judge's conclusion at sec. III,C,2, par. 4, that Jones' telling employee Edwards that he could not talk about the Union during "working" time violated Sec. 8(a)(1) because Jones' admonition was discriminatory, i.e., it only prohibited talk about the Union but did not prohibit conversation about other subjects during the same time. In so concluding, however, Member Hunter does not agree that this one comment constituted a "rule," as the judge also found. The judge's cite to *Pedro's Restaurant*, 246 NLRB 567 (1979), in that regard is not apt as *Pedro's* involved the posting of a notice on a bulletin board. Here, we have a single unlawful admonition which Member Hunter finds clearly does not constitute the promulgation of a "rule."

equipment. In that sense the Respondent was in a position analogous to that of a provider of services who hires or fires based partially on the recommendation of an essential customer. In these circumstances, the Respondent's efforts to comply with the hiring recommendations McMillan made were not, without more, sufficient to make McMillan its agent. Moreover, the only evidence that employees may have thought the Respondent had given McMillan authority over them was the fact that, at McMillan's request, Gibbs left work to get the union card from his car. However, even here the evidence is weak in that the first such request was ignored.

Contrary to the judge, we therefore conclude that McMillan was not an agent of the Respondent. Accordingly, we find that the Respondent was not responsible for McMillan's action in questioning employees as to whether they had received cards, in asking Gibbs where the card was, and in requesting that Gibbs get the card from his car. Therefore, we shall dismiss this allegation of the complaint.[3]

Additionally, because we have found that McMillan was not an agent for the Respondent, we further disagree with the judge's finding that Gibbs' layoff was discriminatorily motivated. Absent a finding that McMillan's knowledge is attributed to the Respondent, there is no basis in the record for concluding that the Respondent was aware of Gibbs' union activity. Accordingly, we also dismiss the 8(a)(3) allegation involving Gibbs.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, F. Mullins Construction, Inc., Aurora, North Carolina, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(a).

"(a) Offer Barry Edwards, Randall Walker, Jerry Eisenzimmer, and Douglas Lee immediate and full reinstatement to their former positions or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, discharging if necessary any employee hired to replace any of them, and make them and the estate of Leslie Heath whole for any loss of earnings any of them or the estate may have suffered by reason of the Respondent's discrimination against them and Heath, in the manner described in the section of this decision entitled 'The Remedy.'"

2. Substitute the attached notice for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT ask employees whether they have received union cards, whether certain employees are trying to get other employees to sign union cards, or to describe the nature of union literature distributed to employees.

WE WILL NOT ask employees whether they intend to "carry on" the Union or lead its organizational efforts.

WE WILL NOT ask employees where they obtained union hats or other union paraphernalia, who gave it to them, or whether they had to sign union cards to obtain them.

WE WILL NOT direct employees to deliver union cards to company agents.

WE WILL NOT tell employees that they would probably lose their jobs if they voted the Union in.

WE WILL NOT tell employees that a supervisor would not be able to obtain a job with the owner of a jobsite who has engaged us to perform work there if the Union comes onto the jobsite.

WE WILL NOT discriminatorily tell employees after the beginning of a union campaign that they cannot talk about the Union during working time.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer Barry Edwards, Randall Walker, Jerry Eisenzimmer, and Douglas Lee immediate reinstatement to their former positions or, if the positions no longer exist, to substantially equivalent positions, without prejudice to their seniority and other rights and privileges, discharging if necessary any employee hired to replace any of them.

WE WILL make these employees, and the estate of Leslie Heath, whole for any loss of earnings they or the estate may have suffered, with interest, because we laid them off unlawfully.

WE WILL expunge from our personnel records or other files of these employees any reference to our unlawful layoffs of them and notify them in writing

[3] Even though we dismiss the 8(a)(1) allegation concerning the incident between McMillan and Gibbs, the remedy remains unchanged as the 8(a)(1) violation would be cumulative.

that this action has been taken and that evidence of these unlawful layoffs will not be used as a basis for further personnel actions against them.

F. MULLINS CONSTRUCTION, INC.

DECISION

STATEMENT OF THE CASE

HOWARD I. GROSSMAN, Administrative Law Judge. The charge in Case 11-CA-10124 was filed on September 24, 1981, by Local Lodge 30, International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers, AFL-CIO (the Union). An amended charge was filed on October 13, and a complaint was issued on November 6, 1981. Thereafter, on November 16, the Union filed a second amended charge. The charge in Case 11-CA-10250 was filed by the Union on December 24, 1981, and a consolidated complaint was issued on January 28, 1982.

As subsequently amended at the hearing, the complaint alleges that F. Mullins Construction, Inc. (Respondent),[1] in September 1981 and thereafter, interrogated its employees concerning their union sympathies and the sympathies of fellow employees, created an impression among its employees that their union activities were under surveillance, orally promulgated a rule prohibiting employees from talking about the Union during working hours, and threatened employees with loss of jobs if they selected the Union as their collective-bargaining representative, all in violation of Section 8(a)(1) of the National Labor Relations Act (the Act). The amended complaint also alleges that Respondent laid off employees Barry Edwards, Randall Walker, and Jerry Eisenzimmer on September 24, 1981, and employees Leslie Heath, Rodney Gibbs, and Douglas Lee on December 3, 1981, because of their union activities, in violation of Section 8(a)(3) and (1) of the Act.

A hearing was held before me on these matters in Washington, North Carolina, on July 27 and 28, 1982, and in Raleigh, North Carolina, on October 5, 1982. On the basis of the entire record, including a brief filed by Respondent, and my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent is a Florida corporation licensed to do business in the State of North Carolina, where it has been engaged as a general contractor at the North Carolina Phosphate jobsite in Aurora, North Carolina. The complaint alleges that Respondent purchased supplies and materials for use at the Aurora jobsite valued in excess of $50,000 directly from sources outside North Carolina, and that it performs services valued in excess of that amount for customers located outside the State.

[1] Respondent's name appears as stipulated at the hearing.

Respondent's answer denies the direct outflow allegation, but appears to admit the direct inflow allegation.[2] The answer also admits that Respondent is an employer engaged in interstate commerce, and that it meets the Board's indirect inflow jurisdictional standard.[3] At the hearing Respondent appeared to contest, although not explicitly, the direct inflow allegation. However, the parties stipulated that Respondent receives materials, supplies, and services from an employer located within the State of North Carolina which is subject to the Board's jurisdiction under the "direct standards." I conclude that Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act under the Board's indirect inflow standard.[4]

II. THE LABOR ORGANIZATION INVOLVED

Respondent admits and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

The General Counsel introduced what he called background evidence tending to show union animus on the part of Respondent. This principally involved two other companies, North Carolina Phosphate, a firm engaged in phosphate extraction at the Aurora jobsite, and Mulberry Construction Co. of Mulberry, Florida, with whom North Carolina Phosphate had contracted to install very large earthmoving equipment, called a dragline, at Aurora. Mulberry was the original contractor on this job, and was succeeded by Respondent.

Charles L. Dover, a business manager for the International Union of Fire, Brakemen, and Engineers, associated with the North Carolina Building and Construction Trades Council, testified that Mulberry had a contract with his organization. About mid-June 1981, Dover discovered that Mulberry was in violation of the contract at a project in Aurora. He met with the president of Mulberry, and informed him that Florida unions would shut down every job that Mulberry had in Florida. The Mulberry official replied that he would get back to North Carolina Phosphate, and was sure that he could arrange with that company to employ union men at the Aurora jobsite. If not, Dover was assured, Mulberry would leave the job.

L. F. Shipman, a coordinator for the North Carolina Trades Council, testified that Mulberry asked him to speak to North Carolina Phosphate about the Aurora job. On July 9, 1981, Shipman had a meeting with the North Carolina Phosphate president, and was informed that the company had decided not to use union men on the job.

About the same time in July, Mulberry employed Barry Edwards at the Aurora jobsite. Edwards indicated

[2] G.C. Exhs. 1(o), pars. 3 and 4, and 1(q), pars. 3 and 4.

[3] G.C. Exh. 1(q), par. 5

[4] See *Siemons Mailing Service*, 122 NLRB 81 fn. 12 (1958); *St. Francis Pie Shop*, 172 NLRB 89, 90 (1968). The General Counsel elected not to litigate the direct outflow allegation.

his union affiliation on his application form, and began a campaign on behalf of the Union immediately. He distributed handbills on the day he was hired and obtained 8 to 10 signed union authorization cards from Mulberry employees. Mulberry's lead welder at that time was Terry Jones, who was later promoted to foreman. During his first week of employment, Edwards told Jones and other employees that he was attempting to organize the job, and that he would appreciate any support they could give.

Respondent protested the introduction of much of this evidence on the ground that it was irrelevant with respect to the issue of whether it had committed an unfair labor practice. The Company noted that an unfair labor practice charge had been filed by the Union against North Carolina Phosphate, but that it had been withdrawn.[5] Respondent also observed that the Union had filed a charge against Mulberry, but that that organization had entered into an informal settlement agreement.[6]

Barry Edwards and Douglas Lee, employees under both Mulberry and Mullins, testified that Steve Ryder, Mulberry's superintendent, told a group of Mulberry employees in July or August that North Carolina Phosphate would not "tolerate" union men on the job. Employee Randall Walker averred that Ryder called a meeting in the latter part of August, and said "they were changing the name of the company," and that the only difference would be the fact that Ryder would not be there any more. Employer Rodney Gibbs asserted that there was picketing at the jobsite during this meeting, and that Ryder said they would shut the job down rather than let the Union come in. Employee Jerry Eisenzimmer testified that Mulberry Supervisor Terry Seville [7] told union activist Barry Edwards in mid-August that the "Union would not be on that job."

Fred G. Mullins testified that he was the president of the Company bearing his name, Respondent herein, and that he had been with the Company since July 1, 1981. He agreed that Mulberry had previously been constructing a dragline for North Carolina Phosphate at Aurora, and that his company took over the job on September 9, 1981.

Mullins made a speech to employees at the time he took over the job. Walker averred that Mullins told employees that he wanted to retain all of them in their existing jobs, and that the job would last until April or May 1982. Employee Jerry Eisenzimmer gave similar testimony. Mullins denied telling employees that they would remain until the completion of the job, but admitted telling them that the job would take until July 1982. I credit Walker's testimony. Although Mullins may not have promised explicitly to keep all employees until the end of the job, his statement that it would last until the following year, coupled with his stated intention to retain all of them in their existing jobs, could reasonably have been interpreted as a promise of continued employment until the end of the project.

[5] R. Exh. 1.
[6] R. Exh. 3.
[7] Seville was an admitted supervisor under Mullins.

Employee Jerry Eisenzimmer testified that he had a conversation with Mulberry Supervisor Terry Seville in mid-August, in which Seville told him that he could stay on the job "as long as they had work down there." I credit this testimony.

Mullins in fact employed all of the Mulberry employees except Superintendent Ryder, and utilized the same equipment which Mulberry had used.[8]

B. *The Supervisory and Agency Issues*

1. The issues

The pleadings establish that Respondent's president Mullins was a supervisor within the meaning of Section 2(11) of the Act, and the parties stipulated that Site Superintendent Jeffrey McGuire and Assistant Site Superintendent Terry Seville had the same status. The parties differ over the status of Terry Jones, John Brooks, and Robert McMillan.

2. Terry Jones and John Brooks

a. *Summary of the evidence*

Jones and Brooks were called leadmen by company witnesses. Brooks was on the day shift and Jones on the night shift.[9] They assigned work to employees in accordance with a "priority list" of jobs to be done, given to them by Site Superintendent McGuire or Assistant Site Superintendent Seville. According to Mullins, this list was given to Jones and Brooks "each morning." McGuire, however, testified that he "prepared a priority list weekly that was handed out Monday . . . to the leadmen—the work had been assigned to the leadman at that point, and at that time he had so many people and so many areas to work, so he distributed his people to those areas." Seville defined a priority list as a "list of things . . . to be done either during that week or to complete a phase of the project." I credit McGuire's and Seville's testimonies, and conclude that the priority list assigned work to Jones and Brooks on a weekly or job basis, but not on a daily basis.

Employee Douglas Lee testified that Jones moved him "from job to job." Jones said that he moved employees to a different "department" when they were finished with a prior "department." He also recorded the employees' time. Employee Rodney Gibbs gave similar testimony about Brooks. Site Superintendent McGuire stated that the "leadmen were given great independence in the distribution of their personnel." Comparing his own duties with those of Brooks, Seville testified as follows:

> I ran quite a few more areas. John was basically welding, and I did a lot more of the iron-work and sub-structures which he supervised the welding on . . . I shouldn't say "supervised," you know, but I'd tell him what to do and then he would just commence to take care of business.

[8] I credit the testimony of employee Barry Edwards corroborated by Walker on this issue.
[9] Jones said that he changed to the day shift the week before Thanksgiving 1981.

Employee Barry Edwards averred that Mulberry distributed a document with the titles of employees in the "chain of command," followed by their telephone numbers. Brooks was listed as welding foreman on the day shift. According to Edwards, employees who were going to be absent from work were required to call the appropriate person on the list and report the absence. Although Brooks described his position as "leadman" under Mullins, he did not expressly contradict Edwards' testimony, which I credit.

Edwards was employed on the night shift. He testified that Jones was promoted to "foreman" in late July or early August 1981, about 2 or 3 weeks after Edwards had been hired. Although Jones described himself as the lead welder, he did not expressly contradict Edwards' testimony about the promotion. Further, according to Edwards' uncontradicted testimony, he congratulated Jones after the promotion, to which the latter replied that there was no need for congratulations, since he had "been made foreman . . . to keep an eye on Edwards." I credit Edwards on the issues of Jones' promotion and his response to Edwards' congratulations.

Edwards testified that Jones "quit working with his tools and started passing out work assignments" after the promotion. There is implicit corroboration from Jones, who said that he "went back to [his] tools" after his transfer to the day shift just before Thanksgiving. On one night, apparently prior to this transfer, Jones did work with his tools, but was "reprimanded" by an individual whom Edwards, relying on Jones, believed to be associated with North Carolina Phosphate. Asked what percentage of time he spent in "manual labor," Jones replied: "Well, I'd say 90 percent, because . . . I had to drag leads, run and get drop lights; first one thing and then another. And then I would try to weld some, and go around and help as much as I could." Brooks, asked how much he worked with his hands, initially answered, "Some," which he later estimated to be 75 percent of his time. His description of his duties is similar to that of Jones.

I conclude that Jones and Brooks, in addition to their work assignment duties, engaged in some manual labor. However, this consisted of a variety of jobs, including help to other employees, unlike the steady "working with tools" of rank-and-file employees. I also conclude that Jones spent less time in manual labor after his promotion to foreman than he had previously done as lead welder.

I find that Jones and Brooks had the title of "foreman" or "welding foreman" under Mulberry at the time that Mullins took over the job on September 9, 1981. They also had the job characteristics outlined above. Inasmuch as Mullins told employees at the time of the takeover that he wanted them to continue in their existing jobs, I also conclude that Jones and Brooks continued in the same capacity under Mullins.[10]

[10] As indicated above, Jones transferred to the day shift just before Thanksgiving, i.e., in the week beginning November 16, 1981, and apparently returned to rank-and-file status at that time.

b. *Factual and legal analysis*

Section 2(11) of the Act sets forth various indicia of supervisory status, including the authority to "assign" or "to responsibly direct" employees, where the exercise of such authority "requires the use of independent judgment." "The functions of a supervisor listed in the statute are disjunctive; the Board need not show that an employee performed all or several of the functions to support a finding of supervisory status." *NLRB v. Dadco Fashions*, 632 F.2d 493, 496 (5th Cir. 1980), enfg. 243 NLRB 1193 (1979).[11]

Brooks and Jones were employed on a jobsite involving the construction of large earthmoving equipment. They assigned work to other employees, principally welders. I conclude that this direction of work was "responsible" and required "independent judgment." This conclusion is based on the following factors: (1) the work to be assigned was given to Brooks and Jones on a weekly or job-phase basis rather than more frequently; it included jobs to be completed followed by other jobs, and thus involved the scheduling of work in which Jones and Brooks were given "great independence in the distribution of their personnel"; (2) welding constitutes skilled work; (3) Jones and Brooks did less manual work than other employees, and almost no routine "work with tools"; (4) they had the title of "foreman" or "welding foreman"; (5) they kept employee timecards; (6) employees were required to call Brooks, and probably Jones, in the event of absence from work; (7) one admitted supervisor's description of his own duties was almost indistinguishable from his description of Brooks', and differed only as to extent of area covered; and (8) Jones' statement to Edwards—that he had been promoted to foreman to "keep an eye" on Edwards—suggested a position of authority over the latter. Although this statement was made under Mulberry's tenure, there was no change in Jones' status under Mullins, at least until his transfer to the day shift.

No two cases involving supervisory issues present exactly the same facts. However, at least two circuit courts of appeals have sustained the Board's findings of supervisory status in cases where responsible direction of work constituted a key factor in the Board's conclusions,[12] and one where the monitoring of timecards was a factor.[13] A similar conclusion is warranted herein, and I find that Brooks and Jones were supervisors within the meaning of Section 2(11) of the Act—Jones until his transfer to the day shift the week of November 16, 1981. Even in the absence of such finding, Respondent would be responsible for their actions since it placed them in positions where employees could reasonably believe that they spoke on behalf of management. *Sambo's Restau-*

[11] See also *NLRB v. Brown Specialty Co.*, 436 F.2d 372, 375 (7th Cir. 1971), enfg. 174 NLRB 519 (1969), 180 NLRB 969 (1970).

[12] *NLRB v. Dadco Fashions*, supra; *Justak Brothers & Co. v. NLRB*, 664 F.2d 1074 (7th Cir. 1981), enfg. 253 NLRB 1054 (1981). See also *NLRB v. Adam & Eve Cosmetics*, 567 F.2d 723 (7th Cir. 1977), revg. 218 NLRB 1317 (1975).

[13] *Dresser Industries v. NLRB*, 654 F.2d 944 (4th Cir. 1981), enfg. as modified 248 NLRB 33 (1980).

rant, 247 NLRB 777, 782 (1980), enfd. 641 F.2d 794 (9th Cir. 1981).

3. Robert McMillan

a. *Factual summary*

The earthmoving equipment, or dragline, which was being constructed at the Aurora jobsite had been purchased by North Carolina Phosphate from Marion Power Shovel Company, a Division of Dresser Industries, located in Marion, Ohio. The equipment was so large that it had to be put together at the jobsite. McMillan worked for Marion as a field weld specialist at the Aurora jobsite from about June 1981 until about June 1982. One of his duties was to witness the contractor's construction of the dragline, and to determine whether it was in accordance with Marion's specifications. Based on his reports, Marion could then decide whether to give a warranty to North Carolina Phosphate. If certain welds had not been done in accordance with the specifications, McMillan would report this fact to the site superintendent and request that the work be corrected.

McMillan also participated in the testing of welders. Edwards testified that McMillan "gave" him a welding test. McMillan disputed this, stating that he only "witnessed" tests given by the contractor. However, he signed a document recording the test results for welders, and the description of his capacity underneath his signature is that of "welding engineer, supervisor, or erection engineer" (R. Exhs. 13 and 14). McMillan also informed the site superintendent whether the applicant had passed the test, with a recommendation for or against his qualification and employment as a welder. Most of his recommendations were followed, according to McMillan.

Another issue is whether McMillan tested welders and made recommendations after Mullins took over the job. Part of the testing involved X-ray analysis of the welds done by the applicant. Asked whether any tests of welders were conducted after Mullins took over from Mulberry, McMillan "guessed" that none had been conducted, but then expressed doubt that all the X-ray results were back by the time of the takeover. Other evidence suggests the probability of testing after September 9. Thus, the welding qualification form provides for expiration of the qualification if the employee had not welded for 6 months. The earliest known qualification form is dated July 2, 1981 (R. Exh. 14). Respondent contends that welding work diminished in late 1981, warranting the layoff of welders. On the other hand, Mullins admitted that he had welding work subsequent to December 3, 1981, and McGuire said that two welders were "rehired" in December. As noted above, McMillan was at the jobsite until June 1982. I conclude from this evidence that McMillan made at least some recommendations concerning the qualifications of welders subsequent to the time that Mullins took over the job on September 9, 1981.

As appears hereinafter, an employee engaged in work was asked by McMillan to get a union card which was located in the employee's automobile. The employee stopped working, obtained the card, and gave it to McMillan.

b. *Legal analysis*

The Board has concluded with judicial approval that an employer was responsible for the actions of a safety director where it appeared to employees that his comments "carried some weight with respect to their employment." *Cumberland Farms Dairy*, 258 NLRB 900 fn. 3 (1981), enfd. as modified 674 F.2d 943 (1st Cir. 1982). It is obvious that McMillan's recommendations concerning the employment of welders, based on the test results, carried "some weight" with respect to *their* employment. Indeed, his recommendations were followed most of the time. Moreover, one employee perceived McMillan as having sufficient authority to warrant the employee's leaving work to get McMillan a union card. I conclude under these circumstances that Respondent is responsible for McMillan's actions.

C. *The Alleged Violations of Section 8(a)(1)*

1. The facts

a. *Terry Jones*

(1) Summary of the evidence

The complaint does not allege any violations of the Act prior to September 1981. However, some of the evidence adduced at the hearing relates to events allegedly having taken place prior to that month, i.e., during Mulberry's tenure. The General Counsel's apparent position is that this constitutes background evidence.

Randall Walker testified that Jones asked him in August whether he had signed a union card. "No, not yet," Walker replied. In another conversation in August, Jones told employees that Edwards "would be an all-right guy if he wasn't a union man," according to Walker. Jones denied making this statement, but asserted that he heard another employee make it.

One of employee Leslie Heath's affidavits affirms that Jones asked him several times in August whether he was for the Union, and Heath replied, "Yes, one hundred percent." Heath signed a union card in August, and asked 10–15 other employees to join the Union. Seville and Jones were present during one of these discussions in August or September.[14]

[14] G.C. Exh. 3. During the hearing in July 1982, the General Counsel represented that Heath was ill with a heart attack and requested admission of his affidavit under Rule 804(b)(5) of the Federal Rules of Evidence. The General Counsel acknowledged, however, that he had not complied with the requirement of that rule that he give advance notice to Respondent and argued that he was precluded from giving Respondent a copy of the affidavit by Sec. 102.118 of the Board's Rules and Regulations. During the recess between the hearing dates on July 28 and October 5, I received Heath's affidavit into evidence on condition that he still be unavailable as a witness on the date the hearing resumed and directed the General Counsel to give a copy to Respondent. Respondent appealed this ruling, which was sustained by the Board. On October 5, the date the hearing resumed, it appeared that Heath had died during the recess. The General Counsel stated that he had complied with my order. I thereupon reaffirmed, during the hearing on October 5, my prior ruling, and two of Heath's affidavits were received, dated October 2, 1981, and January 15, 1982, respectively (G.C. Exhs. 3 and 4). Respondent submitted evidence to contradict some of Heath's averments.

Randall Walker described conversations about the Union with employees, including Jones, in August and September. The Union had started its campaign, and Edwards had given Walker a union card. The first conversations took place in the lunchroom. Jones was "putting the Union down," and Walker on two occasions said that he had been a member of the Steelworkers Union in Tennessee, and that he did not see anything wrong with the Union. Edwards corroborated this testimony. In the first part of September, after Mullins had taken over the job, according to Walker, Jones approached him at his work station and asked whether Barry Edwards was trying to get Walker to sign a union card. Walker replied, "Yes." About a week later, while driving to work with Jones and employee Johnny Williams, Walker asked Jones how the Union worked, and Jones replied that the employees would probably lose their jobs if they voted the Union in.

Jones agreed that he rode to work with Walker and Johnny Williams, but denied that the former ever asked him to explain the Union. They would talk about the Union, Williams testified, and Walker gave the impression that he was against it. Jones denied threatening any employees with loss of jobs. He agreed that he had a conversation with Walker about Edwards' union activities, but gave a different version of it. According to Jones, Walker came to him one day and said that Edwards was talking to Walker about the Union.

Employee Jerry Eisenzimmer testified that Jones asked him about the first of September whether he supported the Union, and Eisenzimmer replied affirmatively. Eisenzimmer's pretrial statement indicates that this conversation took place prior to the Mullins takeover. Jones denied having this conversation.

Employee Douglas Lee averred that Jones told employees on top of a revolving rig in late September, i.e., after the Mullins takeover and the September 24 layoffs, that he would not have anything to do with the Union himself, because North Carolina Phosphate had given the company the first chance to do the job as long as it kept the Union out, and bringing the Union in would mean that Jones could not work "with Carolina Phosphate." Jones admitted having this conversation but contended that what he said was that he intended to "get out of construction" and take a job with North Carolina Phosphate and, therefore, saw no reason to get a union book. He mentioned the cost of union dues.

Barry Edwards testified to a conversation with Jones in the first week of September, i.e., probably under Mulberry. Jones told him that the union organizer on the day shift had been fired, and asked Edwards what chance he had organizing the night shift. Union Organizer James Phillips in fact had been fired, according to Edwards.

Edwards affirmed that employees normally engaged in conversation during working time when it did not interfere with work. He testified that he talked to employees about the Union under these circumstances. In late September, according to Edwards, i.e., under Mullins, Jones told him that he would have to quit talking about the Union on company time. About the same time, Jones asked Edwards how many organizers he had, how many people supported the Union, and whether Edwards thought he would be able to get a union onto the job. Edwards replied that he thought he could get a union in, and that the rest of the information was privileged. Jones denied prohibiting Edwards or anyone else from talking about the Union during working hours.

One of Heath's affidavits[15] avers that Lee, "around the beginning of September," said that he would never join a union, that he would cross a picket line, and admonished Heath to "look at all the money you'd lose like the people picketing down at New Bern." I infer that Heath referred to statements allegedly made prior to the Mullins takeover. The affidavit thereafter states that "sometime in September" Jones asked Heath whether he was going to join the Union, and Heath replied that he would if it would benefit his pocketbook. From the sequence of allegations in the affidavit, I infer that Heath was alleging an event which took place after September 9, i.e., after the takeover. "During the week of September 28," the affidavit also relates, Jones noted that Edwards had been laid off, and asked whether Heath would carry on for the Union or take Edwards' place. According to his affidavits, Heath replied, "Whatever will turn me on," or "Yes, if it becomes necessary."

In addition to the specific denials listed above, Jones was asked on direct examination whether he had ever interrogated employees concerning their union activities and sympathies. He replied, "Not that I recollect." Asked whether he had ever interrogated other employees concerning the union sympathies of other employees, Jones answered, "No, I don't think so."

(2) Factual analysis

Walker's testimony about the lunchroom conversations in August and September was not contradicted. I credit it and find that Walker stated in Jones' presence on two occasions that he had been a member of another union, and saw nothing wrong with the Union. I do not credit Jones' account of the conversations with Walker and Williams during the automobile ride, since it is unbelievable, in light of my prior finding, that Walker could have given the impression that he was opposed to the Union. Inasmuch as Jones was thus an unreliable witness, I credit Walker's account of the conversation and find that Jones, after September 9, told employees that they would probably lose their jobs if they voted the Union in.

Since Walker was a union supporter, it is also improbable, as Jones contended, that Walker would have come to the welding foreman with a statement that Edwards was talking to Walker about the Union. I credit Walker's account of this conversation, and find that Jones, after September 9, asked Walker whether Edwards was trying to get Walker to sign a union card.

Jones' account of the conversation on top of the revolving rig with Lee and other employees admits essential elements of Lee's version of the conversation—Jones' desire to work with North Carolina Phosphate, and the relationship of the Union to this goal. I credit Lee's addi-

[15] Ibid.

tion of the missing element—that Jones said bringing the Union onto the Aurora jobsite would mean that Jones could not obtain employment with North Carolina Phosphate. I also find that this conversation took place after September 9.

Jones was a less reliable witness than Edwards, and I do not credit his denial that he prohibited Edwards from talking about the Union during working hours. Accordingly, I find that, subsequent to Mullins' takeover of the job, Jones told Edwards that he could not talk about the Union during working hours, while it was customary practice for employees to talk about other subjects during working hours. I also reject Jones' general denial of interrogation, and find that, subsequent to September 9, he asked Edwards how many organizers he had, how many people supported the Union, and whether Edwards thought he would be able to get a union onto the job.

I also credit Heath's uncontradicted averments that, subsequent to September 9, Jones asked Heath whether he was going to join the Union, and, after Edwards' layoff, whether Heath was going to "carry on the Union."

I also credit the General Counsel's evidence in the following instances, and find that each took place prior to September 9: Jones' asking Walker whether he had signed a union card yet; Jones' telling employees that he did not see anything wrong with the Union; Jones' asking Eisenzimmer whether he supported the Union, and Eisenzimmer's reply that he did; Jones' telling Edwards that the organizer on the day shift had been fired, and asking him what chance he had to organize the night shift; Jones' asking Heath whether he was for the Union, and Heath's replying, "Yes, one hundred percent"; and Jones' advising Heath to look at all the money pickets were losing at another location.

b. *Terry Seville and John Brooks*

Douglas Lee affirmed that on September 24, after Edwards had been laid off, another employee informed Seville that Edwards had been passing out union information in the yard. Seville inquired about the nature of the information, and Lee told him that it was an "authorization for a representation card." Seville said that he would like to see one, and another employee brought a card to Seville a few days later. Seville looked at it, and said that he did not need it any more, that the "problem had been taken card of." A short time later Seville asked Lee what kind of cards Edwards was distributing, and Lee gave the same answer. This testimony was partially corroborated by Seville, and I credit it.

Lee was laid off on December 3, 1981. He testified that, about 2 or 3 weeks before that event, i.e., in mid-November, he was wearing a union cap at a party. Seville and Brooks were in attendance at the party. According to Lee, Brooks asked him where he managed to get the hat, saying that he had been unable to get one even though he was a union member. Seville then walked over and asked Lee whether Edwards had given him that hat. Lee replied affirmatively. Seville then asked whether Lee had to "sign one of those little blue cards" to get the hat. Lee replied that he had signed a card "a long time ago." I credit this testimony, which was corroborated by Brooks and Seville. I infer that Seville, by his reference to "little blue cards," meant union cards. Seville asserted that the reason for his inquiry was the fact that he collects hats as a hobby, wanted one like the hat Lee was wearing.

c. *Robert McMillan*

Rodney Gibbs testified that Lee was handing out union cards at the gate in "late November." The next day McMillan asked employees, including Gibbs, whether they had received union cards. This took place in the shelter where the welding tests were given. Gibbs replied that he had received one, and McMillan asked where it was. Gibbs replied that it was in his car, and McMillan told him to get it. Gibbs did not do so at the time, and went back to work. Later in the day, when Gibbs was working, McMillan again asked him to get the card. Gibbs complied, and gave the card to McMillan.

McMillan first testified that he had no recoilection of this event, and then said: "I am going to state that it didn't happen. I don't remember it ever happening." McMillan contended that he received a card in early July while going through the gate. McMillan's denial is inconclusive and Gibbs' version shows that he had superior recollection of the event. I credit the latter's testimony, and, in light of McMillan's authority, consider his request to Gibbs—to get the union card—to be an order.

2. Legal analysis

The evidence thus shows that, subsequent to September 9, 1981, Respondent asked its employees: (1) to describe union information being distributed to employees; (2) whether one employee was trying to get another employee to sign a union card; (3) whether employees had received union cards; (4) whether employees supported or intended to join the Union; (5) after the layoff of the leading union activist, whether another employee intended to "carry on the Union"; and (6) where an employee had obtained a union hat, whether a specific employee who was a union activist had given it to him, and whether the employee had to sign a union card to get it. The first five inquiries conveyed to employees Respondent's displeasure with the union activity at the jobsite and were, therefore, coercive. The same reasoning applies to McMillan's order to Gibbs to give one of the cards to McMillan. Accordingly, these inquiries and order violated Section 8(a)(1) of the Act.[16]

Respondent argues the innocence of the various inquiries grouped under number 6 above because of Seville's asserted hobby of collecting hats. I do not accept this argument. Brooks professed no such hobby, and there is no evidence that Seville stated his hobby as the alleged reason when he asked Lee the question. Therefore, nothing was said to offset the inherently coercive nature of the questions. Nor is there any good reason for the questions about Edwards and the signing of union cards. Ac-

[16] *Gossen Co.*, 254 NLRB 339 (1981); *PPG Industries, Inc.*, 251 NLRB 1146, 1147 (1981).

cordingly, I find that such questions also violated Section 8(a)(1).

Jones' statement to Walker and other employees—that they would probably lose their jobs if they voted the Union in—was coercive under established Board law, and I so find. Jones' statement to Lee and other employees—that Jones could not get a job, with North Carolina Phosphate if the Union came onto the Aurora jobsite—must be interpreted in light of Respondent's other unlawful conduct, and Jones' threat concerning loss of jobs made to Walker and other employees, which threat, I find, preceded the statement to Lee. Even though the latter ostensibly concerned only Jones' employment prospects with North Carolina Phosphate, in the context of the preceding events the employees could reasonably interpret Jones' statement as meaning that their own jobs with Mullins, or Mullins' continued presence on the jobsite, would be endangered if they selected the Union as their collective-bargaining representative. Accordingly, Jones' statement to Lee and other employees was also violative of Section 8(a)(1).

Jones' telling Edwards that he could not talk about the Union during working time was a discriminatory no-solicitation rule because it did not prohibit employee conversation about other subjects during such time. The rule was promulgated after the commencement of union activities in which Edwards played a leading role. Accordingly, it discouraged employees from engaging in union activities, and thereby violated Section 8(a)(1) of the Act. *Pedro's Restaurant*, 246 NLRB 567, 573, 583 (1979), enfd. as modified 652 F.2d 1005 (D.C. Cir. 1981).

D. *The Alleged Violations of Section 8(a)(3)*

1. Evidence of adverse working conditions

The General Counsel elicited evidence of adverse working conditions selectively applied against Edwards and Walker. There is no complaint allegation concerning this evidence, and the General Counsel's apparent intention was to establish discriminatory motivation with respect to Edwards' and Walker's layoffs. The evidence concerns "overhead welding," and the measures used to ameliorate its rigors. According to Walker, in this kind of welding the employee is lying down on an "angled" chair, welding over his head with the sparks falling down on him. The parties differed over the issues of alleged rotation of this work among employees and protective clothing used to guard against the sparks.

Walker testified that, during Mulberry's tenure, Seville told Walker that it was company policy to rotate jobs among employees; that this policy continued under Mullins; and that Walker saw overhead welding jobs being rotated under Mullins. Edwards asserted that Superintendent Ryder told him under Mulberry that employees were rotated from one job to the next, and that Mullins told employees at the time of the takeover there would be no change in working conditions. However, Foreman Brooks said that, as far as he knew, there was no policy on rotation of jobs, and Jones gave similar testimony. Brooks' and Jones' testimonies do not meet the specific averments of Walker and Edwards, and the latter are probably accurate because they reflect an employment practice which was reasonable. Moreover, they are consistent with the authority of Brooks and Jones to switch employees from job to job. I conclude that Mulberry and Mullins had a policy of rotating job to job. I conclude that Mulberry and Mullins had a policy of rotating among employees, particularly jobs which are onerous, such as overhead welding.

In addition to job rotation, both Mulberry and Mullins utilized protective clothing against the sparks. This consisted of leather sleeves, vests, and aprons.

Edwards testified that, shortly after Jones' promotion to welding foreman, i.e., under Mulberry, he was placed on overhead welding under "the tub." He asked for protective clothing, and Jones replied, "This ain't no union job and we ain't got to furnish you none." Jones first testified that Edwards asked for a set of welding sleeves, but that he said, "They don't furnish them." However, Jones asserted, "If a man needed a pair he could go get a pair." Then, Jones "offered Barry a pair when we were welding under the tub," but Edwards failed to get them. This testimony from Jones is contradictory and unintelligible, and I credit Edwards.

Edwards asserted that he was given some job rotation, but on some occasions he was left on overhead welding as much as 7 days in a row. Walker testified that three employees, Walker, Edwards, and one other, were not rotated as frequently as other employees. Edwards protested to Jones and Seville, but was told that the overhead welding had to be done. In the middle of September, i.e., under Mullins, Edwards asked what it would take to get off the overhead welding job. Would he have to burn his union card? Seville replied, "No comment," and Jones, laughing, said that "it might help." Jones testified that there was a "lot of joking" going around, and that he might have said this. I credit Edwards.

Edwards was assigned to welding the revolving frame in mid-September. He asked for protective clothing, and Jones replied: "This ain't no union job. How many times do I have to tell you we ain't going to furnish you none." Edwards complained that Jones was "discriminating" against him. The two of them then went to Seville, who arranged for Edwards to weld on top of the frame. Jones testified that he "didn't think" he was discriminating against Edwards.

It started to rain, and Jones put all employees except Edwards in a protected position inside the frame. Edwards got wet, informed Jones that he was not going to work in the rain, and went home after arranging to clock out.

I conclude that Respondent gave Edwards and Walker more onerous work assignments than those given to other employees.

2. The continuation of the union campaign—the union sympathies of Edwards, Walker, and Eisenzimmer

Edwards continued to engage in union activities throughout the change in contractors from Mulberry to Mullins. He obtained 10 to 12 signed union cards after the Mullins takeover. On September 21, the Charging Party's attorney signed unfair labor charges against Mul-

lins, Mulberry, and North Carolina Phosphate.[17] The next day, September 22, Edwards informed Foreman Jones that he had filed the charges. On the following day, September 23, Edwards distributed handbills to Respondent's employees at its front gate. On the day after, September 24, he was laid off.

As noted above, Edwards had given Walker a union card, and Jones interrogated Walker about it. Also as noted, Walker spoke up for the Union in the lunchroom when Jones was "putting it down." Further, Walker told Jones that he had been a member of another labor organization and saw nothing wrong with the Union.

Eisenzimmer signed a union card when Mulberry was the contractor and gave it to Edwards. He signed another card when Mullins became the contractor. Walker testified that he did not see Eisenzimmer manifest any inclinations for or against the Union. However, as set forth above, Eisenzimmer told Jones that he supported the Union. He also testified credibly that he rode to work "every day" with Barry Edwards, and that company supervisors saw him doing so. Since he did this every day, I infer that this took place under both Mulberry and Mullins. Edwards testified on cross-examination that Eisenzimmer wore a union hat on several occasions.

Mullins, McGuire, and Seville admitted knowledge of Edwards' union sympathies, but denied knowing that Walker or Eisenzimmer had the same sentiments. I reject this latter contention. The evidence is unmistakable in the case of Walker. Although he himself was unaware of similar sentiments on the part of Eisenzimmer, this does not negate the evidence which clearly establishes that Respondent was also aware of Eisenzimmer's union sympathies.

3. The September 24 layoffs

According to Edwards, Respondent laid off six employees on September 24—Edwards, Walker, Eisenzimmer, Guy Jeanette, Russell Caroway, and a sixth employee whose first name was "Joe." Although only two of them had signed cards prior to the layoffs, all were union supporters, according to Edwards. Caroway told Edwards the day before the layoff that he was seriously considering signing a card, and Joe attempted to sign one after the layoff—an attempt which Edwards rejected because it did not take place during Joe's employment.[18]

According to Walker, he was assigned to the night shift on September 24. He was laid off without advance notice at 5 p.m. together with the other employees by Site Superintendent McGuire. The latter told the employees to turn in their gear and get off the premises as soon as possible. The employees were not allowed to complete the shift. According to Walker, McGuire told them that they were being laid off because of lack of work. Walker was then welding a revolving frame, and said that about 60 percent of this work had been completed. Edwards was also working on the revolving frame, said that it was unfinished, and was told that he had no job and to get off the premises immediately.

Eisenzimmer gave similar testimony—McGuire told them that most of the welding work had been completed, and that the employees were not needed any more. Eisenzimmer said that there were 2 to 3 days of work left on the job on which he had been working.

Seville gave reasons for the lack of notice of the layoff and the employees' rapid departure from the jobsite after the layoff. As to the first, he said that advance notice makes an employee "edgy," and the employer gets no work out of him thereafter. He also said that it was his experience to ask people to leave as soon as they were dismissed. McGuire averred that the employees were given "showup" pay for 2 hours on the day of the layoff. As for the degree of completion of the work, McGuire estimated "total machine completion at approximately 30 percent by September 24. The welding phase of the work involved two projects—assembly and welding of the "tub" and the "revolving frame." McGuire said that the tub was completely welded by September 24, and that the welding of the revolving frame was 30 to 40 percent completed. This is even less than Walker's estimate.

Site Superintendent McGuire described Edwards as an "excellent welder," while Assistant Site Superintendent Seville said that he was a "very good welder and he worked." Employee Douglas Lee affirmed that Foreman Jones, during the above-described conversation with employees in late September on top of a revolving rig, said that he "would hate to see Barry go because he was a good welder." Jones could put him on a job, and "he would go and do the job." However, Jones added, Edwards "had to go because he was a union organizer." Jones denied saying this. As noted above, I have credited Lee's version of the "revolving rig" conversation, and I also credit his testimony concerning Jones' statement about Edwards during this conversation. Lee's testimony is consistent with supervisory assessments of Edwards' ability, and Lee was a more reliable witness than Jones.

4. The December 3 layoffs

As set forth above, Jones asked Heath in August whether he was for the Union, and Heath answered, "Yes, 100 percent." Heath solicited other employees to join the Union in the presence of supervisors. Later, in September, Jones asked Heath whether he was going to join the Union, and Heath replied that he would do so if it would benefit his pocketbook. After Edwards was laid off, Jones asked Heath whether he was going to take Edwards' place, and Heath answered affirmatively.

Lee testified that, after Edwards was let go, he started "taking up where Barry left off." He distributed handbills, solicited union cards, and wore a union hat, about which Seville and Brooks interrogated him in mid-November.

Gibbs received two union cards, and talked to several employees about the Union. In late November, when

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[17] G.C. Exh. 1(a); R. Exhs. 2 and 3. The charges were received and filed by the Board on September 24.

[18] Respondent points to Edwards' pretrial affidavit in which he said that four out of the six employees laid off were union supporters. Walker expressed a similar opinion. However, Edwards gave the reasons described above to explain his judgment that Caroway and Joe might also be appropriately described as union supporters. I do not consider this to be a contradiction of sufficient importance to impeach Edwards' credibility.

McMillan asked employees whether they had received union cards, Gibbs said that he had received one, and McMillan ordered him to get it.

As in the cases of Walker and Eisenzimmer, Respondent's witnesses denied knowledge of the union "affiliations" of Heath, Lee, and Gibbs. I reject this testimony. It is clear that all three employees were supporters of the Union, and that Respondent knew this fact.

The Company laid off Lee, Gibbs, and Heath on December 3, 1981.[19] About six other employees were laid off at the same time. About 3 p.m. on December 3, when the employees were on break, McGuire said that some employees would get an envelope with two checks and some with one check. Those with two checks were to turn in their equipment and get off the premises immediately. There had been no advance notice, and McGuire did not give any reason for the layoff, according to the uncontradicted testimonies of Lee and Gibbs. One of Heath's affidavits states that the layoff made no sense—he was then cutting holes for electrical wire, and there were 6 to 8 months of work left on the job (G.C. Exh. 3). McGuire testified that the "total machine" was 50 to 60 percent complete by the time that the welding on the tub was complete, and welding on the revolving frame was 90 percent complete.

5. Respondent's economic defense

As stated by Mullins, Respondent decided to lay off employees as phases of the work were completed. The entire project was finished by July 14, 1982, at which time everyone was gone except some maintenance employees. The alleged discriminatees were those selected for these phased layoffs for business rather than discriminatory reasons. Mullins asked McGuire for "manpower study" on taking over the job in September 1981.

McGuire testified that his study resulted in a conclusion that a reduction in force was necessary, taking into consideration the projected completion date and the degree of work which had been done. He and Mullins decided on "productivity" as the factor to be determinative in the selection of employees to be laid off. There were no records on productivity, and McGuire did not make any as a result of his investigation. He asked himself, "Who is most productive?" He kept a list, and relied on reports from Seville and Jones. Seville, however, denied that McGuire ever asked him to observe the productivity of employees for layoff purposes and denied that he reported on this to McGuire. On the other hand, Seville said that he made a study of productivity "in a sense," and reported his "feelings" about the alleged discriminatees to McGuire. However, he could not remember what his feelings were with respect to other employees.

McGuire's testimony on productivity in relevant part is as follows:

> The same criteria was used [sic] every time we laid off people—overall productivity, what we were getting out of people. I must say, though, that the people who were selected, I didn't say "this person is less productive, and this one is less productive, and so is this one." I said, "Who is most productive?" And I made my list there and I said, "Here is how many I can afford to keep. Who's at the top of the list?" And you come down here, and the ones at the bottom. I decided that 6 were going, or 10 were going . . . . It doesn't mean he isn't a good worker, it means I may not have considered him to be one of the best overall performers.

McGuire added that he considered quality and quantity of work performed, attendance records, "general attitude," and "personal problems" which might affect productivity.

McGuire said that he personally observed each of the 26 welders on the day shift for a minimum period of 5 minutes to 1 hour each day. On the other hand, the site superintendent also testified that he considered only the qualifications of 10 welders and 4 laborers on the night shift for the September 24 layoff. The night shift was selected because of a planned elimination of that shift and because of inadequate lighting. However, a short time after the September 24 layoffs Respondent started running a 12- or 24-hour-a-day, 7-day-a-week "millwright" operation,[20] which must also have had lighting problems. McGuire explained that the problem was too much sunlight rather than too little—the final "machine cuts" could not be made in the heat of the day, and the millwright area had proper lighting. These hours were made necessary by the "field machining" phase of the operation.

Mullins testified that the accelerated millwright operation involved jobs that were "associated with the millwrights. Sometimes there's some small welding that goes along with it." Accordingly, the work was performed by millwrights, laborers, and welders who had "dual classifications."

Mullins said that he did not know whether McGuire had determined the skills of the laid-off employees, and the site superintendent admitted that he was only "partially" familiar with their skills. They were all "qualified," he said, but he had simply determined to make the cuts from the night shift.

With respect to Respondent's contention that phased construction projects such as draglines involve progressive layoffs of employees, Eisenzimmer asserted that such layoffs are usually preceded by notice. Assistant Site Superintendent Seville agreed that it is customary in the construction industry to shift employees from one type of a job to another if they are qualified, since their other skills might be needed on the first job at a later time.

[19] The consolidated complaint alleges the date as September 24—the date of the first three layoffs—and the answer admits this (G.C. Exhs. 1(o) and (q)). At the hearing, the General Counsel moved to amend the date to December 3, and Respondent stated that it had no objection. This motion is granted, and the pleadings thus establish December 3 as the date of the layoff of all three alleged discriminatees, a fact buttressed by the testimonies of Lee and Gibbs and one of Heath's affidavits (G.C. Exh. 3).

[20] Mullins and Lee affirmed that it was 12 hours per day, McGuire said that it was 24 hours.

Barry Edwards testified that he was qualified as a welder, construction boilermaker, rigger, fitter, electrician, aligner, and general laborer. As noted above, McGuire considered him to be an "excellent welder," but noted his complaints about overhead welding and his "unauthorized" departure from work in the rain. Randall Walker, in addition to being a welder, was also qualified as a carpenter and in fitting and setting up machinery. Eisenzimmer qualified in welding, operating a drill rig, and a little "carpentry." McGuire claimed that Walker and Eisenzimmer "barely" passed their welding tests under Mulberry. Eisenzimmer agreed that his overhead welding was deficient under Mulberry, and that he received a reprimand for it, but testified that he thereafter improved and received Ryder's assurances of a job as long as there was work at the project.

Despite the September layoffs, Respondent hired new employees thereafter. Company records show that it hired the following employees after September 24: two welders (December 29, 1981); two operators (October and November 1981); two millwrights (October 1981); two millwright helpers (October 1981); one laborer (December 15, 1981); and four electricians (November 1981; December 7, 1981; January 1982; March 1982) (R. Exh. 7). Mullins claimed that two of these were "rehires." He also admitted that the classifications of some employees were changed when the accelerated operation began in October. Lee identified two of these as Dale Ipock and A. J. Cahoon, and testified that during the accelerated operation in October they were transferred to the millwright operation and were "drilling holes." One of Heath's affidavits states that Ipock and another employee, who were retained, were "known antiunion" employees.[21]

McGuire asserted that the same criteria were used in selecting employees for the December 3 layoff. Gibbs was qualified as a welder. He had been reprimanded twice for lack of production, once under Mulberry and again under Mullins, but McGuire considered him to be "very qualified as a welder." As described above, Respondent had no records on productivity. Lee, employed as a welder, had been in construction work for 15–16 years, and could do "most anything on construction that comes along," including millwright work. McGuire described Lee as a "good welder" and a "good worker." He was laid off because McGuire thought he had a death in the family, and had missed work because of this. Heath's affidavits affirm that he had 21 years' experience as a welder. Respondent never disciplined him. On September 21, Mullins complimented Heath and six other employees, saying that they were the "best men," and that he was going to keep them working "with other trades" when the welding work ran out (G.C. Exh. 3). McGuire admitted that Leslie was a good welder and a good worker, but claimed that he was selected for layoff because he "liked to chat more than he liked to weld."

[21] G.C. Exh. 3. Heath also affirmed that Ipock and the other employee had less welding experience than he did, and Respondent introduced their welding certificates to rebut this (R. Exhs. 13 and 14).

6. Legal conclusions

Respondent's violations of Section 8(a)(1) establish its union animus,[22] and tend to show discriminatory motivation in the layoffs. The evidence is particularly strong in the case of Edwards. He was the leading union activist, a factor tending to establish Respondent's unlawful motive. *Comet Corp.*, 261 NLRB 1414 (1982). The Company had subjected him to working conditions more onerous than those of other employees. *Ward Products Corp.*, 243 NLRB 354 (1979). The timing of events preceding his layoff also supports the General Counsel's case—Edwards' acquisition of signed union cards after the September 9 takeover by Mullins, the filing of the unfair labor practice charge on September 21, Edwards' informing Foreman Jones of this fact on September 22, and Edwards' handbilling at the gate on September 23 followed by his layoff the next day. *Injected Rubber Products Corp.*, 258 NLRB 687, 696 (1981). The fact that Respondent admitted his excellence as an employee but nonetheless laid him off is additional evidence. *Boyer Ford Trucks*, 254 NLRB 1389, 1396 (1981).

Walker and Eisenzimmer were both known union sympathizers, and Walker, like Edwards, had been subjected to onerous working conditions not applied to other employees. *Ward Products Corp.*, supra. All three employees had been told by Mullins on September 9 that the job would last until the following year, which the employees could reasonably have interpreted as an implied promise of continued employment. The short time interval between Mullins' speech and the September 24 layoffs, coupled with the absence of any warning of a pending layoff, constitutes additional evidence of Respondent's discriminatory intention. *Glengarry Contracting Industries*, 258 NLRB 1167, 1174 (1981). I reject Seville's argument against such notice—that it makes an employee "edgy," and that the employer thereafter gets no work out of him—and conclude that this was simply manufactured testimony to justify the absence of notice.

The fact that the project was incomplete at the time of the layoffs, and that work remained to be done, is additional evidence.[23] One of the two principal components of the dragline was the revolving frame, and only 30 to 40 percent of the welding on this part had been completed by September 24, according to Site Superintendent McGuire. Edwards, Walker, and Eisenzimmer were all

[22] Although Respondent objected to what the General Counsel called "background evidence" of events under Mulberry, in the absence of any proved connection between Mullins and Mulberry, I have not relied on background evidence, as there is sufficient evidence of events taking place after the Mullins takeover to support the General Counsel's case. It may be noted in passing that knowledge of some of the alleged discriminatees' union activities and sympathies was first acquired under Mulberry by individuals who later became supervisors under Mullins, and that such knowledge must be presumed to have been retained.

Although there is also evidence that North Carolina Phosphate was opposed to having a union at the Aurora jobsite, that Mulberry, a unionized firm, left the job because it could not persuade North Carolina Phosphate to change this policy, and that Mullins was selected by North Carolina Phosphate to take over the job—Respondent calls this the General Counsel's "conspiracy" theory of the case—I have not found it necessary to rely on this evidence.

[23] *General Tire & Rubber Co.*, 262 NLRB 1248 (1982); *H. B. Zachry Co.*, 261 NLRB 681 (1982).

welders, yet they were laid off. There is no rational business reason for this action. The fact Respondent thereafter hired welders is simply more evidence that it was opposed to the three alleged discriminatees for discriminatory reasons,[24] as is the fact that some of the laid-off employees were recalled. *Industrial Erectors, Inc.*, 261 NLRB 888 (1982).

The accelerated production schedule beginning in October, a few weeks after the September 24 layoffs, shows Respondent's continuing need for employees, and further detracts from its case. Respondent's argument that this was a "millwright" operation, for which it did not need welders, is pure sophistry partially admitted by Mullins. The Company hired welders after September 24. Edwards had many other construction skills, and was an electrician. After getting rid of him, Respondent hired four electricians. Finally, the Company simply reclassified employees for the millwright operation, including Ipock, a welder and a known antiunion employee, further demonstrating its unlawful intention. *Daniel Construction Co.*, 264 NLRB 569 (1982). Eisenzimmer's reprimand for deficient overhead welding under Mulberry, a fault which he corrected, is insignificant in the fact of the General Counsel's evidence.

The record further shows that, after Edwards' layoff, Respondent asked Heath whether he was going to take Edwards' place, while Lee actually did so. One of Lee's activities consisted of handbilling, engaged in at Respondent's front gate in late November. Gibbs also engaged in union activity, and was subjected to coercive interrogation concerning it.

The same pattern of events which preceded the September 24 layoffs is also present in the later layoffs. There was continued union activity and unlawful conduct from Respondent concerning it. Matters came to a head with Lee's handbilling at Respondent's front gate in late November. As in Edwards' case, this was followed almost immediately by the layoff of known union sympathizers. As in the earlier layoffs, this timing suggests unlawful motivation.

Although McGuire attempted to give a reason for the September 24 layoffs—telling employees that there was no more welding work—he did not give any reason to the employees in connection with the December 3 layoffs, thus suggesting Respondent's illegal motive. *Acme Die Casting Corp.*, 262 NLRB 777 (1982).

Respondent's economic defense is no more valid in connection with the later layoffs than it was with respect to the earlier ones. It still had work to be done on the project, and, after the December 3 layoffs, hired two welders, one laborer, and three electricians. Heath, with 21 years' experience in the construction industry and praise on September 21 from Mullins as one of the "best" men, was laid off without notice or reason on December 3. The explanation given at the hearing by McGuire—Heath liked to "chat more than he liked to weld." Respondent's professed reason for the layoff of Lee is even more bizarre. Although he was a "good welder" in McGuire's opinion, and could do almost anything in construction, he was laid off because he suffered the misfortune of a death in the family (presumably, although not certainly, requiring him to take time off for the funeral). Although Gibbs had been twice reprimanded, this could not have been the reason for his layoff in light of McGuire's opinion that he was "very" qualified as a welder.

Respondent may well have reduced its employee complement as the project progressed toward completion.[25] However, the asserted "productivity" criteria for the order of layoffs, enunciated by McGuire, was completely vague and subjective. In lieu of objective standards, Respondent relied on supervisory "feelings" about the alleged discriminatees' "general attitudes" and "personal problems." Seville's inability to remember his "feelings" about other employees, the contradiction between his testimony and McGuire's, and his admission that he made a productivity study only "in a sense" show that the alleged study was a sham. Unlike other enterprises, every construction project comes to an end, one way or another. Respondent seized on this fact to rid itself of known union adherents long before completion of the job.

For these reasons, the General Counsel has established a very strong prima facie case that Respondent discharged all six alleged discriminatees because of their union sympathies and activities. And, for the reasons given above, Respondent has not rebutted that case by showing that they would have been discharged in the absence of those activities or sympathies. Accordingly, I find that Respondent laid off all six employees for the reasons alleged in the consolidated complaint, in violation of Section 8(a)(3) and (1) of the Act. *Wright Line*, 251 NLRB 1083 (1980).

In accordance with my findings above, I make the following

CONCLUSIONS OF LAW

1. F. Mullins Construction, Inc. is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Local Lodge 30, International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. By engaging in the following conduct, Respondent committed unfair labor practices in violation of Section 8(a)(1) of the Act:

(a) Asking employees whether they had received union cards, whether one employee was trying to get another to sign a card, and the nature of union information being distributed to employees.

[24] *Franchet Metal Craft*, 262 NLRB 552 (1982); *Coil-ACC, Inc.*, 262 NLRB 76 (1982); *Rain-Ware, Inc.*, 263 NLRB 50 (1982).

[25] Respondent attempted to bolster its case with an appendix attached to its brief assertedly showing a reduction in its employee complement throughout the life of the project. This document was not received at the hearing, and does not constitute part of the record within the meaning of Sec. 102.45 of the Board's Rules and Regulations, since Respondent's brief is not an "answering brief" within the meaning of Sec. 102.46(d) of the Rules. I note in passing that said appendix suggests that Respondent continued to employ millwright workers, electricians, rigger workers, operators, and pipefitter helpers at least until June 1982—skills possessed by some of the discriminatees.

(b) Asking employees whether they supported or intended to join the Union.

(c) After the layoff of the leading union activist, asking another employee whether he intended to "carry on" the Union or lead its organizational efforts.

(d) Asking an employee where he obtained a union hat, whether a specific employee gave it to him, and whether he had to sign a union card to get it.

(e) Directing an employee to give a union card, which he had received from another employee, to a company agent.

(f) Telling employees that they would probably lose their jobs if they voted the Union in.

(g) Telling employees that a supervisor would not be able to find employment with the owner of the site where the employees' employer had been engaged by the owner to perform work if the Union came onto the jobsite.

(h) After the beginning of the union campaign, discriminatorily telling employees that they could not talk about the Union during working time.

4. By laying off Barry Edwards, Randall Walker, and Jerry Eisenzimmer on September 24, 1981, and Leslie Heath, Rodney Gibbs, and Douglas Lee on December 3, 1981, because of their union activities or sympathies, Respondent thereby violated Section 8(a)(3) and (1) of the Act.

5. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

6. Respondent has not violated the Act except as herein specified.

THE REMEDY

It having been found that Respondent has engaged in certain unfair labor practices, it is recommended that it be ordered to cease and desist therefrom and to take certain affirmative actions designed to effectuate the purposes of the Act.

It having been found that Respondent unlawfully laid off Barry Edwards, Randall Walker, and Jerry Eisenzimmer on September 24, 1981, and Leslie Heath, Rodney Gibbs, and Douglas Lee on December 3, 1981, and Leslie Heath having died, it is recommended that Respondent be ordered to offer Barry Edwards, Randall Walker, Jerry Eisenzimmer, Rodney Gibbs, and Douglas Lee immediate and full reinstatement to their former positions or, if those positions no longer exist, to substantially equivalent positions, dismissing if necessary any employee hired to fill any of said positions, and to make them and the estate of Leslie Heath whole for any loss of earnings they or said estate may have suffered by reason of Respondent's unlawful conduct, by severally paying them and said estate sums of money to the amount each individual would have earned from the date of his unlawful layoff to the date of an offer of reinstatement, and in the case of the estate of Leslie Heath up to and including the quarter in which he died, less net earnings during such period, with interest thereon to be computed on a quarterly basis in the manner established by the Board in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and *Florida Steel Corp.*, 231 NLRB 651 (1977).[26] In addition, it is recommended that Respondent be required to expunge from its personnel records all references to its unlawful layoffs of the aforesaid employees, except Heath, and to notify each of them except Heath's estate, in writing, that this action had been taken and that evidence of their unlawful layoffs will not be used as a basis for future personnel actions against them.

I shall also recommend that Respondent be required to post appropriate notices.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[27]

ORDER

The Respondent, F. Mullins Construction, Inc., Aurora, North Carolina, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Asking employees whether they had received union cards, whether certain employees are trying to get other employees to sign union cards, or to describe the nature of union literature being distributed to employees.

(b) Asking employees whether they support or intend to join the Union, or any other labor organization.

(c) Asking employees whether they intend to "carry on" or lead the union organizational efforts.

(d) Asking employees where they obtained union hats or other union paraphernalia, whether specific employees gave such items to them, and whether they had to sign union authorization cards in order to get them.

(e) Directing employees to give union cards to company agents.

(f) Telling employees that they would probably lose their jobs if they voted the Union in.

(g) Telling employees that a supervisor would not be able to obtain employment with the owner of the site where the employees' employer had been engaged by the owner to perform work if the Union came onto the jobsite.

(h) Discriminatorily telling employees after the beginning of a union campaign that they may not talk about the Union during working time.

(i) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer Barry Edwards, Randall Walker, Jerry Eisenzimmer, Rodney Gibbs, and Douglas Lee immediate and full reinstatement to their former positions or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights

[26] See generally *Isis Plumbing*, 138 NLRB 716 (1962), and in the case of Heath's estate, *Mastro Plastics Corp.*, 136 NLRB 1342, 1347, 1364 (1962), enfd. as modified 354 F.2d 170, (2d Cir. 1965).

[27] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

and privileges, discharging if necessary any employee hired to replace any of them, and make them and the estate of Leslie Heath whole for any loss of earnings any of them or said estate may have suffered by reason of Respondent's discrimination against them and Heath, in the manner described in the section of this decision entitled "The Remedy."

(b) Expunge from its personnel records, or other files of the aforesaid individuals, any reference to their unlawful layoffs, and notify them, except the estate of Leslie Heath, in writing, that this action has been taken and that evidence of their unlawful layoffs will not be used as a basis for future personnel actions against them.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at the North Carolina Phosphate jobsite at Aurora, North Carolina, if any of its employees are still employed there, and mail to each of its employees at any time employed on that jobsite, to his or her last known address, copies of the attached notice marked "Appendix."[28] Copies of the notice, on forms provided by the Regional Director for Region 11, after being signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps Respondent has taken to comply.

IT IS FURTHER ORDERED that insofar as the complaint alleges violations of the Act not specifically found herein it is hereby dismissed.

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[28] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Harvard Folding Box Co., Inc. *and* Boston Local No. 600, Graphic Arts International Union, AFL–CIO–CLC. Case 1–CA–17917

14 December 1984

DECISION AND ORDER

BY MEMBERS ZIMMERMAN, HUNTER, AND DENNIS

On 4 March 1982 Administrative Law Judge Walter H. Maloney Jr. issued the attached decision. The General Counsel and the Respondent filed exceptions and supporting briefs, and the Respondent filed a brief in answer to the General Counsel's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions,[2] except as modified below, and to adopt the recommended Order as modified.[3]

We agree with the judge's conclusions that the Respondent violated Section 8(a)(5), (3), and (1) of the Act by unilaterally instituting a formalized progressive disciplinary system based on discriminatory consideration and by unilaterally promulgating an employee handbook which, among other things, memorialized that system and invited employees to take unresolved grievances directly to representatives of management, thereby circumventing the newly certified Union with whom it has a statutory duty to bargain.[4]

We disagree, however, with the judge's finding that the Respondent violated Section 8(a)(5) and (1) of the Act by granting a wage increase. This violation was not alleged in the complaint, argued at the hearing, or urged in the General Counsel's brief to the judge. Thus, because the Respondent was deprived of notice and an opportunity to litigate the issue, we reverse the judge's finding that the Respondent thereby committed an unfair labor practice. See *Cardivan Co.*, 271 NLRB 563 (1984).[5]

Having found that the Respondent disciplined employees in accordance with its unilaterally instituted progressive disciplinary system, discussed above, the judge recommended, among other things, that the Respondent be required to make whole those employees affected, as a means of restoring the status quo ante. In his complaint, the General Counsel alleged that the Respondent unlawfully "instituted" the offending disciplinary system. Thereafter, 19 days before hearing, the General Counsel amended the complaint by notifying the Respondent that:

> . . . the General Counsel intends to request, as part of an appropriate remedy for the unfair labor practices herein, that Respondent make whole employees for any discipline or lost wages suffered by employees . . . as a result of Respondent's instituting a policy for suspending or disciplining employees for tardiness, absenteeism and leaving work early.

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The Respondent also alleges bias on the part of the judge based solely on the judge's reference to one of the Respondent's witnesses, whose testimony on a particular matter was not found worthy of belief, as having "botched his lines badly." We find this allegation to be totally without merit.

[2] In finding that the Respondent discriminatorily discharged employee Lewis in violation of Sec. 8(a)(3) and (1) of the Act, we rely on the following reasons, as well as those set forth by the judge. Lewis was a well-known, active union supporter who had been identified as the employees' likely choice for union steward. He had never been warned about his attendance. While other discharged employees were permitted to return if their foreman agreed, Lewis was told it would be futile to seek reinstatement because Ross, the Respondent's manager, did not want Lewis working for him. Ross, who apparently made the decision to discharge Lewis, did not ordinarily participate in such decisions. (Both Ross and another of the Respondent's witnesses, McGee, each testified that he made the decision to terminate Lewis. Such inconsistent testimony lends further support to the judge's finding of unlawful motive.) Finally, the Respondent threatened to and did fire another vocal union activist, Maden, and discharged Lewis within days of the Union's certification as the employees' collective-bargaining representative.

Having adopted the judge's conclusion that employee Lewis was discriminatorily discharged in violation of Sec. 8(a)(3) of the Act, Members Hunter and Dennis deem it unnecessary to reach the question as to whether Lewis' discharge also violated Sec. 8(a)(4). In their view, such a finding would be cumulative.

For the reasons stated by the judge, Member Zimmerman would find the additional violation. He considers such a finding necessary, in applying the Board's remedial powers, to fully restore the status quo ante.

[3] Certain inadvertent errors in the judge's decision have been noted and corrected.

We also correct the judge's erroneous finding that Lewis missed eight Mondays in 1980. The accurate figure is 12 to 13 Mondays.

[4] Inasmuch as Member Dennis agrees that the Respondent unilaterally instituting a new disciplinary system for absenteeism and tardiness violated Sec. 8(a)(5) and (1), she finds it unnecessary to consider whether that same conduct also violated Sec. 8(a)(3). As a practical matter, such a finding and any additional remedy would be cumulative.

[5] Member Zimmerman finds, as did the judge, that the Respondent's granting of a unilateral wage increase was fully litigated. The facts surrounding the violation were conceded by the Respondent's plant manager. During cross-examination the judge asked Plant Manager Swartz if employees had received wage increases in the preceding 18-month period. Swartz admitted that management decided to grant its employees a general cost-of-living increase in September 1981 and that lower paid personnel were given an additional increase. No objection was taken to this line of questioning, and Swartz' testimony stands uncontroverted. The Respondent also admitted that, despite the existence of a Board certification, it has refused to bargain with the Union. Thus, unlike the situation in *Cardivan Co.*, there is here an admission of the facts constituting the unlawful conduct. Member Zimmerman, therefore, would affirm the judge's conclusion that the Respondent violated Sec. 8(a)(5) and (1) of the Act by making increases in wages without notifying the Union and offering to bargain with it.

In these circumstances, the Respondent was plainly apprised that it faced potential economic liability for the consequences flowing from its implementation of the disciplinary system here found unlawful. The Respondent's records bearing on the implementation were subpoenaed and, without objection, adduced into evidence by the General Counsel. Aided by these evidentiary tools, it is appropriate to determine the extent of the Respondent's liability at the compliance stage of this proceeding.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Harvard Folding Box Co., Inc., Lynn, Massachusetts, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Delete paragraph 1(c) and reletter the subsequent paragraphs.

2. Substitute the following for paragraph 1(e).

"(e) Unilaterally instituting bonus plans, or changing bonus plans, without first notifying the Union of the proposed changes and offering to bargain collectively with it concerning such changes; provided that nothing in the Order shall be construed to require the Respondent to decrease the compensation of any employee."

3. Substitute the following for paragraph 2(b).

"(b) Rescind and cease giving effect to any and all changes in disciplinary procedures and work rules which were announced to employees about 3 June 1980, or which were included in an employee handbook which was distributed about 1 August 1981; expunge from employee personnel records any notices or warnings which were given as a result of the adoption of such rules and procedures; and notify those employees affected that this has been done and that the evidence thus expunged will not be used as a basis for future personnel action against them."

4. Insert the following as paragraph 2(e) and reletter the subsequent paragraphs.

"(e) Expunge from their files any reference to the terminations of George Maden and Robert Lewis and notify Maden and Lewis in writing that this has been done and that evidence of their unlawful terminations will not be used as a basis for future personnel actions against them."

5. Substitute the attached notice for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT tell employees that they will be fired because they have voted for the Union.

WE WILL NOT discourage membership in or activities on behalf of Boston Local No. 600, Graphic Arts International Union, AFL–CIO–CLC, or any other labor organization, by discharging employees, unilaterally instituting disciplinary rules and procedures, or otherwise discriminating against them in their hire or tenure.

WE WILL NOT make unilateral changes in bonus plans, disciplinary procedures, grievance procedures, or any other term or condition of employment without notifying the Union and affording it an opportunity to bargain collectively concerning such proposed changes.

WE WILL NOT by any other means or in any other manner interfere with, restrain, or coerce employees in the exercise of rights guaranteed to them by Section 7 of the Act. These rights include the right to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for their mutual aid and protection.

WE WILL cease giving effect to any changes in work rules and disciplinary procedures which were announced to employees about 3 June 1980, or which are contained in an employee handbook which was distributed about 1 August 1981, and WE WILL expunge from employee personnel records any disciplinary warnings which were given as a result of the adoption of such rules and procedures. WE WILL NOT discharge or suspend employees pursuant to the provisions of illegally instituted disciplinary rules or procedures, WE WILL offer full and immediate reinstatement to any employee who has been discharged pursuant to illegally instituted disciplinary procedures, and WE WILL make whole any employees who have been suspended or discharged pursuant to such procedures, with interest.

WE WILL recognize and bargain collectively with Boston Local No. 600, Graphic Arts International Union, AFL–CIO–CLC as the exclusive collective-bargaining representative of all our production and maintenance employees, including truck drivers, employed at our Lynn, Massachusetts

plant, exclusive of office clerical employees, sales employees, professional employees, guards, and supervisors as defined in the Act.

WE WILL offer to George Maden and to Robert Lewis immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges which they previously enjoyed and WE WILL make them whole for any loss of earnings and other benefits resulting from their discharges, less any net interim earnings, plus interest.

WE WILL expunge from our files any reference to the terminations of George Maden and Robert Lewis and WE WILL notify them in writing that this has been done and that evidence of their unlawful terminations will not be used as a basis for future personnel actions against them.

HARVARD FOLDING BOX CO., INC.

DECISION

STATEMENT OF THE CASE

WALTER H. MALONEY JR., Administrative Law Judge. This case came on for hearing before me at Boston, Massachusetts, on an unfair labor practice complaint,[1] issued by the Regional Director for Region 1 of the Board and amended thereafter, which alleges that Respondent Harvard Folding Box Co., Inc.[2] violated Section 8(a)(1), (3), (4), and (5) of the Act. More particularly, the amended complaint alleges that Respondent told an employee that he was going to be discharged because of his union sympathies, discharged employees Robert Lewis and George Maden because of their membership in and activities on behalf of the Union, and refused to bargain collectively with the Union by unilaterally instituting a new policy with reference to discipline for absenteeism, unilaterally discontinuing a bonus system, and unilaterally instituting a performance bonus system. The complaint also alleges that the Respondent discharged Lewis because he gave testimony under the Act.

It should be noted that the Union herein was certified and Respondent refused to bargain with it in order to test the certification. The Board issued a bargaining order on December 11, 1981, directing Respondent to honor the certification (259 NLRB 686). Respondent denies the commission of any independent violations of Section 8(a)(1) of the Act, claims that Lewis was discharged for chronic absenteeism, and asserts that Maden, in effect, quit by refusing to abide by a company order to work full time rather than part-time. Respondent insists that a disciplinary system and procedure found in a newly promulgated employee handbook merely incorporates in writing the practices of the Employer and thus does not constitute a change in working conditions which warrants bargaining with a certified union. Respondent announced at the hearing in this case that it would pursue its remedies respecting the bargaining order just issued against it in 259 NLRB 686 to the U.S. Circuit Court of Appeals. On these contentions the issues in this case were drawn.[3]

FINDINGS OF FACT

I. THE UNFAIR LABOR PRACTICES ALLEGED

A. *Background*

Respondent operates a factory in Lynn, Massachusetts, where it manufactures boxes and cartons used by businesses to display and package various products. These boxes are cut to order and are completely fabricated at Respondent's premises from cardboard stock. This fabrication includes the design, cutting, printing, and gluing of the finished product. Respondent's principals are Mel Ross and Al Levine. It employs about 90–95 employees although, at the time the events in this case took place, a temporary upsurge in business required it to employ about 115 persons.

Respondent has never had a collective-bargaining agreement with any labor organization. In the spring of 1980, the Union herein organized its production and maintenance employees, petitioned the Board for a representation election, and won the election conducted on May 29, 1980, by a vote of 52 to 38. Despite the existence of a Board certification and a bargaining order based on that certification, Respondent has yet to bargain with the Union concerning any matter.

B. *The Discharges of Robert Lewis and George Maden*

One of the principal in-house activists in the union effort was pressman Robert Lewis. Lewis had worked for Respondent since 1962, starting as a helper and working his way into one of the most skilled positions in the plant. He was one of the senior employees at the plant. Respondent's plant manager Michael Swartz, who once was trained in the pressroom by Lewis, described him as one of the most qualified men in that department. As a pressman, Lewis reported to Jay Goldfarb, who in turn reported to Swartz and Plant Superintendent James McGee.

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[1] The principal docket entries in this case are as follows:
Charge filed herein by Boston Local No. 600, Graphic Arts International Union, AFL–CIO–CLC (the Union), on October 2, 1980; complaint issued by Regional Director for Region 1, on November 17, 1980; Respondent's answer filed on December 24, 1980; amendment to complaint issued on May 28, 1981; Respondent's answer to amendment to complaint filed on June 2, 1981; hearing held in Boston, Massachusetts, on December 14–16, 1981; briefs filed by the General Counsel and Respondent with me on February 16, 1982.

[2] Respondent admits, and I find, that it is a Massachusetts corporation which maintains its principal office and place of business in Lynn, Massachusetts, where it is engaged in the manufacture, sale, and distribution of folding boxes and related products. In the course and conduct of this business, Respondent annually ships from its Lynn, Massachusetts plant directly to points and places located outside the Commonwealth of Massachusetts goods valued in excess of $50,000. Accordingly, Respondent is an employer within the meaning of Sec. 2(2), (6), and (7) of the Act. The Union is a labor organization within the meaning of Sec. 2(5) of the Act.

[3] Certain errors in the transcript are noted and corrected.

Lewis distributed union leaflets from time to time. About May 1, 1980, along with one other employee, he attended a representation case conference on behalf of the Union at the Board office in downtown Boston. At this conference a "stip" election agreement was worked out with Respondent. Lewis then served as the union observer at the election on May 29. At some point in time between the date of the Union's election victory and Lewis' discharge on September 16, Lewis was described by a fellow employee to his supervisor, Goldfarb, as the future shop steward.

The other discriminatee, George "Sandy" Maden, started working for Respondent in 1956. His job was to catalogue, file, and retrieve printing plates and dies and make them available to operating personnel in accordance with job tickets which he received from the front office. He became quite ill in 1976 and, for that reason, was anxious to retain his health insurance benefits with Respondent until he became eligible for Medicare at age 65. Maden, who was approaching the age of 63 in 1979, also desired to retire. He worked out an arrangement with Swartz whereby he would reduce the number of hours worked to 20 to 25 per week and would take a cut in wages from $4.17 to $3 per hour (which was then the minimum wage). In exchange for this cut in pay Respondent would continue to pay Maden's health insurance premium. With the reduction in hours and wages, Maden would then become eligible for monthly social security payments. However, he had to be careful not to earn in excess of $3480 per year or he would lose social security. In 1979, the first full year of this arrangement, Maden earned slightly in excess of $3400.

Late in 1979, Maden approached Swartz to request a raise to $3.50 an hour. His justification for the raise was the increase in the price of gasoline which made it difficult for him to make ends meet on the money he was receiving. Swartz told Maden that he would "get back to him" but, according to Maden, he never did. The first paycheck Maden received in 1980 did not even reflect a 10-cent increase in the minimum wage which went into effect on January 1, 1980. After Maden complained to Swartz about this omission, Respondent complied with the law and began to pay him $3.10 an hour but, despite repeated requests for additional money, Maden was given nothing more. He signed a union card in April during the organizing drive and, on two different occasions, told Swartz and McGee that he hoped the Company would lose the election by one vote because that one vote would be his. He cast a challenged ballot at the election. The challenge was never resolved because it was not determinative of the results.

As noted above, Respondent decided to challenge the results of the election and filed objections claiming that the Union had engaged in misrepresentations during the course of the campaign. On July 3, 1980, the Regional Director issued a report recommending that the objections be overruled in their entirety. On September 11, 1980, the Board adopted the report and certified the Union.

From February 1, 1979, until his discharge on June 17, 1980, Maden normally worked from 7 a.m. to 2 p.m., 4 days a week. He did not work at all on Wednesday. The record is clear that during this period of time he was able to line up and make available to operating personnel in advance of his off time the dies and plates which they normally required. However, it occurred from time to time that a job would suddenly be switched and a different die would have to be pulled immediately and sent to the cutting room or the pressroom. If Maden was absent, someone from the die cutting department would get the die. This task might take 15 minutes and it fell, on occasion, to Dave Katz or to Remo Avellani, the foreman of the die cutting department. Avellani complained to Swartz from time to time about having to do so.[4]

Sometime early in June 1980, William Lemmo, the superintendent in the die cutting department and a friend of Maden, asked Maden if he had told Mel Ross that he had voted for the Union. Maden replied that he did not tell Ross but he had told just about everyone else in the front office. I credit Maden's testimony that Lemmo told Maden that he thought he was going to get "canned" and suggested to Maden that he speak with Ross and explain the circumstances that prompted him to support the Union.[5] Maden's reply was why should he go in and beg for a job which only paid the minimum wage. Lemmo asked Maden on a second occasion if he had spoken with Ross about this question, but Maden had not done so.

Early in June, Maden was told to train David Barcalo, a new employee, to classify, file, and retrieve plates and dies. On June 17, early in the after noon, Lemmo told Maden that he thought he would be "canned" at the end of the week. Maden was scheduled to take a long-planned vacation trip beginning at the end of the week, so he told Lemmo that he was going to take the bull by the horns and go into the front office to announce that he was beginning his vacation at the end of the day instead of on Friday, as originally scheduled. He did so, and when he announced his intention to Swartz, the latter made no reply. When Maden returned to his work station, he saw Lemmo on the phone and overheard Lemmo saying, "Why don't you tell him? I'm not his boss." When Lemmo finished the conversation, he slammed down the phone and told Maden, "Mike Swartz says to tell you that you are all done." Maden picked up his private belongings and immediately left the plant.

I credit Maden's testimony that at no time did Lemmo or anyone else give him any explanation, either orally or in writing, as to the reason for his discharge. I also credit Maden's testimony that at no time did Lemmo or any other supervisor tell him that he could continue to work for the Company if he would do so on a full-time basis. It is true that, in a conversation which took place some days before the discharge, Lemmo had expressed to Maden the opinion that he could think of no reason why the Company might fire him, whereupon Maden had re-

[4] Avellani was described by a fellow supervisor to Lemmo as a "picker."

[5] While denying the specifics of this conversation, Lemmo admits that he told Maden that if he went around shooting his mouth off about the Union Ross would "blast him."

plied that the only excuse that it could use was that he was not a full-time employee.[6]

Respondent normally shuts down the plant for a 2-week vacation early in July. In 1980, production schedules were so demanding that while the vacation period was taken much of the plant continued to operate. Lewis was given a 2-week vacation in early July, during which time he injured his back while performing some chores at home. This was not the first time that Lewis had suffered a back injury so he treated it without going to a physician. When the back injury failed to respond quickly enough to permit him to return to work as scheduled, he called his foreman, Jay Goldfarb, and obtained permission to take a third week of the 4 weeks of vacation to which he was entitled. About July 25, Lewis visited the plant, spoke with McGee, told him about the back injury, and said he was ready to come back to work. McGee complained that Lewis was missing a lot of time but said he did not want him to return until he had the approval of a physician. Lewis said this might take some time to obtain since he was not under the care of a physician. McGee then suggested that Lewis go to the Northgate Medical Clinic, to which the Company referred employees, and have an examination performed by a physician at the clinic. Lewis did so and obtained a letter saying that he could return but only to limited duty. McGee said that such a letter was not satisfactory and informed Lewis that he did not want him to return until the doctor could certify that he was able to perform his job without restrictions. After a second examination, Lewis obtained unrestricted clearance to return to work and did so on August 6.

Regardless of the hours which others might work at the plant, Lewis' regular workday was from 7 a.m. to 5:30 p.m., 5 days a week. He refused to work more than a 10-hour day and refused to work on Saturdays, Sundays, or evenings. His regular job was to operate a two-color 40-inch press, the smallest of several presses which Respondent owned.[7] Despite repeated requests over the years from Respondent's management that he change to one of the larger and more elaborate presses, Lewis insisted that he did not want the responsibility associated with operating one of those presses and insisted on working only the smaller two-color machine. When Lewis was absent, Respondent either did not operate the two-color machine, which it kept on hand for certain smaller jobs which its major customers insisted that it perform, or it shifted one of the pressmen assigned to a larger press to operate Lewis' press. Such a personnel shift might entail shutting down the larger machine.

Lewis missed 1 day of work in August after his return to duty. He developed a case of bronchitis and missed the 4 working days in the week following Labor Day. He worked the entire week of September 8–12 but his bronchitis flared up again over the weekend of September 13–14. He called in sick on Monday, September 15. It was at this point that Respondent decided to discharge Lewis. On the following day, when Lewis again called in sick, he spoke with Swartz who informed him of the discharge. Swartz read to Lewis the text of a discharge letter which was later forwarded by mail. The letter read:

> Your employment by this Company is terminated effective today.
>
> This action is taken because of the numerous occasions on which you have failed to report to work when scheduled to do so.
>
> The pressman's job for which you were employed is a full-time position. Your numerous absences, which have included absence from work on Mondays, have created unnecessary difficulty in operating our Press Department.
>
> We have come to believe that you are either unable or unwilling to perform a full-time job on a regular full-time basis.

Swartz told Lewis that the decision to discharge him was made "higher up" and that his hands were tied respecting it. Lewis then asked to speak with Ross, who was not available at the time. Lewis called again the following day and asked to speak with Ross but was referred to a Quinn, the comptroller. Quinn told Lewis that Ross was unavailable and suggested to Lewis that it would be pointless to call back. He told Lewis that Ross had made up his mind and that he did not want Lewis working for him, adding that the matter was settled.

C. *Unilateral Changes in Wages, Benefits, and Working Conditions*

Shortly after the election, Swartz and McGee held a meeting of the employees in the printing department. McGee complained about the poor attendance record of the Printing Department employees and told employees that their absentee record was fouling up the scheduling of work. Swartz echoed McGee's statement and went on to state that in order to combat the absenteeism problem Respondent was instituting a new disciplinary system. According to the new system, an employee would receive a verbal warning for his first tardiness or his first failure to call in at the beginning of the day to notify the Company that the employee would not be coming in. For the second infraction, the offending employee would receive a week's suspension. For the third infraction, the employee in question would be discharged.

In the summer of 1981, the city of Lynn provided various business firms in the area with the services of an industrial relations or personnel consultant as a means of inducing companies to remain in the city. The consultant, Robert Bernstein, held a series of interviews with various members of Respondent's management team and wrote a personnel handbook based on his interviews. This handbook was distributed to all of Respondent's employees about August 1, 1981. It contained a wide variety of items relating to an individual's employment

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[6] Sometime after he was discharged, Maden returned to the plant and spoke with Lemmo. He told Lemmo that he did not want to do anything that would disturb their friendship and asked Lemmo if he would testify on his behalf if he filed a grievance. Lemmo's reply was that he would have to say that he "assumed" that Maden had been fired because he voted for the Union but that he could not honestly take the stand and assert it as a fact. Maden replied that this was good enough for him.

[7] Respondent regularly operated four-color and six-color presses. These presses could accommodate larger sheets of cardboard than the two-color press.

status, including matters relating to attendance and to grievances. On the subject of attendance, the booklet exhorted employees to come to work regularly and on time, stating that "Repeated unsatisfactory attendance, including reporting late or quitting early, may be cause for disciplinary action. Employees are expected to leave the plant at the end of their shift." It also outlined certain leaves of absence which would be available upon advance request but required employees to make their requests in writing.

With respect to disciplinary problems, the booklet outline noted that, for some infractions of company rules there would be written warnings which would be kept in an employee's personnel file for a period of year. For other infractions there would be verbal warnings, a written record of which would be put in an employee's personnel file and kept for a period of 1 year. For very serious infractions, immediate discharge would follow. The booklet then went on to outline the types of conduct which would be considered major or minor infractions of company rules and set forth the type of punishment which would be imposed for major infractions or repeated for minor infractions. With respect to grievances, the handbook said that any questions about the job, wages, hours, or any other related matter should be discussed with an employee's supervisor. If an employee did not receive word within 3 working days when an appointment is scheduled, he was authorized to go to the office and speak with the plant superintendent without an appointment.

In September 1981, Respondent granted an across-the-board cost-of-living increase of 8 percent to all employees. In addition, it granted other individual increases to specific employees who were at the lower end of the company wage scale. Late in 1980 or early in 1981, Respondent made substantial revisions in its existing attendance bonus and instituted a performance bonus. The exact requirements of these incentive bonuses is rather vague in the record. The previous attendance bonus operated on a system of points given to each individual for perfect attendance during a given workweek. At the end of the year, the employee's total bonus points were added up and he was given a certain amount per point over and above his regular salary. The amount of money assigned to each bonus point depended on the Company's profit during the preceding year. Respondent's management was unhappy about the operations of the attendance bonus. Absenteeism and tardiness was and remains a serious problem at Respondent's plant and management felt that deserving employees were not receiving a sufficient incentive from the old bonus system. They held a series of meetings with employees in which the management's dissatisfaction with the plan was discussed and during which the outlines of a new plan were also announced. The new plan would permit foremen certain flexibility in excusing absences and tardiness in a manner which would not jeopardize attendance bonus points. Moreover, the awards would thereafter be computed and distributed on a quarterly rather than an annual basis. The performance bonus was also announced. It was a new incentive award, whose exact requirements were not set forth in the record except for the fact that the amount of the bonus also depended on the profitability of the Company.

II. ANALYSIS AND CONCLUSIONS

A. *The Discharges of George Maden and Robert Lewis and Related Matters*

It is an unfair labor practice for a supervisor to tell an employee that he is going to be discharged because of his union sympathies. *H. B. Zachry Co.*, 233 NLRB 1143 (1977); *Bradford Furniture Co.*, 254 NLRB 109 (1981). When Lemmo told Maden that he thought Maden was going to be discharged for voting for the Union, he violated Section 8(a)(1) of the Act, even if this prediction did not express Lemmo's personal sentiments. This statement, as well as Lemmo's admitted statement that Ross would "blast" Maden for letting it be known he was a union supporter, provides independent evidence of animus as well as an admission against interest which bears Respondent's true motivation in discharging Maden and Lewis. Other evidence of animus can be derived from the cavalier treatment given to the Union's bargaining rights by Respondent following the election. This treatment is discussed more in detail, infra.

Maden had been with the Company for 26 years. Company General Manager Ross testified that he did a "hell of a job" when he was present. The problem asserted by Respondent is that Maden was not always present because of the arrangement he had concluded with Swartz to work part-time in order to keep his earnings below the statutory maximum allowed to a social security annuitant who is under the age of 65. It was well known that Maden was a union supporter and that he voiced his support to Respondent's management in an impertinent manner. The timing of his discharge, taking place as it did within 3 weeks of a representation election, gives rise to a suspicion of union animus, especially when it was imposed on an employee of 26 years' service whose only shortcoming was that he was not always present for work under an arrangement of 17 months' duration which Respondent had previously approved. The actual job content of Maden's assignment did not take more than 20 or 25 hours a week to perform and Maden was able to keep up with its requirements within that span of time. So were Maden's replacements, none of whom worked at the job more hours than Maden did and who were given other assignments, principally training as diemakers, to fill out the balance of their week. The problem posed by Respondent is that an occasional rush job meant that sometimes a die had to be pulled from its shelf in a hurry and, if Maden was not around to pull it, someone else had to perform this chore. This happened only rarely and, when it did, it consumed only a few minutes out of another employee's day. Maden discussed this problem with Swartz in January 1979. When his part-time working arrangement was first established, Swartz told Maden that he was not at all concerned about pulling dies for an occasional rush job and that Avellani or Katz could take care of it. Suddenly, within weeks of a union victory, to which Maden had tried to make a contribution, an arrangement which had been sat-

isfactory for 17 months suddenly became intolerable. It was the kind of complaint which was plainly contrived and hardly the basis for the drastic personnel action which took place on June 17.

Respondent insists, on the one hand, that Maden was not discharged and that, in effect, he quit. It also argues that he was discharged for cause. According to Respondent, Maden was offered the option of working full-time rather than leaving the Company so it was Maden who made the choice which resulted in his final separation. The contention is wholly without merit. Swartz admits that he never confronted Maden with this choice at the time of his termination but left the matter to Lemmo. Lemmo botched his lines badly when he testified on this point. He said that he told Maden that he had to work full time or leave and asked Maden to think the matter over on his vacation and let him have an answer when he returned. Even Swartz commented on this error in Lemmo's testimony, since the record is otherwise undisputed that Maden was discharged before and not after his vacation. I credit Maden, an unusually straightforward and convincing witness, to the effect that no one, including Lemmo, ever told him he could stay on provided that he would work full time. The best and only plausible explanation for Maden's discharge is the one which Lemmo gave to Maden a few days before the event took place, namely that he was being fired for voting for the Union. Since this was the obvious motive which prompted Respondent's action, I conclude that Respondent, in discharging Maden, violated Section 8(a)(1) and (3) of the Act.

Lewis, an employee of 18 years standing and admittedly Respondent's best pressman, was fired for excessive absenteeism. Respondent counted that Lewis was absent from work during the calendar year 1980 some 36 days, in addition to the period in July and early August when he was on an extended vacation break because of a back injury. In particular, Respondent contended that Lewis missed an inordinate number of Mondays, this assertion being evidence that Lewis was not interested in his job and permitted weekend carousing to render him unfit for work. While Respondent's count of days missed by Lewis was considerably in excess of the number of absences reflected on Lewis' timecards, it is indisputable that Lewis missed a great deal of time in 1980. Of these absences eight fell on Monday. Respondent admits that Lewis always called in to notify the Company that he would not be working but claims that such short notice frequently interrupted or caused difficulties with its job scheduling. Printing jobs are normally assigned to a particular press at the time the order is taken from the customer and they cannot easily be shifted from one press to another. Respondent asserts that it is not particularly bothered by long-term injury, long absences due to illnesses, or vacations because it has adequate advance notice in such situations and can revise production schedules to accommodate such problems. However, unanticipated absences can and do cause serious scheduling headaches, especially when it involves a position as pivotal in the production process as that of a pressman. It was these repeated and unanticipated daily absences which Respondent claims it could no longer abide and which prompted it to discharge Lewis when he called in sick on Monday, September 15.[8]

Respondent was perennially plagued with absenteeism, not only from Lewis but from its entire production staff. Record evidence indicates that Respondent experienced and tolerated from other employees absentee records comparable to that of Lewis. In 1978, Lewis was off the job for several months and nothing in the way of discipline was said or done concerning it. What Respondent's basic contention fails to take into account is that in the late summer of 1980, following Lewis' return to work from his back injury, Lewis' attendance had improved considerably over his record earlier in the year. What Respondent's contention also fails to note is that, despite Lewis' asserted indifference to the Company's production schedules and business requirements, during 1980 Lewis worked 54 hours of premium overtime (at time and one-half) during the first quarter, 50 hours of premium overtime during the second quarter, and 20 hours of premium overtime during the third and final quarter of his employment. Moreover, Respondent admits that Lewis was never suspended nor even warned about any serious consequences which might flow from his own absentee record. Swartz admits that because of his long personal acquaintance with Lewis he could not bring himself to give Lewis any kind of verbal or written warning, and McGee's complaint carried with it no warning of any sort. In light of these facts, it is most understandable that Lewis could and should have believed that his attendance pattern in August and September 1980 was acceptable to Respondent as it had been over a long period of time, and that his decision to call in sick on September 15, when in fact he was sick, would have been treated by Respondent in the same manner that Respondent had treated many such calls over a period of many years. Moreover, when Lewis was discharged, Respondent had no replacement available to take his place and still has none. If the pressures of production were the real motivating factor in eliminating Lewis at this time, normal procedure would dictate that such action would not be taken until Respondent had someone available to fill in and keep Lewis' press running. In fact, Lewis' press operated only 3 or 4 days during August and September, despite his continued presence at the plant, and it was sold after he was terminated.

A more plausible explanation for Respondent's behavior on this occasion is that it had just received from the Board a certification, dated September 11, and was then faced with the hard fact that it had in its midst a labor organization with whom it was legally obligated to deal and which Lewis was instrumental in organizing. It was Lewis who assisted in representing the Union at the representation case conference. It was Lewis who served as the union observer at the election and who was advertised to Respondent as being the Union's new shop stew-

[8] Lewis' excuse for not coming to work on that occasion was that he had a flareup of a bronchial condition and was confined to bed. Respondent does not contest that Lewis was, in fact, sick on this occasion. Implicit in this position is the contention that Lewis should have showed up for work on September 15, notwithstanding the fact that he had bronchitis, in order to save his job.

ard. And now it was Lewis who could be counted on to provide leadership through the months ahead during which Respondent would be trying to chew up time in a tedious and fruitless effort to avoid meeting its duty to engage in collective bargaining. Accordingly, I conclude that Lewis' illness of September 15 was merely a pretext for removing him from Respondent's payroll and that its real reason for discharging him was, as in the Maden case, to eliminate from its shop an active and vocal union supporter. Accordingly, I find that by discharging Robert Lewis Respondent violated Section 8(a)(1) and (3) of the Act. *Pyro Mining Co.*, 253 NLRB 233 (1977). Inasmuch as Lewis' union activities included his presence at the Board office at a representation case conference (and hence a potential union witness if the conference failed to produce agreement and the matter went on for hearing before a hearing officer), the discharge also violates Section 8(a)(4) of the Act.

B. *Unilateral Changes in Wages, Benefits, and Working Conditions*

It is well established that it is an unfair labor practice for an employer in a represented shop to make unilateral changes in the wages, benefits, or working conditions of its employees without first notifying the bargaining representative and giving it an opportunity to discuss the proposed changes. *NLRB v. Katz*, 369 U.S. 736 (1962). This requirement of good-faith bargaining applies to changes which are undertaken while objections to an election are pending, as well as to changes which may be made after a certification has issued. *Mike O'Connor Chevrolet Co.*, 209 NLRB 701 (1971); *Portsmouth Lumber Treating*, 248 NLRB 1170 (1980); *Evans Rotork, Inc.*, 251 NLRB 660 (1980). A new policy of strict enforcement of previously existing work rules is subject to the requirement of notice and bargaining just as much as is the promulgation of brand new work rules. *Pak-Mor Mfg. Co.*, 241 NLRB 801 (1979). Likewise, the transformation of an informal, unstructured system of work rules and practices into a formalized set of rules and procedures is a mandatory subject of bargaining. *Boland Marine & Mfg. Co.*, 225 NLRB 824 (1976). In this case, it is Respondent's initial position that it had no duty to bargain at all with the Union, notwithstanding the certification, because the underlying representation election was tainted with irregularity. The Board disposed of this defense by its decision in 259 NLRB 686 (1976).

In this case, it is admitted on the record that after the certification issued Respondent gave its employees an 8-percent across-the-board cost-of-living increase and made other adjustments in the wage rates of its lower paid personnel. There is no suggestion that these increases were negotiated. While this element is not formally alleged as a violation in the amended complaint, the matter was fully litigated at the hearing, inasmuch as the facts of the violation candidly admitted in the testimony of the Respondent's plant manager. Accordingly, I find that by making increases in wages without notifying the Union and offering to bargain with it Respondent has violated Section 8(a)(1) and (5) of the Act.

Shortly after the election, Respondent's management held a meeting with its press department, at which time it scolded employees about their repeated tardiness and unannounced absences and informed them that new disciplinary procedures would be invoked to discourage such practices. Among other things Respondent stated that it was instituting a practice of progressive discipline by terms of which offending employees would be subject to a warning and then to suspension and discharge. The failure of Respondent to negotiate these changes in its disciplinary practice and its decision to institute them unilaterally violates Section 8(a)(1) and (5) of the Act. The timing of this announcement, coming as it did immediately following a union violation in the representation election, makes it clear that the imposition of the new rule was discriminatorily motivated and hence a violation of Section 8(a)(3) of the Act. *Electri-Flex Co.*, 228 NLRB 847 (1978); *Transportation Management*, 256 NLRB 101 (1981).

Late in the fall of 1980 and early in 1981, Respondent announced to employees that it was instituting a performance bonus, based in part on earnings, and that it was changing the terms of its previous attendance bonus because it was dissatisfied with the results it achieved under old attendance bonus. The failure of Respondent to negotiate changes in the old bonus system and its unilateral institution of a new bonus arrangement violates Section 8(a)(1) and (5) of the Act.

In August 1981, as a result of a study conducted by a city-paid consultant, Respondent prepared and distributed to its employees a handbook in which it set forth a highly structured disciplinary system replacing the flexible, unwritten rules and practices which Respondent had formerly observed. A system of written warnings and written records of verbal warnings was instituted. Respondent argued that this was essentially the procedure it followed before the representation election, but it was unable to produce so much as one written warning which had been issued to any employee previous to May 29, 1980. Indeed, it did not even keep personnel records before this date, maintaining only a card file containing the names and addreses of its current and former employees and an occasional note concerning their employment status. The handbook outlined a detailed plan of progressive discipline, as well as steps to be utilized by an employee in presenting what the Employer calls a grievance. The issuance of this handbook, containing as it does formalized disciplinary rules and procedures as well as new rules and procedures, took place without notification to the Union or negotiation over the contents. Though a detailed compendium of rules and procedures, the handbook made no provision for participation by the certified bargaining representative in the sensitive and critical matter of handling grievances. Accordingly, the issuance of this document and the institution of the matters set forth therein constitutes a violation of Section 8(a)(1) and (5) of the Act.

On these findings of fact and on the entire record, I make the following

CONCLUSIONS OF LAW

1. Respondent Harvard Folding Box Co., Inc. is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Boston Local No. 600, Graphic Arts International Union, AFL–CIO–CLC is a labor organization within the meaning of Section 2(5) of the Act.

3. All production and maintenance employees, including truck drivers, employed by Respondent at its Lynn, Massachusetts plant, exclusive of 25 office clerical employees, sales employees, professional employees, guards, and supervisors as defined in the Act, constitute a unit appropriate for collective bargaining within the meaning of Section 9(b) of the Act.

4. Since about May 29, 1980, Boston Local No. 600, Graphic Arts International Union, AFL–CIO–CLC has been and continues to be the exclusive representative of the employees employed in the unit described above for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment, within the meaning of Section 9(a) of the Act.

5. By unilaterally granting an increase in wages; by unilaterally changing the terms of its attendance bonus and instituting a performance bonus; by unilaterally announcing and instituting a new disciplinary system respecting tardiness and attendance; and by unilaterally announcing and instituting a new system of discipline and of processing grievances, all without notifying the Union and offering it an opportunity to bargain, Respondent herein violated Section 8(a)(5) of the Act.

6. By discriminatorily discharging George Maden and Robert Lewis because of their sympathies for and activities on behalf of the Union; and by instituting a system of warnings, suspensions, and discharge in reprisal for the action of employees in selecting the Union as their bargaining representative, Respondent violated Section 8(a)(3) of the Act.

7. By discharging Robert Lewis because he gave or offered to give testimony under the Act, Respondent violated Section 8(a)(4) of the Act.

8. By the acts and conduct set forth above in Conclusions of Law 5, 6, and 7; and by telling employees that they were going to be discharged because they had voted for the Union, Respondent violated Section 8(a)(1) of the Act.

9. The unfair labor practices recited above have a close, intimate, and substantial effect on the free flow of commerce within the meaning of Section 2(6) and 2(7) of the Act.

REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I will recommend that it be required to cease and desist therefrom and to take certain affirmative actions designed to effectuate the purposes and polices of the Act. Since the violations of the Act found herein are repeated and pervasive and evidence an intention to ignore its basic purposes and policies, I will recommend to the Board a so-called 8(a)(1) remedy designed to suppress any and all violations of that section. *Hickmont Foods*, 242 NLRB 1357 (1979). I will recommend that Respondent be required to bargain collectively with the Union as the exclusive representative of its production and maintenance employees, that it rescind certain unilaterally imposed rules, regulations, and procedures which it instituted in June 1980, and about August 1981, and that it cease and desist from instituting changes in wages, benefits, or working conditions of its employees without first notifying the Union and offering to bargain with it concerning such changes. I will also recommend that Respondent be required to offer full and immediate reinstatement to George Maden, to Robert Lewis, and to any other persons who have been discharged pursuant to illegally instituted rules and disciplinary procedures, and to make them whole for any loss of earnings which they may have suffered by reason of the discrimination practiced against them, in accordance with the *Woolworth* formula,[9] with interest thereon at the adjusted prime rate used by the Internal Revenue Service for the computation of tax payments. *Olympic Medical Corp.*, 250 NLRB 146; *Isis Plumbing Co.*, 138 NLRB 716 (1962). I will also recommend that Respondent be required to post the usual notice, advising its employees of their rights and the results in this case.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[10]

ORDER

Respondent Harvard Folding Box Co., Inc., Lynn, Massachusetts, its officers, agents, supervisors, successors, and assigns, shall

1. Cease and desist from

(a) Telling employees that they are going to be discharged because they have voted for the Union.

(b) Discouraging membership in and activities on behalf of Boston Local No. 600, Graphic Arts International Union, AFL–CIO–CLC, or any other labor organization, by discharging employees, imposing stricter disciplinary rules and procedures, or otherwise discriminating against them in their hire or tenure.

(c) Discharging or otherwise discriminating against employees because they have given or have offered to give testimony under the Act.

(d) Refusing to recognize and bargain collectively with Boston Local No. 600, Graphic Arts International Union, AFL–CIO–CLC as the exclusive collective-bargaining representative of all production and maintenance employees, including truck drivers, employed by Respondent at its Lynn, Massachusetts plant, exclusive of office clerical employees, sales employees, professional employees, guards, and supervisors as defined in the Act.

(e) Unilaterally making increases in wages, instituting bonus plans, changing bonus plans, or otherwise changing the compensation of its employees without first noti-

[9] *F. W. Woolworth Co.*, 90 NLRB 289 (1950).

[10] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

fying the Union of the proposed changes and offering to bargain collectively with it concerning such changes; provided that nothing in the Order shall be construed to require Respondent to decrease the compensation of any employee.

(f) Unilaterally instituting changes in disciplinary procedures concerning tardiness and absenteeism, unilaterally instituting changes in disciplinary practices, work rules, and grievance procedures, and unilaterally changing any other term or condition of employment without first notifying the Union and giving it an opportunity to bargain collectively concerning such changes.

(g) Discharging or suspending employees pursuant to the provisions of an illegally instituted disciplinary procedure.

(h) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action designed to effectuate the purposes and policies of the Act.

(a) Recognize and, on request, bargain collectively with Boston Local No. 600, Graphic Arts International Union, AFL–CIO–CLC as the exclusive collective-bargaining representative of all production and maintenance employees, including truck drivers, employed by Respondent at its Lynn, Massachusetts plant, exclusive of office clerical employees, sales employees, professional employees, guards, and supervisors as defined in the Act.

(b) Rescind and cease giving effect to any and all changes in disciplinary procedures and work rules which were announced to employees about June 3, 1980, or which were included in an employee handbook which was distributed about August 1, 1981, and expunge from employee personnel records any notices or warnings which were given as a result of the adoption of such rules and procedures.

(c) Make whole any employees who were suspended as a result of the implementation of changes in work rules and disciplinary procedures which were made about June 3, 1980, or in the employee handbook which was distributed about August 1, 1981, with interest.

(d) Offer to George Maden, to Robert Lewis, and to any other employees who have been discharged pursuant to illegally instituted disciplinary procedures, full and immediate reinstatement to their former or substantially equivalent employment, without prejudice to their seniority or to other rights which they previously enjoyed, and make them whole for any loss of pay or benefits which they may have suffered by reason of the discrimination found herein, in the manner described above in the section entitled "Remedy."

(e) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(f) Post at its Lynn, Massachusetts plant, copies of the attached notice marked "Appendix."[11] Copies of the notice, on forms provided by the Regional Director for Region 1, after being signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(g) Notify the Regional Director in writing within 20 days from the date of this Order what steps Respondent has taken to comply.

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[11] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Cerock Wire & Cable Group, Inc. *and* **IBEW Local Union 1100, AFL–CIO, Petitioner.** Case 10–RC–12799

14 December 1984

DECISION AND CERTIFICATION OF REPRESENTATIVE

BY MEMBERS ZIMMERMAN, HUNTER, AND DENNIS

The National Labor Relations Board, by a three-member panel, has considered objections to an election held 18 and 19 August 1983 and the hearing officer's report recommending disposition of them. The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 139 for and 77 against the Petitioner, with 7 challenged ballots, an insufficient number to affect the results.

The Board has reviewed the record in light of the exceptions and brief, has adopted the hearing officer's findings[1] and recommendations,[2] and finds that a certification of representative should be issued.

Contrary to our dissenting colleague, we agree with the hearing officer's recommendation to overrule the Employer's Objection 3. (Excerpt from hearing officer's report attached as an appendix.) We find that the list compiled by union observer Jackson while the election was in process did not interfere with the employees' free choice.

During the balloting, Jackson had a list of voters to be challenged on a table in front of her. She covered the list with her arm. As employees gave their names to vote, Jackson would make a hash mark in a column on the reverse side of the list if the employee was wearing a "Vote No" shirt. A similar mark would be placed in an adjacent column if the employee displayed a union button. The columns were not labeled.

The hearing officer found that, while the tally kept by Jackson did not comport with Board precedure, it was de minimis conduct. He noted that no actual names were recorded and that there was no evidence that employees waiting to vote were aware that notations were being made. The Employer's observer apparently was the only one aware of this activity and did not report it to the Board agent until after the polls had closed.

The facts in this case do not support the conclusion that there was a substantial violation of the Board's longstanding policy which prohibits anyone keeping a list of persons who have voted[3] aside from the official eligibility list used to check off voters as they receive their ballots. To sustain his conclusion, our colleague relies on *Sound Refining, Inc.*, 267 NLRB 1301 (1983). We find, however, that *Sound Refining* is factually distinguishable.

In *Sound Refining*, the union observer kept a copy of the *Excelsior* list[4] inside a folder or notebook during the election. As employees appeared to vote, the union observer made a notation next to the names of the voters. The Board set aside the election, finding "that, in the circumstances, it can be inferred that the voters knew that [the union observer] was recording their names." The Board noted that the union observer was a conspicuous presence at the election who made no attempt to conceal his conduct.

In this case, unlike *Sound Refining*, the Petitioner's observer Jackson did not have a list of the voters. The paper she had in front of her during the election had a list only of the names of six employees to be challenged. She used the reverse side of the paper to keep a tally which bore no names, but consisted solely of hash marks arranged in two unidentified columns. Further, Jackson attempted to conceal her activity by keeping her arm over the paper. In the absence of evidence to the contrary, the more reasonable conclusion would be that Jackson did effectively conceal the tally and that the voters neither could nor did infer that a tally of their votes was being kept.

Even assuming that some voters were aware of Jackson's conduct, the absence of names to which the hash marks could be related and Jackson's failure to label the columns under which the hash marks were recorded would make it impossible for them to ascertain the nature of Jackson's tally.[5] Accordingly, we conclude that any breach of the aforementioned rule which may have occurred in this case did not constitute grounds for setting aside the election. The objection is therefore overruled.

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[1] The Employer has excepted to some of the hearing officer's credibility findings. The Board's established policy is not to overrule a hearing officer's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Stretch-Tex Co.*, 118 NLRB 1359, 1361 (1957). We find no basis for reversing the findings.

[2] We adopt the hearing officer's recommendation to overrule the Employer's Objection 2, but we rely solely on his finding that Rick England was not an agent of the Petitioner.

In adopting the hearing officer's recommendation that the Employer's Objection 5 be overruled, Member Zimmerman does not rely on *A.G.S. Graphics*, 262 NLRB 1071 (1982), in which he dissented and which he finds factually distinguishable. Member Dennis finds it unnecessary to rely on *A.G.S. Graphics*.

[3] See *International Stamping Co.*, 97 NLRB 921 (1951).

[4] See *Excelsior Underwear*, 156 NLRB 1236 (1966).

[5] We emphasize that Jackson's conduct involved only the making of hash marks, not the recording of names. See *Masonic House of California*, 258 NLRB 41 fn. 4 (1981).

CERTIFICATION OF REPRESENTATIVE

IT IS CERTIFIED that a majority of the valid ballots have been cast for IBEW Local Union 1100, AFL–CIO and that it is the exclusive collective-bargaining representative of the employees in the following appropriate unit:

> All production and maintenance employees employed by the Employer at its Hartselle, Alabama facility, including all janitorial employees and production clerical employees, but excluding all office clerical employees, professional employees, quality control employees, technical employees, leadpersons, guards and supervisors as defined in the Act.

MEMBER HUNTER, dissenting.

Contrary to my collegues, I would find that the Union's observer Kimette Jackson interfered with the employees' free choice by compiling a list of voters while the election was in progress.

The record establishes that Jackson possessed a proper list of voters whose ballots she intended to challenge. However, the hearing officer found that, when each employee stated his name to the Board agent on entering the polling area to vote, Jackson made a hash mark in one of two unmarked columns on the reverse side of that list. Jackson marked one column if she considered the voter to be a union supporter, and marked the other if she thought the voter opposed the Union. Jackson kept her arm over the paper, which was located on top of the table where the observers were seated.

In *Sound Refining, Inc.*, 267 NLRB 1301 (1983), the Board reiterated the principle that election rules designed to guarantee free choice "must be strictly enforced against material breaches in every case."[1] The Board also stated that an election should be set aside where it can be affirmatively shown or reasonably inferred that employees knew their names were being recorded.[2] I note first that the marks made by Jackson constitute the type of list generally proscribed by the Board's rules.[3] Contrary to the majority, I would also find it appropriate under the circumstances to infer that the voters were aware that Jackson was compiling a list. In this connection I emphasize Jackson's conspicuous presence at the polls as an election observer, as well as the absence of evidence that she attempted to conceal her conduct from the voters.[4] Indeed, rather than conceal her conduct, Jackson recorded the marks in the presence of employees as they stated their names to the Board agent, and she maintained the list on top of the observer's table where it could be seen. That she kept her arm over the list does not warrant a different result because, in doing so, she simply highlighted the overt nature of her conduct.[5] In my view, the voters would reasonably believe that Jackson's conduct was designed to identify them.[6]

In view of the above, and because Jackson compiled the list thoughout the balloting,[7] I do not agree with my colleagues that her breach of the Board's rules was de minimis. Consequently, I would sustain the Employer's Objection 3 and set aside the election.[8]

[1] The Board quoted from *International Stamping Co.*, 97 NLRB 921 (1951).

[2] The Board cited *A. D. Juilliard & Co.*, 110 NLRB 2197, 2199 (1954).

[3] The hearing officer specifically found that Jackson was keeping a "personal tab" of the progress of the vote, and he noted that her conduct "did not comport with the Board's election rules."

[4] See *Sound Refining*, above at 1302.

[5] In these circumstances, I see no basis for the majority's conclusion that Jackson "did effectively conceal" her conduct. Rather than wait until the employees had left the polling area, Jackson recorded the marks while they were giving their names to the Board agent. Rather than keep the list out of sight, she kept it in plain view on top of the observers' table. Placing her arm over the paper in an attempt to be secretive would clearly have the effect of drawing attention to her activity. In my view, the record warrants the inference that the employees were aware that Jackson was compiling a list.

[6] My colleagues assert that, even if the voters were aware of her conduct, Jackson's failure to label the columns or record names would make it impossible for them to ascertain the nature of the tally. In my view, a voter who states his name and immediately sees an observer record a mark would reasonably believe that the observer was trying to identify him in some manner. That Jackson did not use a more specific identification technique does not mean that her conduct was not coercive.

[7] See *Sound Refining*, above at 1302.

[8] In view of my disposition of the Employer's Objection 3, I find it unnecessary to consider the remaining objections.

APPENDIX

OBJECTION 3:

> During the election, the union, by its agent Kimette Jackson, engaged in electioneering at the polling place.

The Employer presented employee Donnie Luke in support of this objection. Luke is classified as a leadperson and served as the Employer's observer in the 5:30 a.m., to 8:30 a.m., polling period on August 18, 1983. Luke testified that he observed that Petitioner's observer, Kimette Jackson, had a list of six (6) names to be challenged, and that the list was folded from left to right. Jackson held the list on the top of the table where the observers were stationed, and kept her arm over the piece of paper. Luke testified that she would make a hash mark on the reverse side of the list as employees would give their name to vote. (See Employer's Ex. 3). The record is clear that Jackson was not writing the voter's name down; however, the record is equally clear that Jackson was keeping personal tab of how she thought the vote was going. Luke testified that an employee who wore a "Vote No" shirt would prompt Jack-

son to mark in one column; while a union button would prompt a hash mark in the adjacent column. However, as Employer's Ex. 3 demonstrates, the columns are not labeled in any way which would indicate which column signified a "yes" or "no" vote.

Given the foregoing, I find the list keeping by Jackson to be *de minimis*. While Jackson's conduct undoubtedly did not comport with the Board's election rules, I am not convinced that her transgression warrants the setting aside of the election. Of special significance is the fact that no actual names were recorded by Jackson, and there is no evidence that the employees waiting to vote actually noticed Jackson's practice of making these marks as they gave their names to the observers. To the contrary, Luke apparently was the only individual that was aware Jackson was making hash marks as the voters entered the polling area:

> HEARING OFFICER ROX: . . . When you discovered that Miss Jackson was making marks on the left side for a vote "no" or "yes"—I'm not sure the record will reflect—and marks on the right side, did you bring that to the Board agent's attention? Did you tell the Board agent that she was doing that?
>
> LUKE: No sir.
>
> HEARING OFFICER ROX: Why didn't you?
>
> LUKE: Because the lawyer told me to observe it and tell him at the end of the session.
>
> HEARING OFFICER ROX: Did the Board agent tell you to [inform him of] anything that was going on that you felt was improper? Didn't he tell you that at the beginning of this, before the polls opened?
>
> LUKE: He might [have].
>
> HEARING OFFICER ROX: But you never mentioned it to the Board agent while the polls were open, that she was doing this?
>
> LUKE: No, sir.

Accordingly, I find Objection 3 to be without merit, and shall recommend that it be dismissed. *Robert's Tours, Inc.*, 244 NLRB 818 at fn. 5 (1979).

Berry-Mahurin Construction, Inc. *and* Brian P. Lucas

United Brotherhood of Carpenters and Joiners of America, Local 308, AFL–CIO *and* Brian P. Lucas. Cases 18–CA–6614 and 18–CB–1017

14 December 1984

SUPPLEMENTAL DECISION AND ORDER

BY MEMBERS ZIMMERMAN, HUNTER, AND DENNIS

On 5 July 1983 Administrative Law Judge Richard H. Beddow Jr. issued the attached supplemental decision. The Respondents filed exceptions and supporting briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order.

1. The Respondents contend that Brian Lucas is not entitled to the back wages set forth in the Order because there were more applicants than openings for Respondent Employer's job and Lucas might not have been hired. We find no merit in this contention. In backpay cases, it is the Board's longstanding rule that

> . . . while the general burden of proof is on the General Counsel to establish the damage which has resulted from Respondent's *established* discriminat[ion] . . . i.e., the gross backpay over the backpay period, the burden of proof is upon the Respondent as to diminution of damages, whether from the willful loss of earnings . . . or from the unavailability of a job at Respondent's plant for some reason unconnected with the discrimination." [*Mastro Plastics Corp.*, 136 NLRB 1342, 1346 (1962), enfd. 345 F.2d 170 (2d Cir. 1965), cert. denied 384 U.S. 972 (1966).]

Here, the General Counsel established that 4 out of 11 applicants were hired. The Respondents, on the other hand, proffered no evidence to indicate Lucas would not have been one of the applicants selected for the job, absent the discrimination against him. In these circumstances, we find that the Respondents failed to meet their burden of proof. To hold otherwise would, as the judge pointed out, allow the Respondents to benefit from the uncertainties caused by their own misconduct. See *Famet, Inc.*, 222 NLRB 1180, 1182 (1976).

2. We agree with the judge's conclusion that Lucas is entitled to reimbursement for medical expenses which occurred during the period from 14 to 19 October 1980 under the Union's health insurance plan. Using the average hours worked by four temporary employees, the judge estimated that Lucas would have been only 2 workweeks short of attaining eligibility for health benefits. The judge then inferred that Lucas would have met the eligibility requirements because he would have had a 14-week period in the construction season to get the necessary 2 weeks of work. We find that the judge's inference is sufficiently grounded in objective evidence to overcome the Respondents' contention that it is too speculative to support an award of backpay. The prospect of 14 weeks in the season when work is normally more available is adequate support for the inference that Lucas would have met the 2-week shortfall. As the judge observed, it is necessarily speculative to resolve whether Lucas actually would have obtained eligibility; on the other hand, it is clear that the Respondents' unlawful conduct destroyed Lucas' opportunity for inclusion in the insurance plan. To deny reimbursement of the medical expenses would, as we found with respect to backpay, allow the Respondents to benefit from the uncertainties caused by their own misconduct.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondents, Berry-Mahurin Construction, Inc., Marion, Iowa, its officers, agents, successors, and assigns, and United Brotherhood of Carpenters and Joiners of America, Local 308, AFL–CIO, its officers, agents, and representatives, shall take the action set forth in the Order.

MEMBER DENNIS, dissenting in part.

Unlike my colleagues, I agree with the Respondents' contention that the record does not establish that Lucas would have been eligible for health benefits. I find speculative the judge's calculations of additional hours that Lucas might have worked to gain health benefit eligibility.

SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

RICHARD H. BEDDOW JR., Administrative Law Judge. This matter was heard in Cedar Rapids, Iowa, on March 21, 1983 and, subsequently, briefs were filed by all parties. The proceeding is based on backpay specifications dated November 30, 1982, following court of appeals enforcement on July 16, 1982, of a Board Decision and Order of September 30, 1981, reported at 258 NLRB

1259 (1981). The Board found that the Respondent Union violated Section 8(b)(1)(A) and (2) of the National Labor Relations Act by its refusal to refer Brian Lucas to employment with Respondent Employer, and by its requirement that job applicants become members of the Union as a prerequisite for referral through the hiring hall. The Board further found that Respondent Employer's rejection of Lucas for employment was due to Respondent Union's unlawful refusal to refer Lucas and, therefore, Respondent Employer violated Section 8(a)(1) and (3) of the Act.

I.

The General Counsel submits that the most appropriate measure of the earnings Lucas would have received, but for Respondents' unlawful conduct, and the proper measure of the length of the backpay period, as set out in the backpay specification, should be based on the duration of employment and the earnings received by carpenter Bryan T. Reilly while he was employed by Respondent Employer at the Duane Arnold Energy Center. More specifically, the General Counsel points out that Lucas was denied the opportunity to go through the application and testing process on January 14, 1980, whereas Reilly took his test on January 15, 1980, and worked until June 4, 1980, and it is argued that the latter dates therefore should establish the backpay period.

At the particular jobsite involved, Respondent Employer was under contract to perform certain regular work as well as special work during the power plant's annual "outage." The outage was scheduled for the period between February 8 and April 18, 1980, and Lucas understood that he was applying for temporary outage-related work. Although Reilly sought work contemporaneously with Lucas, he had a continuing work record with Respondent Employer and he was assigned to regular remodeling type work not related to the outage work engaged in by most of the other carpenters hired at that time. He also continued with that work beyond the date when the outage work was completed. As pointed out by Respondent Employer, the court of appeals herein specifically referred to the compliance stage of this proceeding suggesting "the temporary nature of the work for which Lucas was applying will undoubtedly be taken into consideration." Under these circumstances the Respondents contend that Reilly is a dissimilarly situated employee who cannot be used for comparative backpay purposes and that, at the most, the dates of the outage, February 8 through April 18, 1980, would constitute the maximum backpay period.

The record, however, shows that those carpenters hired contemporaneously with Lucas' application actually started on various dates in January. Specifically, the following carpenters were hired the week of January 14 or shortly thereafter:

	Date Hired	*Date Laid Off*	*Gross Wages*
Dwayne Donels	1/17	4/7	$5305
Michael Hughes	1/15	3/7	4814
James Kalina	1/15	4/15	9759
Dennis Deklotz	1/28	4/7	6126

Respondent Union also disputes that employee Kalina could be considered to be representative inasmuch as he formerly had been a carpenter foreman and worked longer because of his ability (layoff on the job was not related to seniority). Respondent Employer suggests that the gross wages for seven other carpenters, who contemporaneously applied for employment and were paid for a day of testing, should be included with those in the table above and that the figures be averaged in keeping with the method of backpay computing set forth in *Central Freight Lines*, 266 NLRB 182 (1983). The General Counsel, on the other hand, suggests that the latter case is inapplicable because it involved permanent rather than temporary employment.

Based on the overall record and arguments of counsel, I conclude that Brian Lucas is due backpay computed on the basis of average gross pay full-time temporary employees hired the week of January 14, 1980, or shortly thereafter (when Lucas was wrongfully denied the opportunity of employment) and employed as carpenters for and during the period of the 1980 plant outage at the Duane Arnold Energy Center. Accordingly, the backpay period should begin January 14, 1980, and end April 15, 1980, when the last comparable employee hired for the outage was laid off. Contrary to the arguments of the General Counsel, I find that carpenter Reilly is a dissimilarly situated employee who worked essentially as a regular carpenter for Respondent Employer and who was not hired at the Energy Center for the purpose or the period of the temporary work related to the annual outage.

Moreover, I find that the application of a *Central Freight Lines* type formula based on averaging is especially relevant and desirable where, as here, there exists a category of similarly situated employees with relatively consistent pay records throughout almost all of the entire backpay period. Also, carpenter Kalina, although perhaps more skilled and experienced than others, was hired as a journeyman carpenter, the same classification as Lucas and the others were hired, and I find no reason to exclude his figures from inclusion in the relevant group of employees. In a similar vein, I find that the decision in *Central Freight Lines*, supra, clearly shows that data for the several unsuccessful job applicants tested during mid-January should not be averaged into the category for computation purposes.

As noted by the General Counsel, Respondents also have argued that there was an unlikelihood that Lucas would have been employed by Respondent Employer because it is not known whether he would have successfully passed the preemployment examinations and courses, and because even if Lucas had successfully passed the tests and courses, he would have merely entered a pool of potential employees. Clearly, however, the prior decisions of the Board and court of appeals in the instant case raise the effective presumption that

except for the discrimination against him, Lucas would have been hired and, therefore, must be placed in a category of those similarly situated, namely, those carpenters who were hired. Moreover, the Board will not give Respondents the benefit of uncertainties caused by their own misconduct, and the policy of the Board is to presume from the underlying unfair labor practice finding that Respondents are liable for backpay as determined by the backpay specifications. *Famet, Inc.*, 222 NLRB 1180 (1976).

Under the circumstances, I find that the average gross pay of the four similarly situated employees was $6484 for the backpay period of January 14 through April 15, 1980, and that Brian P. Lucas is due that amount minus net interim earnings,[1] which shall be recomputed to reflect the appropriate backpay period.

II.

The backpay specification also asserts entitlement to reimbursement to Lucas for medical expenses which occurred October 14–19, 1980, for the birth of a child.[2] Lucas paid the expense which amounted to $974, without the aid of insurance.

Respondent Union's health insurance plan states that to establish initial eligibility a member must accumulate at least 600 hours in his or her hour bank during not more than four consecutive work quarters. "Work Quarter" is defined as a period of three consecutive calendar months commencing on August 1, November 1, February 1, or May 1. During the relevant backpay period Lucas could have accrued up to approximately 520 hours during three quarters, if he had not been denied employment. According to the plan, if Lucas would have had the necessary hours for the work quarter of May, June, and July 1980, he would have been eligible for insurance benefits in the insurance quarter of October, November, and December, and medical expenses in that latter insurance quarter would have been covered. Also, if Lucas would have satisfied the initial eligibility requirement by working 600 hours in four consecutive work quarters, he could have continued coverage by contribution, regardless of continued employment status.

Although Lucas would not have fully established his initial eligibility during the backpay period, he would have accumulated a significant proportion of the total number of hours needed and could have initially qualified with approximately 2 more weeks of work within Respondent Union's jurisdiction in April or in the May-June-July work quarter. While it is necessarily speculative to resolve whether or not Lucas actually would have obtained eligibility, it otherwise is clear that Respondents' violation of the Act destroyed his opportunity for inclusion within the insurance plan. Inasmuch as Lucas would have had an opportunity to gain his 2-week short-fall over an approximate 14-week period during what is normally considered the construction season and, in the absence of any indication to the contrary,[3] I infer that Lucas would have been able to work the necessary minimum under the hour qualifications of the insurance plan and that he would have been eligible for benefits were it not for Respondents' violation of the Act. Lucas would not have had to pay the medical charges under these circumstances and thus, in order to restore Lucas as nearly as possible to the economic position he would have enjoyed in the absence of the unlawful conduct, I find that the specified medical expenses should be awarded.

According to the General Counsel's exhibit of the health plan, it pays 100 percent of the hospital's daily rate to a maximum of $3100, 80 percent of all other covered expenses, with a maximum of $100 for diagnostic laboratory and X-ray expenses, and includes a cash deductible of $100. Applying the above to the itemized medical expenses, it is shown that Lucas paid $561 in total for the hospital's daily rate, which is 100 percent covered; paid $51 for diagnostic laboratory services, which is less than the $100 maximum and, therefore, 80 percent covered; and paid $362 for medical supplies, drugs, an I.V., and operation room use, all apparently 80 percent covered. Thus, the covered amount is $899.40, less the $100 cash deductible. Accordingly, I conclude that Lucas is entitled under the plan to reimbursement for $799.40.

III.

The backpay specification also claims that Respondent Employer is obligated for each hour Lucas would haved worked in the backpay period to contribute to the Five Rivers Carpenters' District Council Health and Welfare Fund, the Geneva Pension Fund, and the Apprenticeship Committee Fund. These contributions owed by Respondent Employer are the result of its contractual agreements with Respondent Union. The agreement effective August 4, 1977, to April 30, 1980, states that employers bound by it shall pay 45 cents per hour for each hour worked by employees covered by the agreement to the Health and Welfare Plan; 45 cents per hour for each hour worked by employees covered by the agreement to the Geneva Pension Plan; and 8 cents an hour worked to the Apprenticeship Committee. I find that contributions to the described funds are necessary and proper in order to effectuate the policies of the Act, see *Fruin-Colnon Corp.*, 244 NLRB 513 (1979), and they will be allowed; however, both Respondents should be jointly and severally liable for the contributions, see *Fruin-Colnon Corp.*,

[1] The interim earnings shall appropriately reflect as deductions from interim earnings those expenses set forth in the backpay specifications, totaling $251, including transportation expenses incurred by the discriminatee in connection with seeking interim employment, which would not have been incurred but for the discrimination. See *Aircraft & Helicopter Leasing*, 227 NLRB 644 (1976). Possible unemployment compensation paid to Lucas during the backpay period shall not be included in interim earnings. See *Gullett Gin Co.*, 340 U.S. 361 (1951).

[2] Although the health plan document subpoenaed by the General Counsel and placed in the record does not specifically explain the coverage of pregnancy expenses, it is the best evidence available and it does not specifically exclude such coverage. In view of Respondent Union's failure to provide any other material to the contrary, the basic presumptions relative to backpay specifications apply and I find that expenses incurred due to a pregnancy should be considered to be covered under the health insurance plan.

[3] The Union's records pertaining to membership and dues shows that various new members were paying monthly dues during Lucas' period and some joined the Union during the next quarter, in September 1980.

supra, and the specific amount should be recomputed to reflect the backpay period of January 14 through April 15, 1980.

IV.

In the Board's decision herein, it was determined that Respondent Union violated the Act because it required that job applicants become members of the Union as a prerequisite for referral through the hiring hall (contrary to applicable state law), and it ordered that Respondent Union "reimburse those individuals who have paid initiation fees or dues to it, either directly or indirectly through payroll deductions, unless those individuals are shown to have agreed to make such payments voluntarily and without regard to the referral system."

At the hearing, the General Counsel amended the backpay specification to delete the names of 42 individuals under this section of the Board's Decision and Order. In addition, based on information obtained after the close of the hearing, the General Counsel moved to delete the name of David Trickle, which motion was granted, thereby reducing Respondent Union's total liability for fees and dues to $19,020.39 (see the attached Appendix.) The specifications were based on questionnaires sent by the Board to all persons (approximately 88) who paid initiation fees and dues from September 1979 through 1982.

Respondent Union did not subpoena or call to testify the claimants listed in the backpay specification but instead relied on the testimony of business agents Calvin E. Kennedy and James C. Christensen, who each testified in a generalized manner about what each perceived to be the motives of various named claimants in joining the Union as well as their history of membership based on their union dues and payment records. In substance, Respondent Union has shown that those persons listed came to the Union and joined, that some are still members, that some transferred to other locations, and that some dropped out or were suspended for nonpayment of dues.

As argued by the General Counsel, the Board made it clear that it is Respondent Union's burden to establish that the claimants paid their dues and fees voluntarily and without regard to the referral system. Under these circumstances, I cannot conclude that the union business agents' self-serving testimony that the claimants did not say they were subject to coercion at the time they joined, as well as the showing of such things as current membership status, are sufficient to support an inference that the listed claimants joined the Union voluntarily. Moreover, Respondent Union's showing begs the question with respect to the role of the referral system, as specifically mentioned in the Board's Order.

Under these circumstances, and in view of the basic presumption inherent in the Board's prior finding of unfair labor practices regarding union fees and the referral system, I conclude that Respondent Union has failed to present sufficent and reliable evidence that would substantiate its burden of proof. Accordingly, I find that the backpay specification in this respect, as amended, should be allowed and that checks for the amounts requested should be remitted to the Regional Director for Region 18 for all individuals still listed, see attached Appendix, whom Respondent Union failed to subpoena to testify, unless Respondent Union was unable to locate such individuals. With regard to those individuals Respondent Union was unable to locate, Respondent Union shall pay to the Regional Director the amounts owed, to be held in escrow for a period not exceeding 1 year from the date of the Supplemental Decision and Order, to afford Respondent Union and the General Counsel an opportunity to locate and question such individuals.

The record does show that Respondent Union could not locate Thomas O. Mitton, Damon H. Gardner Jr., Kevin L. Gallagher, Luck Godar, Norman L. Luloff, Roy Williams, Dann A. Doty, Kevin M. Jensen, David L. Marks, and Charles K. Lange. Therefore, reimbursement for those individuals should be placed in escrow in order to give the General Counsel an opportunity to locate and examine such individuals with regard to the issue of whether they joined voluntarily. The Regional Director then shall make a final determination whether any factors are revealed which might indicate that such individuals joined voluntarily. See *Coast Delivery Service*, 198 NLRB 1026 (1972).

ORDER

Respondent Berry-Mahurin Construction, Inc., Marion, Iowa, its officers, agents, successors, and assigns, and Respondent United Brotherhood of Carpenters and Joiners of America, Local 308, AFL–CIO, its officers, agents, and representatives, jointly and serverally liable, shall make whole Brian P. Lucas by paying him $799.40 as reimbursement for medical expenses, and backpay of $6484, minus net interim earnings as computed in the manner set forth in this supplemental decision, plus accrued interest computed in the manner set forth in *Florida Steel Corp.*, 231 NLRB 651 (1977), minus any tax withholding required by Federal or state laws; and by payment to the Five Rivers Carpenters' District Council Health and Welfare Fund, Geneva Pension Fund, and Apprenticeship Committee Fund, as computed in the manner set forth in this supplemental decision, plus accrued interest to the date of payment pursuant to *Florida Steel*, supra.

In addition, Local 308 shall reimburse those individuals listed in the attached Appendix the amount specified for initiation fees, dues, and assessments, plus accrued interest to the date of payment pursuant to *Florida Steel*, supra, by remittance of individual checks to the Regional Director for Region 18 to be distributed or, where appropriate, held in escrow pursuant to the method set forth in this supplemental decision.

APPENDIX

Individual claimants who have paid initiation fees, dues, and assessments under the Board Order and court judgment.

Askers, Philip B.	$1,004.40
Beed, Douglas B.	413.30
Boyle, William J.	683.10
Condit, David M.	477.001
DeShaw, Charles A.	692.20

Doolin, Emerald L.	355.00
Doty, Dann A.	161.20
Duecker, Lynn E.	581.60
Ewing, William H.	163.00
Ferrall, Robert A.	707.20
Gallagher, Kevin L.	140.60
Gardner, Damon H., Jr.	120.60
Godar, Luke A.	516.80
Hulker, Eddie A.	734.80
Jensen, Kevin M.	709.20
Kazimour, David G.	473.20
Krousie, James A.	608.70
Lange, Charles K.	774.20
Lnenicka, Steve J.	780.30
Lubahn, Dennis J.	858.90
Luloff, Norman L.	377.40
Marks, David L.	471.40
McClease, Jeffrey A.	20.60
Mitton, Thomas O.	788.29
Mundt, William J.	716.50
Nunemaker, Richard D.	503.80
Olson, Reggie D.	141.00
Ronald, William R.	312.30
Sanders, William L.	698.90
Schroeder, Jeff M.	324.00
Scott, Dennis L.	789.50
Snitker, Steve P.	64.20
Staub, Bob A.	268.50
Stewart, Robin B.	113.70
Taylor, Bernard	94.10
Trautwein, David L.	608.20
Turner, Milton	94.10
Vedepo, Alvin R.	608.70
Williams, Roy	121.00
Wilson, Robert A.	585.40
Worden, Duane R.	63.70
Zahradnik, Donald W.	20.60
	$19,020.39

M. W. Kellogg Constructors, Inc. *and* **Gilbert L. Smith**

United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 250, AFL-CIO *and* **Gilbert L. Smith.** Cases 21-CA-21330 and 21-CB-8117

14 December 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS ZIMMERMAN AND DENNIS

On 15 February 1984 Administrative Law Judge Jerrold H. Shapiro issued the attached decision. Respondent Employer and Respondent Union each filed exceptions and supporting briefs.[1] The General Counsel filed exceptions and a supporting brief, and Respondent Union filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions as modified.

1. We agree with the judge, for the reasons stated at length in his decision, that Respondent Employer violated Section 8(a)(3) and (1) of the Act by refusing to assign unscheduled overtime to nonmembers of Respondent Union (travelers) employed on its Shell Oil Project in Carson, California, from 1 March through 31 May 1982, and by laying off 87 travelers named in Appendices A and B of the judge's decision because of their nonmembership in Respondent Union, and committed numerous independent violations of Section 8(a)(1).[3] We disagree, however, with the judge that Respondent Employer did not violate Section 8(a)(3) and (1) of the Act by laying off the remaining 42 travelers named in Appendix C of the judge's decision.

Applying the *Wright Line*[4] analysis, the judge properly found that the General Counsel made a prima facie showing that nonmembership in Respondent Union was a motivating factor in Respondent Employer's decision to deny unscheduled overtime to travelers and to lay off each of the alleged discriminatees. In so deciding, the judge found the "grossly disproportionate" number of travelers selected for layoff and the number of Respondent Union's members assigned unscheduled overtime work to be persuasive evidence of discriminatory motivation. The judge also found that Respondent Employer's foremen's statements that the travelers could not be assigned overtime work and would be laid off before the project's shutdown phase because they were not members of Respondent Union constituted an "outright confession of unlawful discrimination," as did their testimony that such was the Employer's practice. The judge found further evidence of illegal motivation in the foremen's statements that their discrimination against the travelers was due to pressure from Respondent Union, and in Respondent Employer's deviations from its usual policy of having the crew foremen select the persons for layoff and overtime work. The judge also found that the disparate treatment of traveler Foster compared with the treatment of other travelers, retaining him to work the shutdown because Respondent Employer mistakenly thought he was a member of Respondent Union, further demonstrates discriminatory motivation.

The judge also found Respondent Employer failed to establish that the 87 travelers would have been laid off, or travelers denied unscheduled overtime, for legitimate business reasons notwithstanding their nonmembership status with Respondent Union. Of the 87 travelers 75 were pipefitters by trade, and the judge found there was insufficient evidence that as a group they were less competent or experienced than Respondent Union's members. Of the 87 travelers 12 were plumbers by trade, but the judge found they were competent and experienced pipefitters or their supervisors regarded them as such, and Respondent Employer produced insufficient credible evidence to prove that the 12

[1] Respondent Employer has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

[2] Respondent Employer has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In sec. I,A,2,(a),(6), par. 1 of his decision the judge inadvertently substituted the word "light" for "like." As corrected, the sentence reads: "It is established that 'the essence of discrimination in a Section 8(a)(3) violation consists of treating like cases differently.'"

[3] The judge found that Respondent Employer violated Sec. 8(a)(1) of the Act by informing employees that travelers could not be assigned overtime work and would be laid off from work before the shutdown phase of the project because of their nonmembership in Respondent Union; by informing a traveler that if he transferred his membership into Respondent Union he would be eligible to work the project's shutdown phase; by telling a traveler that he was laid off because Respondent Union had given instructions that all the travelers were to be laid off; by telling a traveler that he and another traveler could not work overtime because of instructions from Respondent Union; and by telling travelers that it was Respondent Union's policy that Respondent Employer could not assign the travelers any overtime work.

[4] *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved by the Supreme Court in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

plumber-travelers would have otherwise been selected for layoff. The judge found Respondent Employer presented no evidence that its refusal to assign unscheduled overtime to the travelers was motivated by their being either less competent or less experienced than members of Respondent Union the foremen selected to perform the overtime. The judge emphasized that Respondent Employer failed to call any of its foremen or general foremen who made the overtime and layoff selections to explain their motivation for selecting the travelers for layoff and failing to assign them unscheduled overtime work.[5]

The judge found, however, that the 42 travelers in Appendix C of his decision would have been selected for layoff irrespective of their nonmembership in Respondent Union because they were not qualified pipefitters. The judge found:

> [The 42 travelers] are all plumbers by trade, who . . . were presumably less qualified to perform the pipefitting work required of them, than those pipefitters employed on the project who were pipefitters by trade. There is no evidence that any one of the 42 was an experienced pipefitter or that supervision regarded any one of them as just as competent as those pipefitters employed on the project who were pipefitters by trade.

In reaching this conclusion, the judge considered that the foremen failed to testify as to their motivation in selecting the travelers for layoff. The judge found, nevertheless, that circumstantial evidence warranted the inference that these travelers would have been selected for layoff in the normal course of business.

The General Counsel contends that the judge improperly relied on his erroneous findings that there was no evidence that supervision was satisfied with the 42 travelers' work, that as a class the plumbers were presumably less qualified to perform pipefitting work, and that there is no evidence that any of the 42 travelers was an experienced pipefitter. The General Counsel argues that the record reveals that many of these plumber-travelers had been working as pipefitters on the Shell Oil Project for months without having been terminated for cause.[6] The General Counsel claims that this raises an inference that Respondent Employer was satisfied with their work. Furthermore, the General Counsel points out that Respondent Employer failed to present testimony from these travelers' foremen as to why they selected them for layoff, or that the plumber-travelers would have been laid off in any event despite their nonmember status.[7]

We find merit in the General Counsel's analysis that the judge, by relying on his presumption that these travelers were less qualified pipefitters and therefore would have been laid off regardless of their nonmembership in Respondent Union, improperly substituted his own standards for those the foremen actually relied on in making the layoff selections and shifted to the General Counsel the burden of proof a respondent must meet under *Wright Line*. The judge erroneously distinguished between the group of 42 plumber-travelers (listed in Appendix C of the judge's decision) and the 12 plumber-travelers (listed in Appendix B), whose layoffs the judge found to violate Section 8(a)(3) and (1), merely because the General Counsel presented evidence of supervisory satisfaction with the 12 plumber-travelers' work, but not concerning the 42. Furthermore, the judge erred in distinguishing between plumber-travelers and pipefitter-travelers in determining that Respondent Employer established a nondiscriminatory, legitimate business reason for laying off the 42 plumber-travelers before Local members. In making their layoff selections, Respondent Employer's foremen made no distinction between plumber-travelers and pipefitters-travelers. Accordingly, we conclude that Respondent Employer violated Section 8(a)(3) and (1) of the Act by laying off the 42 plumber-travelers listed in Appendix C of the judge's decision.[8]

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[5] Respondent Employer and the General Counsel presented evidence of a longstanding industry practice to give preference in overtime and layoff decisions to local members over nonmember travelers. The judge found that Respondent Employer failed to establish the existence of such an industry practice. The judge further found that even if such a practice existed, there was insufficient evidence to show that it was based on legitimate business rather than simply union membership considerations.

Respondent Employer and Respondent Union admitted, and we find, for reasons described below, that such a practice existed, but we agree with the judge that the practice is based on unlawful union membership considerations, rather than legitimate business reasons, and does not provide justification for granting preference to Local Union members over traveler nonmembers for purposes of unscheduled overtime and layoff selection.

[6] Respondent Employer had a practice of terminating pipefitters for cause such as poor production during the course of the project.

[7] There was, however, evidence that some foremen laid off travelers even though they considered them competent pipefitters.

[8] We specifically reject, as did the judge, Respondent Employer's 8(f)(4) defense because, in granting preference to members of Respondent Union over travelers in layoff and unscheduled overtime decisions, it did not rely on the permissible criteria of length of service with the Employer, in the industry, or in the particular geographical area.

Respondent Employer contends that the Union's priority book dispatch system insulates it from liability. The four book system grants priority in dispatch in the following order: (1) journeymen pipefitters with 3000 hours of employment in the Local 250 area; (2) journeymen pipefitters with 3000 hours in the area covered by the Local agreement; (3) journeymen pipefitters with 3000 hours in California; and (4) journeymen pipefitters with less than 3000 hours regardless of their place of employment. When, however, Respondent Employer's foremen made layoff and unscheduled overtime decisions, they did so based only on each employee's status as a local member or traveler, not on their book dispatch priority. That most Local Union members may have been in book I and most travelers in book IV does not make the Employer's dependence on membership status in decision-making valid under Sec. 8(f)(4).

2. The judge also found, and we agree, that Respondent Union violated Section 8(b)(1)(A) of the Act by threatening an employee with loss of employment if he contested Respondent Employer's unlawful policy of laying off travelers because of nonmembership in Respondent Union and by refusing to permit certain travelers to examine its hiring hall's dispatch books. Contrary to the judge, however, we also find that Respondent Union violated Section 8(b)(2) and (1)(A) of the Act by causing or attempting to cause Respondent Employer to discriminate against travelers with regard to unscheduled overtime and layoff selection because of nonmembership in Respondent Union, and Section 8(b)(1)(A) through certain statements about the discriminatory treatment of travelers.

The judge concluded the General Counsel failed to prove Respondent Union caused or attempted to cause Respondent Employer to discriminate against the travelers in violation of Section 8(a)(3) of the Act. The judge found no direct evidence of causation, and no direct or circumstantial evidence of either a written or oral understanding between the Respondents that Respondent Employer would discriminate against the travelers in favor of Respondent Union's members. He also found the Respondents' contention that a discriminatory longstanding practice in the pipefitting industry exists does not amount to an admission by the Respondents of an understanding between the Respondents to grant preferential treatment to Respondent Union's members. The judge rejected the Respondents' contention that such a longstanding industry practice exists. The judge found that "the understanding relied upon by the Respondents in their post-hearing briefs is not the type of understanding which exists by virtue of an overt or affirmative act engaged in by the Respondent Union," and thus did not constitute union causation under Section 8(b)(2) of the Act.

The General Counsel contends that all the surrounding circumstances support a reasonable inference that a union-employer understanding exists to discriminate against travelers in layoff and overtime selection. We agree.

To establish a violation of Section 8(b)(2) of the Act, direct evidence that the Union expressly demanded the discrimination is not necessary.[9] A union can be found to have caused employer discrimination if there is sufficient evidence to support a reasonable inference of a union request or a union-employer understanding.[10]

Respondent Employer and Respondent Union both admitted the existence of a discriminatory practice to which they were parties. Respondent Union's business manager Richard Slawson and its steward at the Shell Oil Project Richard Wareham testified that the practice of granting preference to local members over travelers for overtime and layoff purposes has been followed within Respondent Local's jurisdiction, as well as within that of other locals. Wareham also testified that if the travelers had not been laid off first, he would have considered it a violation of the members' rights and that he would have had to "try to help the members out." Foremen on the project informed their crewmembers that the travelers would not work overtime and were being laid off because of Respondent Union's policy.[11]

Union Steward Wareham was responsible for "checking in" the new hires on the project and explaining project work rules to them. During check-in, Wareham informed the employees that they would not be assigned unscheduled overtime because Respondent Union's members would do this work. Wareham also told traveler Cangi that he had been assigned overtime because the foreman mistakenly thought Cangi was a member of Respondent Union. When traveler Gilbert Smith complained to Steward Wareham about the layoffs, noting that new Local members were being hired at the same time travelers were being laid off, Wareham replied, "[T]hat's the way it is." When Smith said he did not think it was fair and intended to fight it, Wareham said if Smith fought it he would never work in the area again.

In addition, Respondent Union's agents refused to allow at least three travelers to view the dispatch books to determine their placement and verify that Respondent Union properly followed the dispatch system. Traveler Hector Martel testified that after his layoff he spoke to Union Business Manager Slawson concerning changing his book status to book I. Slawson stated that he wanted to keep the work for the Local hands. According to Martel, Slawson said, "[I]f you want to press the issue, you can, but I'll never dispatch—but you'll never get dispatched out of this office." Traveler Gerald Mayes testified that when he gave Slawson

[9] *International Packings Corp.*, 221 NLRB 479, 484 (1975), enfd. 542 F.2d 1163 (1st Cir. 1976).

[10] *Walter J. Barnes Electrical Co.*, 188 NLRB 183, 185–186 (1971); *Carpenters Local 742 (Simmons Co.)*, 157 NLRB 451 (1966), enfd. 377 F.2d 929 (D.C. Cir. 1967); *R-M Framers, Inc.*, 207 NLRB 36, 43–44 (1973); *Hotel, Motel & Club Employees Local 568 (Warwick Hotel)*, 141 NLRB 310, 312 (1963), enfd. 334 F.2d 723 (3d Cir. 1964).

[11] For example, Foreman Al Thuotte informed the travelers on his crew that "it was the policy of Local 250 that he just could not give [them] any overtime." Foreman Bill Springer told traveler Mayes that he was unable to remove Mayes' name from the layoff list because "word come down from 250 that all the Travelers will go" and that the instructions that the travelers would not work the overtime had come from Local 250. (The judge inadvertently attributed the latter statement to Foreman Wayne Springer, Bill Springer's son.)

verification of his 3000 hours to change to book I status, Slawson stated, "[Y]ou're still not going to work out of here."

We find these circumstances clearly demonstrate the existence of a union-employer understanding that Local members would receive preference over travelers for layoff and unscheduled overtime purposes. Indeed, as noted, Respondent Union and Respondent Employer have admitted its existence. The additional evidence in the form of statements by Respondent Union representatives and Respondent Employer foremen, recited above, is overwhelming confirmation of the parties' understanding. We therefore find that Respondent Union violated Section 8(b)(2) and (1)(A) of the Act by causing or attempting to cause Respondent Employer to discriminate against travelers in regard to selection for layoff and unscheduled overtime, and find it jointly and severally liable with Respondent Employer for any loss of earnings and benefits the travelers suffered as a result of the discrimination against them.[12]

We disagree with the judge that Union Steward Wareham did not violate Section 8(b)(1)(A) of the Act by, as previously recounted, telling employees "checking in" at the jobsite that they would not be assigned unscheduled overtime because Respondent Union's members would do this work, and informing traveler Cangi that he had been assigned overtime because the foreman mistakenly thought Cangi was a member of Respondent Union. The judge found these statements did not violate Section 8(b)(1)(A) of the Act because Respondent Union did not cause, nor was it responsible for, the Employer's illegal discrimination. Furthermore, according to the judge, the circumstances under which Wareham made the statements do not lead to the conclusion that "Wareham by his conduct placed himself in a situation reasonably calculated to lead the employees to believe that the Respondent Union was a party to the Respondent Employer's illegal discrimination." The judge found that Wareham was merely acting as a conduit for Respondent Employer in explaining company rules to employees, and "the circumstances do not warrant the inference that Wareham's explanation of the various company rules was calculated to lead the employees to reasonably believe that the Union was responsible for these rules."

The General Counsel contends that the judge's reasoning that Wareham was merely acting as Respondent Employer's conduit is without merit. The General Counsel points out that the "work rules" Wareham explained included the terms and conditions embodied in the labor contract. We agree. The union steward was responsible for enforcing the collective-bargaining agreement on the job, and for seeing that those employed on the site had the proper referral slip. Furthermore, Wareham's statement to Cangi was made when Cangi complained to Wareham as steward about his treatment on the job. Thus, Wareham was Respondent Union's representative at the site. See *Iron Workers Local 600 (Bay City Erection)*, 134 NLRB 301, 306–307 (1961), modified on other grounds 144 NLRB 1049 (1963). We find that Wareham's statements tended to restrain or coerce employees in their Section 7 rights, and therefore violated Section 8(b)(1)(A) of the Act.

In light of our finding of additional violations, we shall issue amended Conclusions of Law, an amended remedy, and a new Order and notices to employees and members.

AMENDED CONCLUSIONS OF LAW

1. Substitute the following for Conclusion of Law 3.

"3. Respondent Employer violated Section 8(a)(3) and (1) of the Act by refusing to assign unscheduled overtime work to nonmembers of Respondent Union (travelers) employed on the Shell Oil Project in Carson, California, from 1 March through 31 May 1982, and by laying off the 129 travelers listed in Appendices A, B, and C of the judge's decision because they were not members of Respondent Union."

2. Substitute the following for Conclusion of Law 5.

"5. Respondent Union violated Section 8(b)(2) and (1)(A) of the Act by causing or attempting to cause Respondent Employer to violate Section 8(a)(3) and (1) of the Act by refusing to assign unscheduled overtime work to nonmembers of Respondent Union (travelers) employed on the Shell Oil Project in Carson, California, from 1 March through 31 May 1982, and by laying off the 129 travelers listed in Appendices A, B, and C of the judge's decision because they were not members of Respondent Union."

3. Add the following as Conclusion of Law 6.

"6. Respondent Union violated Section 8(b)(1)(A) of the Act by threatening an employee

[12] In *Simmons Co.*, above, respondent union violated Sec. 8(b)(2) and (1)(A) by causing the employer to discharge an employee. In that case, the union business agent refused to renew the employee's work permit. The union steward told the employee that he could not let him work, and the company's foreman said, "That's right, you need a work permit." The foreman took the employee to the superintendent who terminated the employee. The foreman testified it was "understood" that a work permit was required for employment and stated that "things don't have to be spoken in words." The judge found no agreement or understanding requiring a work permit as a condition of employment. The Board reversed, finding that such an understanding existed, and that the employee had been terminated pursuant to the understanding.

with loss of employment if he contested Respondent Employer's unlawful policy of laying off travelers because of their nonmembership in Respondent Union, by telling employees checking in at the jobsite that they would not be assigned unscheduled overtime because Respondent Union's members would do such work, and by telling an employee that he had been assigned overtime because the foreman mistakenly thought he was a member of Respondent Union."

4. Reletter Conclusions of Law 6 and 7 as 7 and 8, respectively.

AMENDED REMEDY

Having found that Respondent Employer and Respondent Union have engaged in certain unfair labor practices, we shall order them to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that Respondent Employer violated Section 8(a)(3) and (1) of the Act by refusing to assign unscheduled overtime work to the travelers employed on the Shell Oil Project in Carson, California, from 1 March through 31 May 1982 because of their nonmembership in Respondent Union and by laying off 129 travelers listed in Appendices A, B, and C of the judge's decision between 7 April and 19 May 1982 for the same reason, and having found that Respondent Union violated Section 8(b)(2) and (1)(A) of the Act by causing or attempting to cause Respondent Employer to engage in such conduct, we shall order Respondent Employer and Respondent Union, jointly and severally, to make whole the travelers for any loss of earnings or other benefits they may have suffered as a result of the discrimination against them, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *Florida Steel Corp.*, 231 NLRB 651 (1977). See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962). The Respondents' backpay liability will toll no later than the date Respondent Employer's work on the Shell Oil Project ended.

We shall also order Respondent Employer to inform each of the discriminatees, in writing, that he or she will be considered eligible for future employment on a nondiscriminatory basis at any of its projects if he or she chooses to apply for employment at any of them. We shall order Respondent Union to inform each of the discriminatees, in writing, that it has no objection to his or her future employment at any of Respondent Employer's projects.

We shall further order Respondent Employer and Respondent Union to mail copies of the notices in Appendices A and B, respectively, to each employee Respondent Employer employed as a pipefitter on the Shell Oil Project from 1 March through 31 May 1982.

We shall also order Respondent Union to permit applicants for employment who register for work at its exclusive hiring hall to examine, on request, its dispatch books.

ORDER

The National Labor Relations Board orders that

A. The Respondent Employer, M. W. Kellogg Constructors, Inc., Houston, Texas, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Laying off or refusing to assign unscheduled overtime work or in any other manner discriminating against any employee because of his or her nonmembership in United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 250, AFL–CIO or any other union.

(b) Telling employees that they are being discriminated against in regard to unscheduled overtime assignments or layoff selection because of their nonmembership in Respondent Union, or any other union.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make whole, jointly and severally with Respondent Union, the travelers employed on the Shell Oil Project in Carson, California, from 1 March through 31 May 1982 for any loss of unscheduled overtime pay, and the 129 travelers named in Appendices A, B, and C of the judge's decision for any loss of earnings or other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

(b) Inform the individuals named in Appendices A, B, and C of the judge's decision, in writing, that they will be eligible for future employment at any of its projects on a nondiscriminatory basis if they choose to apply for employment at any of them.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Mail a copy of the attached notice marked "Appendix A"[13] to each individual it employed as a pipefitter on the Shell Oil Project between 1 March and 31 May 1982. Copies of the notice, on forms provided by the Regional Director for Region 21, after being signed by Respondent Employer's authorized representative, shall be mailed by Respondent Employer immediately upon receipt.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps Respondent Employer has taken to comply.

B. The Respondent Union, United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 250, AFL–CIO, Gardena, California, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Causing or attempting to cause Respondent Employer to lay off, or refuse to assign unscheduled overtime work to, any employee because of his or her nonmembership in Respondent Union.

(b) Telling employees that they are being discriminated against in regard to unscheduled overtime assignments because of their nonmembership in Respondent Union.

(c) Threatening employees with loss of employment if they contest Respondent Employer's practice of discriminating against employees because of their nonmembership in Respondent Union.

(d) Refusing to permit applicants for employment who register for work at its exclusive hiring hall to examine, on request, its dispatch books.

(e) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make whole, jointly and severally with Respondent Employer, the travelers employed on the Shell Oil Project from 1 March through 31 May 1982 for any loss of unscheduled overtime pay, and the 129 travelers named in Appendices A, B, and C of the judge's decision for any loss of earnings or other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

(b) Inform the individuals named in Appendices A, B, and C of the judge's decision, in writing, that it has no objection to their future employment at any of Respondent Employer's projects.

(c) Permit applicants for employment who register for work at its exclusive hiring hall to examine, on request, its dispatch books.

(d) Preserve and, on request, make available to the Board or its agents for examination and copying, all dispatch and other hiring hall records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Post at its business offices and hiring hall, and mail to each individual employed as a pipefitter on the Shell Oil Project between 1 March and 31 May 1982, copies of the attached notice marked "Appendix B."[14] Copies of the notice, on forms provided by the Regional Director for Region 21, after being signed by Respondent Union's authorized representative, shall be posted by Respondent Union immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to members are customarily posted. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director in writing within 20 days from the date of this Order what steps Respondent Union has taken to comply.

[13] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

[14] See fn. 13, above.

APPENDIX A

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT lay you off, refuse to assign you unscheduled overtime work, or in any other manner discriminate against any of you because of your nonmembership in United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 250, AFL–CIO or any other union.

WE WILL NOT tell any of you that you are being discriminated against in regard to unscheduled overtime assignments or layoff selection because of your nonmembership in the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL make whole, jointly and severally with the Union, the travelers employed on the Shell Oil

Project in Carson, California, from 1 March through 31 May 1982 for any loss of overtime pay, and the 129 travelers named in Appendices A, B, and C of the judge's decision for any loss of earnings or other benefits resulting from the discrimination against them, less any net interim earnings, plus interest.

WE WILL inform the individuals named in Appendices A, B, and C of the judge's decision, in writing, that they will be eligible for future employment at any of our projects on a nondiscriminatory basis if they choose to apply for employment at any of them.

M. W. KELLOGG CONSTRUCTORS, INC.

APPENDIX B

NOTICE TO EMPLOYEES AND MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT cause or attempt to cause M. W. Kellogg Constructors, Inc. to lay you off or refuse to assign unscheduled overtime work to any of you because of your nonmembership in us.

WE WILL NOT tell you that you are being discriminated against in regard to unscheduled overtime assignments because of your nonmembership in us.

WE WILL NOT threaten you with loss of employment if you contest M. W. Kellogg Constructors' practice of discriminating against employees because of their nonmembership in us.

WE WILL NOT refuse to permit applicants for employment who register for work at our exclusive hiring hall to examine, on request, our dispatch books.

WE WILL NOT in any like or related manner restrain or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL make whole, jointly and severally with M. W. Kellogg Constructors, Inc., the travelers employed on the Shell Oil Project from 1 March through 31 May 1982 for any loss of unscheduled overtime pay, and the 129 travelers named in Appendices A, B, and C of the judge's decision for any loss of earnings or other benefits resulting from the discrimination against them, less any net interim earnings, plus interest.

WE WILL inform the individuals named in Appendices A, B, and C of the judge's decision, in writing, that we have no objection to their future employment at any of M. W. Kellogg Constructors' projects.

WE WILL permit applicants for employment who register for work at our exclusive hiring hall to examine, on request, our dispatch books.

UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPE FITTING INDUSTRY OF THE UNITED STATES AND CANADA, LOCAL 250, AFL–CIO

DECISION

STATEMENT OF THE CASE

JERROLD H. SHAPIRO, Administrative Law Judge. The hearing in these cases which was held on several days between August 1 and 11, 1983, is based on unfair labor practice charges filed by an individual, Gilbert L. Smith, against M. W. Kellogg Constructors, Inc. (Respondent Employer) and United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 250, AFL–CIO (Respondent Union) and collectively referred to as the Respondents. The initial charges were filed on June 10, 1982, and were amended March 21, 1983. Thereafter the Regional Director of the National Labor Relations Board for Region 21 consolidated these cases and on March 30, 1983, on behalf of the General Counsel of the National Labor Relations Board (the Board) issued a consolidated complaint based on the aforesaid charges alleging that the Respondent Employer was engaging in unfair labor practices within the meaning of Section 8(a)(1) and (3) of the National Labor Relations Act (the Act) and that the Respondent Union was engaging in unfair labor practices within the meaning of Section 8(b)(1)(A) and (2) of the Act.

The consolidated complaint alleges that Respondent Employer violated Section 8(a)(1) and (3) of the Act and that Respondent Union violated Section 8(b)(1)(A) and (2) of the Act by entering into, maintaining, and giving effect to "an arrangement, understanding and practice" pursuant to which the members of Respondent Union employed by Respondent Employer were assigned overtime and not selected for layoff in preference to employees, who are not members of Respondent Union, known as travelers. The complaint further alleges that Respondent Employer further violated Section 8(a)(1) and (3) of the Act by assigning overtime work to members of Respondent Union in preference to the nonmember travelers thereby causing 157 named travelers to receive less overtime work during the period from March 1 through May 30, 1982, than they otherwise would have received and by selecting for layoff 130 named travelers on the dates alleged from April 7 through May 19, 1982, because they were not members of Respondent Union. Additionally the complaint alleges that Respondent Union violated Section 8(b)(2) and (1)(A) of the Act by causing Respondent Employer to engage in the aforesaid illegal

conduct and violated Section 8(b)(1)(A) of the Act by refusing the request of job applicants to examine Respondent Union's referral and out-of-work list. Also the complaint alleges that Respondent Employer violated Section 8(a)(1) of the Act and Respondent Union violated Section 8(b)(1)(A) of the Act by virtue of several statements made to employees by Respondent Employer's foremen and Respondent Union's steward about the aforesaid alleged illegal discrimination. Respondents filed answers denying the commission of the alleged unfair labor practices.

On the entire record,[1] from my observation of the demeanor of the witnesses, and having considered the posthearing briefs, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondents admit that Respondent Employer meets one of the Board's applicable discretionary jurisdictional standards and is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.[2]

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Respondents' Alleged Discrimination Against the Travelers in Favor of the Members of Respondent Union Employed on the Shell Oil Project*

1. The evidence

a. *Respondent Employer's business and its operations on the Shell Oil Project*

Respondent Employer is a general contractor in the building and construction industry whose headquarters is in Houston, Texas. Its primary business is construction for industrial customers in the petrochemical industry in the several States of the United States and in other countries.

During 1981 and 1982 Respondent Employer, pursuant to a contract with the Shell Oil Company, was engaged in the modernization and expansion of facilities at Shell Oil Company's oil refinery in Carson, California (the Shell Oil Project). The facilities involved were the orthoflow unit, also known as the catalytic cracker, which makes gasoline from crude oil. Respondent Employer's work at the Shell Oil project was performed while the refinery was operating and consisted of two phases. The first phase, on which work began about June 1981, was the construction phase, during which Respondent Employer built new facilities, including the remodeling and expansion of the catalytic cracker. When this phase of the project ended, approximately late in May 1982, the second phase, referred to as the shutdown, began and was completed about July 27, 1982, at which time Respondent Employer's work on the project ended. During the shutdown phase Respondent Employer integrated the newly constructed unit into the existing facility.

Respondent Employer's work on the project was managed by a resident construction manager, a construction superintendent, and several craft superintendents, all of whom were not represented by any labor organization. Ned Bertrand was Respondent Employer's construction superintendent. The record does not reveal the name of Respondent Employer's piping superintendent who was the craft superintendent responsible for the work of the craft involved in this case. The employees involved in this case, Respondent Employer's pipefitters, worked in crews of from 6 to 12 persons. Each crew was supervised by a foreman. Several such foremen were supervised by a general foreman who was in turn supervised by a head general foreman. All of these foremen, who admittedly were statutory supervisors, were members of Respondent Union and were referred to the Shell Oil project through Respondent Union's hiring hall. Their terms and conditions of employment were established by Respondents' collective-bargaining agreement covering the project.

b. *Respondent Union*

Respondent Union's parent, the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL–CIO (the United Association) regulates the geographic and craft jurisdiction of its local unions.[3] The United Association charters pipefitter locals, plumber locals, sprinkler-fitter locals, metal trades locals, and combination locals that dispatch more than one of those crafts. Respondent Union is chartered by the United Association to perform all of the industrial pipefitting work in Los Angeles and Orange Counties which are in southern California. It is not a combination local, rather it is a straight line pipefitter local which has approximately 4200 active members, virtually all of whom are journeymen pipefitters. Respondent Union's principal official is its business manager Richard Slawson. Its representative on the Shell Oil project during the time material was Richard Wareham, its job steward.

Although there are indications in the United Association's constitution that a member of a local union affiliated with the United Association must reside in that local union's geographical territory, no such requirement is contained in Respondent Union's constitution and bylaws and, as a matter of fact, members of Respondent Union are not required to reside and do not in fact reside within its geographic jurisdiction.[4] The record reveals

[1] The General Counsel's motion to correct transcript is granted.

[2] Respondents admit that Respondent Union is a labor organization within the meaning of Sec. 2(5) of the Act.

[3] Respondent Employer in its posthearing brief "requests judicial notice of the fact that the purpose of such regulation by the United Association is to preserve its labor monopoly by eliminating competition between locals and apportioning jurisdiction in a logical, equitable and efficient manner." This request is denied because I am not persuaded that the facts which I have been asked to judicial notice are either "generally known" or "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." See Fed.R.Evid. 201(b).

[4] Respondent Union is apparently not the only pipefitter local affiliated with the United Association which does not require its members to reside within the limits of its geographical jurisdiction. See *Daugherty Co.*, 147 NLRB 1295, 1298–99 (1964).

that membership in Respondent Union is not keyed to residence within a circumscribed geographic area. No evidence was introduced as to the proportion of Respondent Union's members working on the Shell Oil project who resided within the geographical jurisdiction of Respondent Union.

c. *Travelers*

There are members of local unions affiliated with the United Association who leave the areas where they reside and travel to other areas in search of work. They are referred to as travelers. Some travel only on a temporary basis but others travel continuously. The United Association's constitution requires that a traveler get a travel card from his local union and deposit it with the local union within whose jurisdiction he is seeking work. The traveler continues to pay montnly dues to his local union and is responsible for maintaining membership in good standing in his local union, but pays a sum of $6 a month to the local union in whose jurisdiction he is seeking work. The $6 goes toward the local union's expense of operating its hiring hall and of representing the traveler for purposes of collective bargaining.

d. *Respondent's collective-bargaining relationship and employment of the pipefitters on the Shell Oil project*

The primary craftsmen used in Respondent Employer's business are pipefitters including pipefitter welders, herein referred to collectively as pipefitters. The United Association is a labor organization with primary jurisdiction over this craft. Thus Respondent Employer has historically been a party to the National Construction Agreement for the United States of America (the National Construction Agreement), which is a collective-bargaining agreement negotiated by and between the United Association and the Natrional Constructors Association on behalf of the Association's employer-members who do business throughout the United States, one of whom is Respondent Employer. This agreement provides that to the extent not inconsistent with it certain practices and terms of the local agreements shall bind the employers who are signatory to the National Construction Agreement. The particular local agreement which was in effect at the Shell Oil project is the 1980–1983 Independent Industrial and General Pipefitting Agreement (the Local Agreement) between the contractors who perform industrial and general pipefitting work in southern California and those local unions, including Respondent Union, located in southern California and affiliated with the United Association, who have jurisdiction over the work covered by the agreement

Respondent Union's trade jurisdiction encompassed the industrial pipefitting work performed by Respondent Employer's employees on the Shell Oil project. Accordingly the project was staffed through Respondent Union's hiring hall pursuant to the hiring provisions, article V, of the Local Agreement. In pertinent part article V obligated Respondent Employer to employ only qualified journeymen "steamfitters, pipefitters and/or welders" (collectively referred to as journeymen pipefitters) who have had 4 years of actual, practical working experience in the pipefitting trade in the building and construction industry. It further obligated Respondent Employer to hire these workers through Respondent Union's hiring facility. Article V also provides that Respondent Union, on the request of Respondent Employer, shall refer qualified pipefitter applicants from its hiring hall to Respondent Employer in the following order of preference: (1) those with 3000 hours of employment in Respondent Union's geographical jurisdiction within the past 3 years for contractors who were party to or covered by the Local Agreement; (2) those with 3000 hours of employment within the past 3 years in the geographical area covered by the Local Agreement with any of the contractors who were party to that agreement; (3) those with 3000 hours of employment in the State of California within the past 3 years as employees of employers party to a collective-bargaining agreement signed with a local union affiliated with the United Association in the State of California; and (4) those with less than 3000 hours of employment within the past 3 years regardless of their place of employment so long as the applicant qualified as a journeyman pipefitter. As a practical matter the effect of the hiring hall provisions is that those applicants who qualified for the first category, book 1, were usually members of Respondent Union and those applicants who qualified for the remaining three categories, books 2, 3, and 4, were usually either travelers or nonmembers of a United Association local.

During the period in which the major part of the construction phase of the Shell Oil project was in process, there was a shortage of journeymen pipefitters registered at Responent Union's hiring hall who were able to register on book 1. As a result, during this phase of the project, Respondent Union referred to Respondent Employer a substantial number of journeymen pipefitters registered on books 2 through 4 who were travelers. In addition there was also a shortage of traveler journeymen pipefitters registered on the out-of-work list so Respondent Union, in order to meet Respondent Employer's requests for pipefitters, allowed a substantial number of journeymen plumbers to register on the out-of-work lists and referred them to the project as journeymen pipefitters. All of the aforesaid travelers had deposited their travel cards with Respondent Union. A substantial number of them left their residences and traveled to Respondent Union's geographical area only after having been told by their own business agents that Respondent Union had notified said business agents that there was work available for them in Respondent Union's hiring hall.

e. *The assignment of unscheduled overtime*

There are two types of overtime in the construction industry: unscheduled and scheduled overtime. Unscheduled overtime occurs when employees continue to work after their regularly scheduled five 8-hour days, Monday through Friday. Even if this overtime is scheduled a few days in advance it is still considered unscheduled overtime. Scheduled overtime occurs when employees on a regular basis are scheduled to work more than the usual five 8-hour days, i.e., 6 days a week, 10 hours per day.

On the Shell Oil project there was no scheduled overtime during the construction phase, June 1981 through May 1982, and until March 1982 there was virtually no unscheduled overtime. During March, April, and May 1982 as the construction phase came to a conclusion there was a substantial increase in the amount of unscheduled overtime worked by the pipefitters. The National Construction Agreement and the Local Agreement are silent about the assignment of unscheduled overtime.

During the months of March through May 1982 the numbers of hours of unscheduled overtime assigned by Respondent Employer to members of Respondent Union and the nonmember travelers were as follows:[5]

Payroll Week	*Hrs. of Overtime, Members*	*Hrs. of Overtime, Travelers*
10	74	4
11	170	12.5
12	409	8.5
13	434.5	17
14	334	1.5
15	162	3
16	119.5	1
17	364.25	11.5
18	391.75	24
19	188.5	1.5
20	332.25	27
21	486	0

During the months of March through May 1982 the number of travelers and members of Respondent Union employed by Respondent Employer on the Shell Oil project was as follows:[6]

	Members	*Travelers*
3/8/82	236	131
3/15/82	243	141
3/22/82	240	150
3/25/82	243	140
4/5/82	236	140
4/12/82	226	100
4/19/82	216	97
4/26/82	208	92
5/3/82	203	58
5/10/82	208	32
5/17/82	212	14
5/24/82	201	1
5/31/82	277	1

[5] These figures do not include the number of hours of unscheduled overtime worked by the foremen, all of whom were members of Respondent Union.

[6] These figures include those members of Respondent Union employed as foremen.

f. Respondent's statements to travelers about overtime work

Respondent Union's steward on the Shell Oil project from January 1982 until the end of the project was Richard Wareham and prior to that the Union's steward on the project was Ronald Gilbert. When new hires were dispatched to the project from Respondent Union's hiring hall, the first thing they did on arriving at the jobsite was to give their referral slips to the union steward at which time the steward, before taking workers to the warehouse for their hardhats and to the general foreman for their job assignments, told them about the various company rules and regulations which governed the job. The record establishes that in 1981 Union Steward Gilbert and in 1982 Union Steward Wareham, in explaining the various company work rules to the new hires, told them that the travelers on the job would not be assigned any of the unscheduled overtime work. Also on at least one occasion Wareham told them that the orders that the travelers would not work any overtime had come from "up front" and on another occasion stated to a group of new hires that where there was overtime work the travelers would be replaced by "local 250 men."[7]

In April 1982 Rigging Crew Foreman Wayne Shouse on a Thursday asked the employees on his crew, at least two of whom were travelers, if they wanted to work the coming Saturday. Everyone indicated that they wanted to work. The next day, Shouse told the crew that the travelers on the crew could not work the Saturday overtime. When one of the travelers asked for an explanation for this action, Shouse stated that travelers would not be assigned overtime.[8]

In April 1982 Foreman Wayne Springer, whose crew consisted of virtually all travelers, on more than one occasion told members of his crew that since the crew was comprised of travelers he could not assign the crew any overtime and that because he did not think this was fair he had refused to work the overtime supervising another crew and did not intend to work any overtime. Wayne Springer's father, Bill Springer, who was also a foreman, likewise stated that he felt the same way and did not intend to work the overtime because if the men he supervised could not work it then he would not work it. Also Foreman Wayne Springer on one of these occasions explained to traveler Gerald Mayes that the instruction that

[7] The above-described statements attributed to Steward Gilbert are based on the undenied testimony of traveler Hector Martel who impressed me as a credible witness. The above-described statements attributed to Steward Wareham are based on the testimony of travelers Keith Pashby, William Grady, and Larry Lindquist. Wareham testified that he never really talked to the new hires about the subject of overtime, but merely stated to them that if they worked overtime on a Tuesday they would not get paid for it until the following week. I have rejected Wareham's testimony and credited the testimony of Pashby, Grady, and Lindquist because their testimonial demeanor was good whereas Wareham's was poor.

[8] The above description of Foreman Shouse's conduct is based on the testimony of travelers Paul Mathieson and George Bics who impressed me as being sincere and reliable witnesses. Shouse failed to deny engaging in the conduct Mathieson and Bics attributed to him.

the travelers would not work the overtime had come from Local 250.[9]

In April 1982 Foreman Jack Moore told his crew, which included several travelers, that they could expect to work some overtime. The next day Moore retracted this statement; he told the crew that "there was not going to be any travelers going to work the overtime, just local hands." Also during the same period of time Foreman Moore asked one of the welders on his crew, who was a member of Respondent Union, to work some overtime, but failed to ask the welder's working partner who was a traveler. The welder's working partner, traveler Hector Martel, asked why Moore did not ask him to work overtime. Moore replied by stating that no travelers would work overtime.

On several occasions Foreman Joe Poletti asked the welder who worked with traveler Martel to work overtime but failed to likewise ask Martel to work the overtime. The welder was a member of Respondent Union, whereas Martel as a traveler was not a member of Respondent Union. When Martel asked, "[How] about me," Poletti told him, "[N]o, you're a travel card" and when Martel asked, "[H]ow come we don't work," Poletti stated, "orders from up high."

Traveler William Grady credibly testified that on occasion his crew worked overtime, but that Grady and the other travelers on the crew were not assigned to work the overtime and that once his foreman Al Thuotte apologized to Grady and Grady's welder, who was also a traveler, for not assigning them any of the overtime work and explained to them that "it was the policy of local 250 that he just could not give [them] any overtime."[10]

Traveler Virgil James was never asked to work overtime even though those members of his crew who were members of Respondent Union were assigned to work overtime. On several occasions James' foreman Joe Breiter and Breiter's general foreman Bill Stuart told James that he was not being asked to work overtime because he was a traveler.[11]

In March 1982 traveler Gerald Mayes discovered that other members of his crew were being assigned to work overtime but that he was not, so he asked General Foreman T. J. Cratsenburg the reason for this. Cratsenburg replied by stating, "[T]he travelers cannot work overtime, just the local people." Also in April 1982 Cratsenburg, in response to an inquiry from traveler Gilbert Smith as to whether Smith would be assigned to work overtime that week, told Smith, "[N]o, just local hands will work the overtime."[12]

Early in April 1982 traveler Michael Cangi, who was working on an instrumentation crew supervised by Foreman Marty Jewitt, was asked by Jewitt to work on Saturday, which was unscheduled overtime. Cangi observed that Jewitt did not ask Cangi's working partner, a member of Respondent Union, to work this overtime. Cangi told Jewitt that he felt uncomfortable working the overtime because Jewitt had not asked Cangi's working partner who was a member of Respondent Union to work with him. Jewitt replied by stating that it did not matter whether Cangi was a travel card or local, that Cangi was qualified and that Jewitt wanted him to work that Saturday. Cangi complied and worked this overtime. Thereafter Jewitt asked Cangi to work on another Saturday, but when Cangi observed that his working partner had again not been asked to work this overtime, Cangi went and spoke to Respondent Union's job steward, Richard Wareham. Cangi explained to Wareham that he had been asked to work that Saturday but felt uneasy about it because other workers on his crew who are members of Respondent Union had not been asked to work the overtime. Wareham told him that "the only reason" Cangi was working the Saturday overtime was because General Foreman Jess Hughes thought that Cangi was a member of Respondent Union. Cangi stated that he felt uneasy about working the coming Saturday because he did not want to ruin a good friendship among the crew and create hard feelings. Wareham responded by stating, "[L]et your conscience be your guide." Cangi called in sick and did not work the Saturday overtime. The following Monday General Foreman Hughes asked him why he had not come to work Saturday. Cangi informed him that he had felt uneasy because he was a traveler and that his working partner, who was a member of Respondent Union, was not asked to work. Cangi also told Hughes that "it's a standard procedure—I've worked in the Union 23 years and local members usually get preference [for] overtime." Hughes replied by stating that he knew that Cangi was qualified because he had worked with him on other jobs and that when Cangi

[9] The above description of Foreman Wayne Springer's conduct is based on the undenied testimony of travelers Gerald Mayes, Cloyd Colby, and Gilbert Smith. Each one of these witnesses impressed me as a sincere and reliable witness.

[10] Although Foreman Thuotte did not specifically deny having the above-described conversation, he testified that Grady once informed him that he did not desire to work overtime. Initially Thuotte testified that Grady had told him "that he's had his time and give it to the other guys." Later Thuotte gave a different account of Grady's refusal to work overtime, now testifying that when Grady was told by Thuotte that there would be some overtime in a day or two that Grady responded by stating, "[Y]ou can give that to the younger guys. I don't need to go up those stairs." I have credited Grady's above-described testimony because his testimonial demeanor was good, whereas Thuotte's was poor.

[11] Based on the testimony of James who when he testified seemed to be a sincere and reliable witness. Breiter did not refute James' testimony and Stuart was unable to categorically deny James' testimony. Stuart testified he was unable to specifically recall whether he talked with James about overtime. Demeanorwise, James impressed me as a more credible witness than Stuart.

[12] The findings in this paragraph are based on the testimony of Gerald Mayes and Gilbert Smith who demeanorwise impressed me as credible witnesses. Cratsenburg admitted that in selecting workers for unscheduled overtime it was the practice of the foremen under his supervision to select members of Local 250 rather than travelers and that Cratsenburg only assigned overtime to travelers in "an emergency." (Tr. 1003, 1043.) Cratsenburg did not deny engaging in the above-described conduct attributed to him by Mayes and Smith. However, with respect to Mayes, he testified that the reason he never asked Mayes to work overtime was that he knew that Mayes did not like to work in high places and with respect to Smith testified that Smith got all of the overtime that was available for his crew. To the extent that this constitutes a denial that he made the above-described statements to Mayes and Smith, I have credited Mayes' and Smith's testimony because their testimonial demeanor was excellent whereas Cratsenburg gave me the impression that he was solely interested in furthering the Respondents' position and not in the truth.

was asked to work overtime Hughes expected him to obey.[13]

g. *The layoffs*

The first phase of the Shell Oil project, the construction phase, ended late in May 1982 at which time the second and final phase commenced. This was the shutdown phase during which the newly constructed facilities were integrated into the existing facilities. The shutdown lasted until approximately the middle or end of July 1982 and all of the pipefitters employed on the project during this phase worked substantial amounts of regularly scheduled overtime. As I have noted supra, there was no regularly scheduled overtime work during the construction phase.

When the construction phase entered its final stages in April and May 1982 Respondent Employer for a legitimate business reason reduced significantly the number of pipefitters it employed on the project. These layoffs commenced during the week ending Friday, April 9, 1982, and ended during the week ending Friday, May 21, 1982.[14] Shortly thereafter Respondent Employer increased its work force of pipefitters significantly in order to meet its manpower requirements for the shutdown phase of the project. The numbers involved in these layoffs and rehires are as follows.

On April 5, 1982, the total number of pipefitters, including foremen employed by Respondent Employer on the project, totaled 378 of whom 140 were travelers and 238 were members of Respondent Union. (Jt. Exh. 1, App. J.) During the period starting from the week ending April 9 through the week ending May 21, 1982, a total of 180 pipefitters were laid off; 132 travelers and 48 members of Respondent Union. (Jt. Exh. 1, App. E.)[15] When viewed in terms of percentages approximately 37 percent of the pipefitters employed immediately before the layoffs commenced were travelers, yet 73 percent of the pipefitters selected for layoff were travelers. The result was that on May 24, 1982, at the completion of this series of layoffs there was a total of 202 pipefitters including foremen employed on the project, only 1 of whom was a traveler. (Jt. Exh. 1, App. J.)

Sometime during the week ending May 31, 1982, Respondent Employer commenced to hire additional pipefitters to work the shutdown and from this time until the end of the shutdown hired approximately 200 pipefitters to work on the project, none of whom were travelers. All of the aforesaid new hires were dispatched by Respondent Union to the project from the group 1 dispatch book pursuant to the terms of the Local Agreement. Of the 200 new hires 93 had been employed by Respondent Employer at some time earlier on the project and of these 10 had been discharged for cause and 12 had been laid off during the previous layoffs in April-May 1982.

As I have found, supra, only one traveler pipefitter remained employed on the project after the April-May 1982 layoffs. This traveler was Paul Foster. The only explanation advanced by Respondent Employer for not laying off Foster with all of the other travelers was the testimony of General Foreman T. J. Cratsenburg which was given during the General Counsel's cross-examination. Cratsenburg testified that the reason Foster was not laid off with the other travelers was that Foster had group 1 status because he had worked 3000 hours of employment in the geographical area of Respondent Union as a journeyman pipefitter under the Local Agreement. Cratsenburg further testified that it was Cratsenburg's understanding that Foster had book 1 status from the time he was initially referred to the project as he had been dispatched to the project by Respondent Union from book 1. I reject Cratsenburg's testimony for the following reason.

There is no evidence that at the time of the April-May 1982 layoffs Foster qualified for book 1, let alone evidence that Foster had documented the number of hours he had worked within Respondent Union's jurisdiction and gone to the Union with this documentation and asked to be placed on book 1. Quite the opposite, the record shows that Foster was dispatched to the project from book 2, not book 1, and that it was not until July 6, 1984, after his layoff from the project that Foster for the first time registered at Respondent Union's hiring facility on book 1 and that this book was not Respondent Union's usual book 1 on which persons classified as pipefitters registered, but the Union registered him on the Plumbers book also known as the Subjourneymen's book.

Traveler Fernando Moore who was classified by the United Association as a journeyman pipefitter was laid off with the other travelers in May 1982 even though he qualified for pipefitters book 1 status at the time of his layoff. Also travelers Hector Martel and Gerald Mayes and Gilbert Smith, who like Foster were classified by the United Association as journeymen plumbers, were laid off with the other travelers in May 1982 even though they, like Foster, qualified for plumbers book 1 status at the time of the layoff.

Cratsenburg's testimonial demeanor was poor. In general he left me with the impression that he was not a sincere and reliable witness. He seemed to be an insincere witness who was intent on slanting his testimony so that it would be helpful to the Respondents' case. This conclusion which is based on my observation of Cratsenburg's demeanor is bolstered by a significant inconsistency between Cratsenburg's testimony given during the hearing and the testimony contained in his prehearing af-

[13] The findings in this paragraph are based on the undenied and uncontradicted testimony of Cangi, who impressed me as a trustworthy and reliable witness.

[14] During the April-May 1982 layoffs Respondent Employer hired 34 pipefitters, all of whom were members of Respondent Union, 13 of whom were classified as pipefitters, 17 as instrument fitters, and 4 as welders. During this same period Respondent Employer laid off travelers whose trade classifications were pipefitters, instrument pipefitters, and welders. A total of 15 of the 34 new hires had previously worked on the Shell Oil project and had left under the following circumstances: 11 quit; 2 were discharged for absenteeism; and 1 was discharged for smoking in a nonsmoking area.

[15] The 132 laid-off travelers had the following United Association trade classifications: 55 plumbers; 37 welders; and 40 pipefitters, which included 2 sprinkler/fitters and 5 instrument fitters. (Jt. Exh. 1, App. E.) The 48 laid-off members of Respondent Union had the following United Association trade classifications: 29 pipefitters, including 2 instrument fitters, 6 metal trades fitters, and 1 apprentice; and 19 welders of whom 6 were metal trades welders and 1 was an instrument welder.

fidavit submitted to the National Labor Relations Board. In his prehearing affidavit Craftsenburg swore that in selecting pipefitters for layoff the foremen under his supervision gave no consideration to whether they were members of Respondent Union or whether they were plumbers or pipefitters by trade or what dispatch book they had been referred from to the project, but that the foreman selected pipefitters for layoff on the basis of their ability. In short Cratsenburg informed the Board that Respondent Employer in selecting pipefitters for layoff did not in any way prefer travelers for layoff over members of Respondent Union, but treated them equally so long as their ability was equal. However, during the hearing Respondent Employer conceded that Respondent Employer's foremen in selecting pipefitters for layoff followed an alleged longstanding industry practice pursuant to which they retained members of Respondent Union over travelers regardless of ability. Contrary to his affidavit, Cratsenburg during the hearing in this proceeding testified that the practice in the pipefitting industry is for foremen to lay off travelers before members of the local union in the geographical jurisdiction in which the project is located and that on the Shell Oil project this practice was followed. Cratsenburg further testified that if the foremen under his supervision had not followed this practice of laying off travelers before the members of Respondent Union that Cratsenburg "would have went and talked to [the foremen] and I would have asked them what the hell they were doing."

It is for all of the foregoing reasons, plus the fact that there was no corroboration of Craftsenburg's testimony that Foster was not laid off because he had qualified for book 1,[16] that I have rejected his testimony that this was the reason Foster was not laid off with the other travelers. Also, for the same reasons, I reject his further testimony, given in response to a leading question, that if a traveler on the Shell Oil project worked the requisite number of hours so as to qualify for book 1 status such a traveler was treated like a member of Respondent Union for layoff and overtime purposes.

Not only do I reject Cratsenburg's testimony concerning the reason for Respondent Employer's failure to lay off Foster, but I am persuaded that the circumstantial evidence warrants the inference that the real reason for Respondent Employer's failure to lay off Foster with the other travelers was that it mistakenly thought that he was a member of Respondent Union rather than a traveler. This conclusion is based on the following considerations.

When Foster was dispatched to the Shell Oil project on October 6, 1981, the referral slip issued to him by Respondent Union's dispatcher, which referral slip is used by Respondent Employer for recordkeeping purposes (Tr. 840), inadvertently failed to note that Foster was a traveler. Normally when a traveler pipefitter was dispatched to the project the dispatcher noted this fact on the face of the referral slip with the number of the United Association Local to which the traveler belonged.

Traveler Mayes testified that when General Foreman Cratsenburg in April 1982 told Mayes that Mayes could not work overtime because only local people could work it that Foster who was Mayes' welder was present, and that in the same breath Cratsenburg asked Foster to work the overtime. Likewise the foreman over Mayes' crew in denying Mayes' request to work unscheduled overtime stated to Mayes, in Foster's presence, that travelers could not work overtime, yet in the same breath selected Foster to work the overtime. Under the circumstances I think that it is a fair inference that because of Foster's referral slip Cratsenburg and Foster's foreman were under the mistaken impression that Foster was not a traveler but a member of Respondent Union.

Respondent Employer's head foreman for the project, William Goldie, testified that when the shutdown phase of the project started there was not a single traveler employed in Respondent Employer's work force, thus indicating that Respondent Employer believed that Foster, who was still in its employ, was *not* a traveler.

It is for all of the foregoing reasons that I am of the opinion that the reason Foster was not laid off with the other travelers prior to the start of the shutdown was due to Respondent Employer's mistaken belief that he was a member of Respondent Union.

h. *Respondents' statements to the travelers concerning the layoffs*

About May 1, 1982, Respondent Union's job steward Richard Wareham was asked by a group of travelers whether they would be able to work any overtime. The credible and undenied testimony of traveler Gilbert Smith is that Wareham responded by stating that "the travelers probably will not even be working the shutdown."

On May 14, 1982, the day that travelers Gilbert Smith and Paul Mathieson were laid off, they went to Union Steward Wareham following their layoff in order to get their referral slips which they needed to reregister at Respondent Union's hiring hall. During the ensuing conversation Smith complained to Wareham about the layoff of the travelers and the fact that new workers who were members of Respondent Union were being hired at the same time as the travelers were being laid off. Wareham replied by stating "that's the way it is" and advised Smith and Mathieson that "no travelers will be on the job, only local hands will work." Smith stated that he did not think that this was fair and intended to fight it. Wareham replied by stating that if Smith did fight it that Smith would never work in the area again.[17]

[16] Foster's foreman, the person who decided that Foster would not be laid off, was not called by Respondent Employer to explain why Foster was not laid off with all of the other travelers.

[17] The description of Wareham's May 14, 1982 conversation with Smith is based on a composite of Smith's and Mathieson's testimony. Their testimony was not inconsistent and each of them testified in a sincere and trustworthy manner. Wareham did not give his version of his conversation with Smith, but specifically denied making the above-described remarks attributed to him. I have rejected his denial because his testimonial demeanor was poor, whereas the testimonial demeanor of Smith and Mathieson, particularly Smith's, was good.

During the construction phase of the project General Foreman Bill Stuart asked traveler Michael Cangi on more than one occasion whether Cangi was eligible to transfer his membership into Respondent Union and told Cangi that if he did this that Cangi would be able to work the scheduled overtime connected with the shutdown phase of the project with the rest of the "local people."[18]

A few days before his Friday, April 30, 1982 layoff traveler Virgil James was notified by his foreman Joe Fahey that there would be a layoff that Friday which would affect Fahey's crew, but that "the people being laid off were not up to him [that] it was coming from above." Thereafter, on the morning of the layoff Fahey told James that General Foreman Bill Stuart "had given him a list of people to be laid off and that [James' name] was on it." Fahey stated, "[T]here was nothing he could do about who was chosen to be laid off, that that came down from Bill Stuart." Shortly after this General Foreman Stuart spoke to James and the others who were being laif off that day and explained to them that he had been ordered to reduce the workers employed on his crews and "was told by his superiors to get rid of the travelers."[19]

Early in April 1982 General Foreman T. J. Cratsenburg, in response to traveler Paul Mathieson's inquiry about whether Respondent Employer intended to lay off the travelers, told Mathieson and traveler George Bics that he was going to try to keep travelers Mathieson, Bics, Smith, Allen, and Mayes because they had been doing a good job. Thereafter during the April-May 1982 layoffs when Mathieson expressed concern about being laid off, Cratsenburg stated that Mathieson and the aforesaid four named travelers did not have to worry about being laid off. Also, Cratsenburg during the April-May 1982 layoffs told traveler Gilbert Smith that Cratsenburg was going to try to save the jobs of Smith as well as travelers Mayes, Mathieson, Allen, and Bics and employ them to do the rigging work during the shutdown phase of the project. And in early April 1982 Cratsenburg told traveler Cloyd Colby, in response to Colby's inquiry about being laid off, that Cratsenburg was going to try to save Colby from being laid off because Colby had done a good job for Cratsenburg and at one time they had been members of the same local union.[20]

On May 14, 1982, shortly after travelers Mathieson, Bics, and Smith were notified that they were being laid off that day, General Foreman Cratsenburg spoke to them and apologized for not being able to keep them on the project for the shutdown phase. He told them that there was nothing he could do about this, that there would not be any travelers working the shutdown phase of the project, and that this instruction had been issued by someone above him, either from "the top," or "higher up," or "from the man."[21]

Early in April 1982 Foreman Marty Barnes told traveler John Davis that the travelers on the project would not be working the overtime on the shutdown because "this was the way it was."[22]

On May 13, 1982, Foreman Wayne Shouse told travelers Mathieson, Bics, and Smith, who worked on his crew, that they would be laid off the next day. He explained to them that they were being laid off because there would be no travelers working during the shutdown phase of the project.[23]

On May 13, 1982, Foreman Bill Springer told traveler Gerald Mayes, who was laid off May 14, 1982, that while once before Springer had been able to remove Mayes' name from the layoff list, this time "word had come down from 250 that all travelers will go" and that Springer had unsuccessfully talked to the head foreman but that his hands were tied.[24]

Early in April 1982 Foreman Wayne Springer asked traveler Cloyd Colby what shift he wanted to work during the shutdown phase of the project, and noted Colby's preference in his notebook. Thereafter on May 6, 1982, the day before Colby's layoff, Colby was told by Springer that he was sorry to have to tell him that he was being terminated the next day and explained to Colby that all of the travelers were going to be terminated either that week or the following week.[25]

In May 1982, shortly before traveler William Grady's May 7, 1982 layoff, his foreman A. L. Thuotte spoke to Grady and two other travelers about the layoff. Thuotte told them he was not supposed to tell them that they were going to be laid off, but that all of the travelers would be laid off before "the big overtime starts" (a reference to the shutdown phase of the project during which regular overtime was scheduled), and that the overtime "will all go to 250 men."[26]

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[18] The description of Stuart's remarks to Cangi is based on Cangi's testimony. Stuart testified that he could not imagine himself making these remarks but was not able to specifically deny making them. I have credited Cangi's testimony because Cangi's testimonial demeanor was that of a sincere and reliable witness.

[19] The description of Fahey's and Stuart's remarks set forth above is based on James' testimony. Fahey was not called to deny the remarks attributed to him. Stuart failed to give his version of the remarks he made to James and the other laid-off workers, but testified that he did not "recall" telling James that he had been instructed by his superiors to lay off travelers first. I have credited James' testimony and rejected Stuart's because James' demeanor was that of a sincere and reliable witness, whereas Stuart's demeanor was poor.

[20] The description of the conversations set forth in this paragraph is based on the testimony of Mathieson, Smith, and Colby, each of whom impressed me as a sincere and reliable witness. Their testimony was not denied by Cratsenburg who admitted that on more than one occasion he told travelers Mathieson, Bics, Smith, and Allen that they had been doing a good job and that he was going to try to keep them through the shutdown phase of the project.

[21] The description of Cratsenburg's above remarks is based on a composite of Mathieson's, Bics', and Smith's testimony only to the extent that their testimony is not inconsistent. They impressed me as trustworthy witnesses when they gave the above-described testimony. I have not credited Mathieson's testimony that Cratsenburg, in response to Mathieson's inquiry, identified Respondent Union's business manager Slawson as the person who ordered the layoff of the travelers. His testimony in this respect was contradicted by Bics and Smith, who testified that Cratsenburg did not mention Slawson's name.

[22] Based on the undenied testimony of Davis who impressed me as a credible witness.

[23] Based on the undenied testimony of Mathieson and Bics who impressed me as sincere witnesses.

[24] Based on the undenied testimony of Mayes who impressed me as a sincere witness.

[25] Based on the undenied testimony of Colby who impressed me as a credible witness.

[26] Based on Grady's testimony. Thuotte testified that he did not tell any of his crew that they were being laid off because they were travelers

Continued

i. The competency of the travelers employed on the Shell Oil project who were laid off and denied overtime work

The United Association has historically divided its members into different trades. The relevant trade classifications involved in this case are the pipefitter and plumber classifications. The pipefitter classification includes those pipefitters who specialize as welders or instrument fitters. The work of the pipefitters usually involves industrial pipefitting, namely, working on the piping and receptacles connected with high-pressure piping systems, including the instruments and controls connected with such systems, in the heavy manufacturing, petrochemical, and utility power industries. The work of the plumbers is usually confined to low-pressure piping systems, including the instruments and controls connected with such systems, associated with residential and commercial construction.

Respondent Union is a straight line pipefitters local; virtually all of its members are classified as pipefitters. Respondent Union's contractual relationship with Respondent Employer obligated it to dispatch qualified journeymen pipefitters to Respondent Employer's Shell Oil project. However, due to an insufficient number of applicants registered on book 1 at its hiring hall facility Respondent Union, in order to meet the employment requirements of Respondent Employer, was forced to rely on the applicants registered in its other books, who were traveler pipefitters and plumbers.

There is no evidence of the number of travelers and members of Respondent Union employed on the Shell Oil project prior to March 1982. But the record reveals that during March 1982 and through April 5, 1982, between 36 and 38 percent of the pipefitters employed on the Shell Oil job were travelers, either pipefitters or plumbers by trade. Thereafter in April 1982, approximately 31 percent of the pipefitters on the project were travelers, either pipefitters or plumbers by trade. This percentage dropped to 22 percent on May 3, 1982; 13 percent on May 10, 1982; 6 percent on May 17, 1982; and thereafter less than 1 percent. As I have found supra, Respondent Employer retained one traveler on the job after May 17, 1982, when it mistakenly believed that he was a member of Respondent Union.

The record, prior to April 1982, does not reveal the proportion of the travelers employed on the project who were classified by trade as plumbers and steamfitters. The sole evidence on this subject is that of the 132 travelers laid off during the months of April-May 1982, 57 percent or 75 were pipefitters by trade and 43 percent or 57 were plumbers by trade.[27] Absent any evidence to the contrary I shall presume that during the relevant period during which Respondent Employer was assigning unscheduled overtime, March through May 1982, this was the breakdown between traveler pipefitters and plumbers employed on the project.

I shall now set forth and evaluate evidence pertaining to the competency of the travelers employed on the project.

(1) The pipefitters

It is undisputed that all members of the United Association classified as pipefitters by trade have comparable minimum qualifications to perform work normally assigned to persons with this trade classification. The only evidence that specific traveler pipefitters by trade employed on the Shell Oil project were not performing their work competently or were otherwise less than satisfactory workers is the fact that during April 1982 three were discharged; two for lack of production and one for absenteeism. However, during this same period 25 fitters who were members of Respondent Union were discharged; 3 for lack of production. Other than this there is no specific evidence that Respondent Employer regarded any of the travelers on the project, who were pipefitters by trade, as less than satisfactory workers.[28] And the testimony of the three travelers who testified in this proceeding, who were pipefitters by trade, establishes that each of them was eminently qualified to perform the whole gamut of duties expected of them on the project. One was a member of a United Association straight line pipefitters local and the other two were members of combination locals. Likewise, the record reveals that several of the travelers who were pipefitters by trade had been working as pipefitters immediately prior to their employment on the project as pipefitters for the Bechtel Construction Company at the San Onofre, California Nuclear Power Plant under the terms of the National Contractors Agreement.[29] Under the circumstances, absent a prima facie showing that the traveler pipefitters by trade employed on the Shell Oil project were less qualified as a group than Respondent Union's members to do the project's pipefitting work, I will not presume that they were less qualified than Respondent Union members to work the shutdown phase or the unscheduled overtime during the construction phase. Quite the opposite, since all members of the United Association classified as pipefitters by trade have comparable mini-

and further testified that when he notified Grady of his layoff that he told him that the reason for the layoff was "probably because he was book 2, estimated as book 2, and then we were going to book one." I have rejected Thuotte's testimony and credited Grady's because the testimonial demeanor of Thuotte was poor, whereas Grady's was good.

[27] The 57 plumbers include 2 who were sprinkler fitters by trade which classification appears to be more closely related to the plumber classification in terms of normal industrial pipefitting work experience.

[28] I have considered the testimony of General Foreman Cratsenburg that he never observed a single traveler pipefitter on the job whom he felt was any good. Cratsenburg's testimony was completely without specificity. He failed to point to a single incident where he observed a traveler pipefitter by trade doing less than satisfactory work, nor did he name even one traveler pipefitter, who was a pipefitter by trade, whom he considered to be less than a satisfactory worker. Also, as I have noted supra, Cratsenburg gave me the impression from his testimonial demeanor that he was not a sincere or reliable witness.

[29] Presley Moore for approximately 2-1/2 years during 1978–1981; John Ward for approximately 3 months during 1980–1981; Duane Sillanpa for approximately 13 months during 1980–1982; Jeffrey Roland for approximately 18 months during 1979–1981; Jeronimo Pina for approximately 14 months during 1978–1980; Forest Lenz for approximately 18 months during 1979–1981; and R. F. Trusty for almost 2 years. The record also reveals that some of these pipefitters worked for Bechtel at San Onofre under the terms of a maintenance contract which Bechtel had with the power company. Where this was the case, however, the record, G.C. Exh. 7, specifically reflects this and I have not relied on those periods of time in computing the aforesaid figures.

mum qualifications to perform work normally assigned to persons with this trade classification, I have presumed, absent a showing to the contrary, that the traveler pipefitters by trade employed on the Shell Oil project as a group were just as qualified as Respondent Union's members to do the pipefitting work assigned on the project, including the unscheduled overtime work and the work during the shutdown phase of the project.[30]

The record reveals that during the April-May 1982 period relevant to this case 75 travelers employed on the project, who were pipefitters by trade, were laid off by Respondent Employer. The complaint specifically names each of these travelers and the respective dates that they were laid off and alleges that each of the layoffs was illegally motivated. The names of the 75 travelers who were pipefitters by trade and their respective dates of layoff are set forth in Appendix A of the decision.

(2) The plumbers

The record reveals that, while the basic skills and tools of a plumber are the same as those of a pipefitter, they are different trades with different qualifications and usually plumbers do not do industrial pipefitting or that if they do it is not generally with the same degree of regularity as a pipefitter by trade.[31] But it does not follow that all of the plumbers employed as pipefitters on the project were less competent than Respondent Union's members to work the unscheduled overtime during the construction phase or the extensive scheduled overtime work during the shutdown phase of the project. The evidence with respect to this question and my evaluation of it follows.

The record shows that plumbers Cangi, Mathieson, Rabey, Segura, Lindquist, Colby, and Martel employed on the project had experience working as industrial pipefitters at the time they began work on the project. Michael Cangi had been doing industrial pipefitting work for approximately 19 years and had worked on numerous industrial jobs where he performed all facets of the pipefitter's trade and had worked in the jurisdiction of Respondent Union as a pipefitter on five or six refinery jobs prior to the Shell Oil project. Paul Mathieson had worked as a pipefitter for approximately 4 or 5 years prior to the Shell Oil project and immediately prior to the project had been employed as a pipefitter for over 14 months on two industrial jobs within Respondent Union's jurisdiction and his work on the second of these jobs was apparently so impressive that the general foreman made him a foreman. Paul Segura and Joseph Rabey immediately prior to working on the Shell Oil project had been employed as pipefitters for the Bechtel Construction Company at the San Onofre, California Nuclear Power Plant, under the terms of the National Construction Agreement, for substantial periods of time; Segura for approximately 15 months and Rabey for approximately 11 months.[32] Segura's work as a pipefitter was apparently so satisfactory that he was made a foreman on the job. Other traveler plumbers who were experienced pipefitters were Larry Linquist, Cloyd Colby, and Hector Martel. Immediately prior to his work on the project Lindquist had worked for approximately 8 months as a pipefitter on refinery jobs within Respondent Union's jurisdiction. Cloyd Colby, who has been a member of the United Association for 20 years, and is a member of a combination plumber-pipefitter local, spent approximately 50 percent of his worktime as a United Association member working as a journeyman pipefitter.[33] Hector Martel prior to the Shell Oil project worked as a pipefitter in the jurisdiction of Respondent Union for approximately 9 months on a refinery job similar to the Shell Oil project and by the time of his layoff had worked within a 3-year period over 3000 hours as a pipefitter within Respondent Union's jurisdiction.

The statements made by Respondent Employer's foreman reveal that Respondent Employer thought that traveler plumbers Pashby, Cangi, Mathieson, Bics, Mayes, Smith, and O'Bosky were well qualified to do pipefitting work on the project. Keith Pashby was complimented about his work by his foreman and one of Respondent Employer's engineers. Michael Cangie was complimented about his work and reliability by both his foreman and general foreman. In fact General Foreman William Stuart indicated his satisfaction with Cangi's work by suggesting that Cangi transfer his membership into Respondent Union so that Cangi could work for Stuart during the shutdown.[34] Also a month before Cangi's layoff the foreman of the instrumentation crew, Marty Jewitt, was instrumental in Cangi being transferred to his crew because of Cangi's qualification as an instrumentation fitter, which the record shows was a skill which at that time Respondent Employer badly needed on the project. Cangi, on starting work on Jewitt's crew, observed that he was more qualified to do this work than

[30] I recognize that the pipefitters who were Respondent Union members who worked on the Shell Oil project were, as a group, more likely than the traveler pipefitters by trade to have previously worked an oil refinery shutdown inasmuch as 35 or 40 percent of their work is refinery work. The record does not establish, however, that the shutdown or unscheduled overtime work on the project required skills and experience not possessed by the traveler pipefitters by trade or that they were not qualified to competently perform the type of work expected of a journeyman pipefitter during the shutdown or unscheduled overtime.

[31] I note that 3 of the General Counsel's 12 plumber witnesses, who worked as pipefitters on the Shell Oil project, Virgil James, William Grady, and John Davis, had virtually done no work as pipefitters prior to their employment on the project.

[32] Segura and Rabey worked for Bechtel at San Onofre for certain periods of time under the terms of a maintenance contract, but the record, G.C. Exh. 7, indicates which periods of time they worked under that contract and I have not relied on those periods of their employment with Bechtel in arriving at the above-described figures.

[33] As I have found supra, in early April 1982 General Foreman Cratsenburg told Colby that Cratsenburg was going to try to save Colby from being laid off because in addition to having belonged to the same local union as Cratsenburg Colby had done a good job on the project.

[34] The record establishes that at least one of the travelers on the project transferred his membership into Respondent Union during the construction phase of the project and as a result worked the shutdown. Thus, traveler Fernando Moore, who was employed as a welder on the project, testified that during the course of his work on the project he worked with a couple of excellent traveler pipefitters who assisted him with his welding, that one of them was Dave Schere, and further testified that during the course of the construction phase of the project Schere became a member of Respondent Union. Since Schere's name is not among those listed as having been laid off during the layoffs herein, I presume he was not laid off during the construction phase and worked the shutdown.

two of the other pipefitters who were members of Respondent Union, who had never done the work previously. On several occasions General Foreman T. J. Cratsenburg complimented the work of Paul Mathieson, George Bics, Gerald Mays, and Gilbert Smith.[35] Also, Bics' foreman complimented him about his work on several occasions.[36] And as I have found supra, during April-May 1982 Cratsenburg indicated that he regarded Mathieson, Bics, Smith, and Mayes as good employees whom he did not want to lay off.[37]

Cratsenburg stated that he was going to try to keep these workers working through the shutdown because they had been doing a good job and because of this they did not have to worry about being laid off. And when Cratsenburg told them about their layoffs, he apologized and explained that it was not his decision but was forced on him from above. Also in Mayes' case it is undisputed that Mayes' foreman Bill Springer stated to him that he did not think laying off the travelers was fair because the travelers "were doing such a good job for him." And apparently because Mayes had been doing such a good job, Springer had previously removed Mayes' name from a layoff list.

Also, with respect to Mathieson's and Bics' competency as pipefitters on the project, traveler Albert Allen, who is a pipefitter by trade who worked on the project as a welder, credibly testified that Mathieson and Bics worked with him as pipefitters when they were not working on the rigging crew and that Mathieson's work as a fitter was "good" and that Bics' work was "very good." Allen further testified that while one of Respondent Union's members who worked with him as a pipefitter was a "very good man" that another one by the name of Williams had no idea of what to do and Allen had to give him repeated instructions. Lastly, with respect to Reginald O'Bosky, it is undisputed that O'Bosky's foreman and general foreman complimented him about his work and that before he was laid off General Foreman Johnston asked O'Bosky and Cangi if they would work the shutdown for him as he was going to work a crew at night during the shutdown, thus indicating that Johnston regarded both O'Bosky and Cangi as competent to work the shutdown. And when Foreman Young informed O'Bosky that he was laid off, Young indicated that he was unhappy with having to lay off O'Bosky because he wanted to keep him on his crew to work the next job. Previously on March 22, 1982, General Foreman Stuart and Foreman Breiter plus two other pipefitters who were members of Respondent Union signed a statement on O'Bosky's behalf that they had worked with him on the project for over 5 months and "find him reliable, qualified as a steamfitter" and "feel he would be a benefit to the trade as a steamfitter."

Respondent called six witnesses to testify about the competency of the plumbers employed on the Shell Oil project: Head General Foreman William Goldie; General Foremen T. J. Cratsenburg and William Stuart; and Foremen Al Thuotte, Wayne Shouse, and Martin Barnes. Their testimony, in pertinent part, is set forth hereinafter.

Head General Foreman Goldie testified that he observed that many of the travelers seemed unfamiliar with the work they were doing. When asked to point to specific examples of what he observed, Goldie was unable to do so. He testified, "I cannot give you too many [examples] right now. I've seen a lot of stuff that tells you the man is not familiar with the work." The closest to any degree of specificity that Goldie came was when he testified, "I've seen people rigging up things which is very unsafe." When he gave this testimony Goldie did not impress me as a sincere witness. His testimonial demeanor was poor. I also note that Goldie gave contradictory testimony to the National Labor Relations Board on a highly significant matter. During the investigatory stages of this proceeding Goldie submitted a sworn affidavit to the Board in which he stated that in selecting pipefitters to work overtime and for layoff on the Shell Oil project that Respondent Employer did not consider the pipefitters' status as travelers or members of Respondent Union, rather the selection was based on merit. During the hearing, however, Goldie flatly contradicted this testimony, now testifying that the status of the pipefitters as travelers and as members of Respondent Union was taken into account in selecting pipefitters for layoff and for overtime. These inconsistencies in Goldie's testimony, plus his poor testimonial demeanor, left me with the impression that Goldie was not a sincere witness, but was tailoring his testimony to fit whatever he thought would help Respondent's case. This plus the ambiguity in Goldie's testimony has led me to reject Goldie's above-described testimony regarding the competency of the travelers employed on the Shell Oil project.

Foreman Thuotte testified that the three plumbers employed in his crew, Datz, Grady, and Locke, were willing workers, but lacked prior pipefitting experience because he was forced to give them the same amount of supervision that he would have given an apprentice pipefitter. Thuotte further testified that there was another traveler on his crew whom he identified as "Vince," who worked as a welder and who was as qualified as the members of Respondent Union that worked on Thuotte's crew.

Foreman Barnes testified that plumber John Davis, who was employed in Barnes' crew and who, as I have found supra, had virtually no prior pipefitter experience, did not have the skills of a journeyman pipefitter and because of this Barnes could not assign him the usual scope of work performed by a journeyman pipefitter. Barnes also testified that the other plumbers employed as fitters on his crew in general had to be closely supervised because of their lack of experience, but that there were some plumbers in his crew who were competent pipefitters. Barnes further testified that most of the plumbers whom he observed on the project were not as competent as the members of Respondent Union employed on the project, but while the plumbers as a group were not as competent as Respondent Union's members there were

[35] Based on the undenied testimony of Mathieson, Mayes, and Bics who impressed me as credible and reliable witnesses.

[36] Based on the undenied testimony of Bics who impressed me as an honest witness.

[37] I note that Gilbert Smith at the time of his layoff on May 14, 1982, had worked over 3000 hours as a pipefitter within the jurisdiction of Respondent Union within a 3-year period.

some plumbers who were just as good and perhaps even more competent than certain members of Respondent Union.

General Foreman Stuart's crews were comprised of mostly travelers, most of whom were plumbers by trade. Stuart testified that while some of these travelers "approached being as good" as the members of Respondent Union the vast majority was not nearly as competent as the members of Respondent Union employed on the project,[38] and because of this he was forced to assign them the type of work that they were used to doing as plumbers, i.e., screwing pipes and doing the rigging work, and since the plumbers did not know much about heavy rigging that he closely supervised their rigging work.

General Foreman Cratsenburg testified concerning the competency of plumbers Judd, Colby, Lindquist, Mayes, Mathieson, Smith, and Bics. Regarding Judd and Colby he testified he received complaints from the welders for whom they were doing fitting work that they did not know how to do their job. Regarding Lindquist he testified that Lindquist's foreman and fellow employees complained to him that Lindquist was standing around a lot instead of working and that Cratsenburg had several talks with Lindquist's foreman to try to get Lindquist to work. Regarding Mayes he testified that Mayes was afraid of working up high and asked Cratsenburg to assign him to a job close to the ground. Regarding Mathieson, Smith, and Bics he testified that they were willing workers and that he received no complaints about their work, but that their foreman had to train them and closely supervise their work on the rigging crew because of their inexperience. Lastly, when asked whether there were any specific problems to which he could refer reflecting the difficulties that he had with the travelers in terms of their competence or ability, that he did not have with the local hands, Cratsenburg was able to point to only one episode. In this regard he testified that while laying out a sewer line Bics, Mathieson, and Smith were in the process of hacksawing into an electrical line and that Cratsenburg stopped them from doing this only after their foreman Wayne Shouse informed Cratsenburg what they were doing.

I reject Cratsenburg's above-described testimony in its entirety for these reasons. Cratsenburg's testimonial demeanor, as I have found supra, was that of an insincere witness who seemed intent on slanting his testimony so that it would be favorable to Respondents in disregard of the truth. The following additional factors further impugn his testimony. It is undisputed that Colby, who Cratsenburg supposedly was informed was not a competent pipefitter, was told by Cratsenburg that he was trying to prevent Colby from being selected for layoff because Colby had done a good job for Cratsenburg. It is undisputed that Lindquist received no complaints or disciplinary warnings from supervision despite Cratsenburg's allegation that he was a constant subject of complaints for not working and that Cratsenburg on several occasions supposedly spoke to Lindquist's foreman in an effort to get him to do some work. Mayes credibly testified that he was not afraid to work up high and that prior to the Shell Oil project he had done this type of work and was comfortable doing it. It is undisputed that during the April-May 1982 layoffs, as I have found supra, Cratsenburg stated that he was going to try to keep Mathieson, Bics, Smith, and Mayes to work the shutdown phase of the project because they had been doing a good job and that when he laid them off he apologized saying that his decision to lay them off had been forced on him from above. This hardly jibes with his above-described comments concerning their work. And finally Mathieson and Bics, who impressed me demeanorwise as sincere witnesses, specifically denied engaging in the conduct concerning the cutting of the electrical line attributed to them by Cratsenburg. Also Wayne Shouse, their foreman, who was a witness for Respondent Employer, failed to corroborate Cratsenburg's account of this incident. It is for all of the foregoing reasons that I have rejected Cratsenburg's testimony in its entirety.

It is undisputed that plumbers Mathieson, Bics, and Smith prior to the Shell Oil project had an insignificant amount of experience doing heavy rigging work of the sort being done on the project. On the project they worked in large part on Foreman Wayne Shouse's rigging crew and they also did other pipefitting work for Shouse and on other crews. Shouse testified that, due to the inexperience of Mathieson, Bics, and Smith, he had to teach them how to do the rigging work, and that initially he supervised them very closely and even toward the end of their tenure gave them close supervision on several heavy lifts which were "very, very complicated." He further testified that not one of these three plumbers knew the system of hand signals used to do the rigging work and that Shouse had to teach them the signals used to do the rigging work and had to correct them over and over until they got the signals right. Mathieson and Bics testified in effect that despite their inexperience that Shouse did not have to teach them how to do their jobs as riggers or teach them the proper hand signals to use. In regard to the hand signals it is undisputed that these signals are printed clearly on the outside of the cranes used in the rigging operation. Mathieson testified that during the period of several months that he worked on the rigging crew on only approximately five occasions did Shouse have to explain to the crew how to do their job, but would usually stand and watch them work. Mathieson and Bics impressed me demeanorwise as cred-

[38] I am convinced that when Stuart testified that the work of some of the travelers whose work he was familiar with "approached being as good" as the work of the "local hands" that he was not being truthful and that in fact there were some, albeit very few plumbers, who worked under his supervision whose competency equaled that of the local hands under his supervison. Thus when Stuart gave this testimony I received the impression from his testimonial demeanor that he was not being perfectly candid in his assessment of the travelers' competency. This impression is reinforced by the undisputed testimony of plumber Michael Cangi, set forth supra, that on several occasions Stuart indicated his satisfaction with Cangi's work by suggesting that Cangi transfer his membership into Respondent Union so that Cangi could work for Stuart during the shutdown phase of the project. Also it is undisputed, as described in detail supra, that on March 22, 1982, Stuart signed a statement on behalf of plumber Reginald O'Bosky that he had worked with O'Bosky on the project for over 5 months and "find him reliable and qualified as a steamfitter" and "feel he would be a benefit to the trade as a steamfitter."

ible witnesses, Shouse did not. Accordingly I have rejected his testimony. I also note that it is hardly likely that General Foreman Cratsenburg, Shouse's supervisor, would have indicated that he wanted Mathieson, Bics, and Smith to remain on the project for the shutdown phase of the project if in fact they were as incompetent on the rigging crew as described by Shouse. In addition, it is undisputed that Mathieson, Bics, and Smith were complimented by either Cratsenburg or Foreman Shouse about their work.

Based on the foregoing I am of the opinion that as a class the plumbers by trade employed on the Shell Oil project as pipefitters were not as competent as the pipefitters by trade employed on the project, but that of the 55 plumbers laid off during the time material the record establishes that 12 of them were as competent in their work as pipefitters on the project as the pipefitters by trade. The 12 were: Hector Martel, Michael Cangi, Paul Mathieson, Paul Segura, Joseph Rabey, Gerald Mayes, George Bics, Gilbert Smith, Larry Lindquist, Reginald O'Bosky, Cloyd Colby, and Keith Pashby.[39] The conclusion that the record shows that their work as pipefitters on the project was as competent as the work performed by the class of workers who were pipefitters by trade is based on one or a combination of the factors described above: work experience as a pipefitter; and/or the statements by supervision; and/or the observation of pipefitter by trade Allen about the work of two of them.

In concluding that there is insufficient evidence to establish that as a group the laid-off travelers who were pipefitters by trade were less competent than members of Respondent Union who were not laid off and in also concluding that there was more than a de minimis number of laid-off traveler plumbers who were just as competent as members of Respondent Union who were not laid off, I have taken into consideration the testimony of Respondent Employer's witnesses who testified in effect that the shutdown phase of the project which was staffed completely by members of Respondent Union went much better than the construction phase. To the extent that the layoffs resulted in the removal of the plumbers who are not experienced pipefitters and their replacement by experienced pipefitters I am sure that it resulted in greater productivity during the shutdown than if these plumbers had been retained. However, the degree of this increase in productivity is open to serious question. Other than the conclusionary and self-serving testimony of Respondent Employer's construction superintendent Bertrand, Head General Foreman Goldie, and General Foremen Cratsenburg and Stuart, Respondents offered no concrete evidence that demonstrates the extent of the improvement of the productivity during the shutdown phase in comparison to the construction phase.

Head General Foreman Goldie testified that the shutdown went much better and faster with less problems than the construction phase. Construction Superintendent Bertrand, Respondent Employer's principal management official on the project, simply testified that the shutdown went much better than the construction phase. General Foreman Cratsenburg testified that the workers performed far more work during the shutdown than during the construction phase. General Foreman Stuart testified that the quality of the work force was much better during the shutdown. No concrete evidence was introduced to indicate by how much the productivity improved. All the record reveals is that the shutdown phase was scheduled to last approximately 6 weeks with a certain number of pipefitters and that it in fact finished on time using that amount of pipefitters. There is no evidence that the construction phase did not finish on time with the allotted number of workers or that the unscheduled overtime worked during the construction phase was unusual for a project of this kind. In short, while I am sure that the replacement of the plumbers who were inexperienced pipefitters by the more experienced pipefitters who were members of Respondent Union resulted in an increase in productivity, I am not persuaded that the record establishes that the increase was substantial or significant.

j. *The alleged industry practice of granting preferential treatment in overtime and layoff selection to local United Association members over Travelers*

(1) The evidence

Respondents contend that there is an industry practice of granting preferential treatment in overtime and layoff selection to local members of the United Association over travelers. I shall discuss and evaluate the evidence pertinent to this contention. However, before doing this I note that I have not considered the testimony on this subject given by either William Goldie or T. J. Cratsenburg, both of whom impressed me as being dishonest and unreliable witnesses to such an extent that it was not possible for me to tell when they were and when they were not distorting their testimony so as to favor Respondents.

Goldie, who was Respondent Employer's head foreman on the Shell Oil project and is a member of Respondent Union, testified that, during the 32 years he has worked in the industry, a preference has been given to local members of the United Association over travelers in the assignment of unscheduled overtime. When questioned by Respondent Employer's counsel about the alleged industry practice, not only was Goldie's testimonial demeanor poor but his manner of testifying reinforced my impression that he was not a reliable witness. His initial testimony on this subject was not responsive to the question and, when the question was repeated, Goldie was still unable to answer it and remained silent for a long period of time. He explained his silence in these terms: "I'm thinking . . . I do not want to say the wrong thing." It was my impression that this was not the observation of a conscientious witness who was hesitating in order to be sure that his testimony was accurate and reliable. Rather Goldie's demeanor was that of a witness intent on making sure that his testimony was favorable to Respondents even if it meant distorting the facts. Also, the reliability of any testimony given by Goldie on the

[39] The complaint specifically names each of these 12 travelers and the respective dates of their layoff and alleges that each of the layoffs was illegally motivated. The names of these 12 travelers with their respective dates of layoff have been set forth in App. B of the decision.

subject of an alleged industry practice of preferring the local members over travelers is highly suspect due to the fact that Goldie gave sharply contradictory testimony to the Board, as I have described supra, on the closely related subject of the way Respondent Employer handled the overtime and layoff selection on the Shell Oil project. It is for all of these reasons that I have concluded that Goldie is an unreliable witness and because of this I have not considered his testimony.

The demeanor of T. J. Cratsenburg, a member of Respondent Union and a general foreman of Respondent Employer on the project, was poor. Also as I have found supra, he gave false testimony on the following significant matters: the failure of Respondent Employer to select traveler Paul Foster for layoff; the competency of certain travelers who worked on crews under his supervision; and his contention that three of these travelers created a possible safety hazard when they supposedly almost hacksawed an electrical line. In addition, the reliability of any testimony presented by Cratsenburg on the subject of an alleged industry practice of preferring local members over travelers is highly suspect due to the fact Cratsenburg gave sharply contradicting testimony to the Board, as I have described supra, on the closely related subject of the way Respondent Employer handled the layoff selection on the Shell Oil project. It is for all of these reasons that I have concluded that Cratsenburg is an unreliable witness and because of this I have not considered his testimony.

Gilbert Smith, a traveler on the Shell Oil project, who was a plumber by trade and who has been a member of the United Association for over 20 years, testified that "it is in the Plumber's Union unwritten law that when a job is finished the travelers will get laid off first." Smith, to illustrate the application of this law, further testified that when members of Respondent Union worked as travelers on a job in the jurisdiction of Smith's local union and a job started to "wind down," the members of Respondent Union were laid off first before the members of Smith's local union. There is no evidence concerning the number of times Smith during his career has worked as a traveler in the pipefitting industry.

Cloyd Colby, a traveler on the Shell Oil project who has been a member of the United Association for approximately 20 years, testified, "[I]t is common practice by the Union not to let travelers work overtime [on refinery jobs]. When plant shutdowns in the refinery business occur, it is common practice by the plumbing and pipefitting union to give the overtime to the local union members and to lay off the travelers first where there is a reduction in force." There is no indication of the number of refinery jobs worked by Colby as a pipefitter, other than the Shell Oil project. Colby testified that his aforesaid testimony was based on what he was told by other members of his local union and by members of Respondent Union and not on his personal experience. Colby also testified that on the nonrefinery industrial pipefitting jobs that he has worked, as the job nears its completion layoffs are based on merit with the better workers being retained regardless of their status as a traveler. There is no evidence as to the extensiveness of Colby's work as a traveler on industrial pipefitting jobs other than an indication that he worked once in Seattle, Washington.

Michael Cangi, a traveler on the Shell Oil project, who is a plumber by trade and a member of the United Association for approximately 23 years, testified that "it's standard procedure" that "local members usually get preference" for overtime work because "that's just the way we work it," but where there is full employment the travelers are assigned overtime and "there is usually no stink raised because everybody's getting a piece of the action." And with respect to layoffs Cangi testified that there is an unwritten code or law among the members of the United Association that when there are local United Association members out of work in the area of a project which is nearing completion that the travelers on the project voluntarily quit so that the local workers will have the work. In this respect he testified:

> [I]t's the same as if you come to a job and they have a picket line there, you don't call the business manager and ask if you can cross it. You know you are not supposed to work behind the picket line. A good union man doesn't. So that's a code; you just don't do it. It's an unwritten law. The same with if a job is winding down, there is no more work in the area, they give you the opportunity, let you know. They let you know that the work is winding down and they would appreciate it if you sought work elsewhere. But you don't have to quit. They give you that choice. That is the way I have worked it for 23 years.

But if there is ample work for both the local members and the travelers, Cangi testified that he remains on the project until its completion even though he is a traveler. The record establishes that Cangi has worked as a traveler on several occasions as a pipefitter in the jurisdiction of the Respondent Union and has also worked as a traveler in the pipefitting industry at various times in Seattle, Washington, Fairbanks, Alaska, New London, Connecticut, San Diego, California, and San Luis Obispo, California.

Martin Barnes Jr., a pipefitter by trade and a member of Respondent Union, was a foreman on the Shell Oil project. He has only worked as a traveler in the pipefitting industry within the State of California and there is no evidence of the number of jobs that he has worked as a traveler. He testified that "if there is going to be layoffs . . . they lay off the travelers before they lay off local people" and that when Barnes worked as a traveler that he was laid off before the local members on the job, even though Barnes was a more competent worker than the local members. In fact, Barnes testified that he will quit a job on which he is working as a traveler in order to prevent a local member from being laid off ahead of him, explaining, "so I can go back to that local and work anytime I want without any hassles." This is true even when Barnes works within the geographical jurisdiction of the United Association local which has the pipefitting

jurisdiction covering the geographical area in which Barnes lives.[40]

Richard Slawson, Respondent Union's business manager, who is a journeyman pipefitter by trade, testified that the criteria used generally in the pipefitting industry throughout the United States to allocate unscheduled overtime and to select workers for layoff is as follows:

> Normally if there is a small amount of overtime in a particular area on a job site [and if the] job site consisted of just members from the area, they would probably try to spread it around a little bit so that the members do not become disgruntled. But if there was a mix on the job site of people from outside the area that the foremen were unfamiliar with, travelers in the instance of overtime, it would be that the local people would be given the overtime, and in the instance of layoff, the local people who the foremen are familiar with would remain on the job.

Slawson further testified that his familiarity with these criteria is based on his "experience on job sites" and his conversations as an official of Respondent Union with members of that Union and with officials from other United Association local affiliates. There is no indication in the record as to the number of jobs or their locations on which Slawson worked as a traveler.

Richard Wareham, a journeyman pipefitter, who was Respondent Union's job steward on the Shell Oil project, testified that he has experience working on crews which employed a mix of travelers and local union members, and that his experience has been that the criteria used for selecting persons for layoff on such crews was that the travelers were laid off first and local union members last and that he knew of no case where this procedure was not followed. Regarding the allocation of unscheduled overtime where mixed crews of travelers and local union members were employed, Wareham testified that there is no policy that travelers do not receive the unscheduled overtime, but that in fact they usually do not receive unscheduled overtime because the crew foreman almost always gives preference to the local union members over the travelers in the assignment of such overtime. There is no evidence of the number of jobs or their locations where Wareham has worked as a traveler.

William Stuart, a pipefitter by trade and a member of Respondent Union, was a general foreman for Respondent Employer on the Shell Oil project. He testified that he was familiar with a practice and custom in the pipefitting industry pertaining to layoffs and the allocation of overtime. He described this practice and custom as follows. "Local Hands get preference." Stuart admitted that until 1983 he had never previously worked as a traveler, but that his aforesaid testimony was based on what he had been told by various pipefitters who were members of his family or otherwise related to him.

Wayne Shouse, a journeyman pipefitter and a member of Respondent Union, was a foreman on the Shell Oil project. Shouse has worked as a traveler in these locations: Anchorage, Alaska, San Diego, California, and San Luis Obispo, California. He testified that on those jobs it was the practice to lay off travelers first. More specifically he testified, "[T]hey gradually lay off, lay off, lay off and the travelers are always the first ones they lay off" and that pursuant to this practice Shouse was laid off ahead of local members even though in some instances he had substantially more experience than the local members retained. Shouse also testified that the practice in the pipefitting industry regarding unscheduled overtime was "where there is [unscheduled] overtime . . . normally, the local people will work and travelers will not get that overtime."

Al Thuotte, a journeyman pipefitter and a member of Respondent Union, was a foreman for Respondent Employer on the Shell Oil project. Thuotte has had de minimis experience working as a traveler, but testified that based on what his uncle, a retired United Association member, has told him, it was his understanding that it was common practice for travelers to be laid off before local hands.

Ned Bertrand, Respondent Employer's construction superintendent on the Shell Oil project, testified that the practice and custom in the pipefitting industry "has always been that when it comes down to layoffs, all the travelers will go first and the local people will be last" and further testified that with respect to the assignment of unscheduled overtime "it's been a custom that they use local people to do the work." Regarding Bertrand's qualifications to give his testimony, the record reveals that for virtually his entire life he has worked for one employer, Respondent Employer, in both the United States and other countries. All total he has worked for approximately 20 years for Respondent Employer on projects located in the United States in the States of California, Virginia, Iowa, Texas, Kansas, Ohio, and Louisiana. For the past 20 years his position has been that of at least pipefitting superintendent or higher. However, for the 10-year period preceding the Shell Oil project Bertrand had nothing whatsoever to do with the selection of workers for layoff or the selection of workers to work unscheduled overtime, inasmuch as these matters are left entirety to the discretion of the general foreman and foreman on the job. In fact Bertrand was not even informed during this 10-year period as to the basis for the selection of personnel for layoff or overtime.

(2) Conclusions

I am of the opinion that the testimony of the several witnesses set forth immediately above, whether considered separately or in its totality, is insufficient to establish that there is a longstanding practice in the pipefitting industry of the United States[41] whereby the members of the local unions affiliated with the United Association, in whose geographical jurisdiction a job is being performed,

[40] Barnes, although a member of Respondent Union, does not live within its geographical jurisdiction.

[41] The governing collective-bargaining agreement, the National Construction Agreement, encompasses a nationwide multiemployer bargaining unit.

receive preferential treatment over travelers in overtime and layoff selection. I have reached this conclusion because of the following considerations.

The testimony of Colby, Thuotte, and Stuart concerning the alleged past practice is based solely on hearsay, what others told them, not on their own work experience in the industry. There is no evidence that either Smith, Wareham, or Shouse has the necessary work experience as a traveler to give competent testimony about any longstanding practice in the industry.[42] Barnes has worked as a traveler only within the State of California and no evidence was presented as to whether he worked as a traveler on more than a de minimis number of occasions. Bertrand worked for only one employer, Respondent Employer, and testified in effect that for the past 10 years he has had no knowledge about how Respondent Employer has been selecting its pipefitters for layoff or for unscheduled overtime. Slawson's testimony was based primarily on hearsay, the statements of officials from other United Association local affiliates and members of Respondent Union who worked as travelers. I have taken into account that Slawson testified that his testimony about the industry practice was based in part on his "experience on job sites." However, this portion of his testimony lacks specificity; no effort was made to put some flesh and blood on this conclusionary and ambiguous statement. Regarding Cangi's testimony, although he has substantial experience working as a traveler in the pipefitting industry and has worked in that capacity in several different States, I am not persuaded that the testimony of one traveler about his experiences as a traveler in the industry is by itself sufficient to meet the burden of proof required of Respondent Employer to establish the existence of a longstanding industry practice. And since there has been no showing that the other witnesses who testified about the alleged practice were competent to testify about this subject, their testimony, when coupled with Cangi's, is insufficient to warrant a finding that Respondent Employer has proven the existence of a longstanding practice in the pipefitting industry of the United States whereby employers grant preferential treatment to local members of the United Association over travelers in the assignment of unscheduled overtime work and layoff selection.

Even assuming that I have erred, and the record does not establish a practice in the pipefitting industry of the United States whereby employers discriminate against travelers in favor of local members with respect to overtime work assignments and layoff selection, the record lacks sufficient evidence to establish either the reason for the practice or under what circumstances the practice is invoked by employers, or whether it is invoked without limitation. Traveler Cangi testified that, in his opinion, the practice applied only where there was a shortage of work for pipefitters in the geographical jurisdiction of the local union where the job was being performed. But none of the other witnesses, whose testimony is set forth above, placed such a limitation on the practice, but simply testified that the practice was that in making overtime assignments and in selecting workers for layoff local members were given preferential treatment over travelers. They gave no explanation for the reason for the alleged practice nor did any other witness specifically testify about what motivated the employers in the industry to institute the alleged practice of discriminating against travelers in favor of local union members. Thus, even if the alleged longstanding industry practice exists, there is a lack of evidence to warrant a conclusion that it is based on a legitimate business consideration rather than simply on considerations of union membership.

Also, assuming that Respondents have proven that there is a longstanding practice in the pipefitting industry of the United States whereby members of the United Association local unions are granted preferential treatment over travelers, with respect to the assignment of unscheduled overtime work and the selection of workers for layoff, I reject Respondents' further contention that this practice created enforceable contractual rights for Respondent Union's members who were employed on the Shell Oil project. As I have indicated supra, the term and conditions of employment of the pipefitters employed on the project were governed by the National Construction Agreement and to the extent that its terms were not inconsistent with the terms of the Local Agreement by that agreement. Both agreements are silent about the assignment of unscheduled overtime and the selection of workers for layoff. I recognize that in this situation, in certain cases, a longstanding practice in an industry whereby local union members are favored over travelers in certain aspects of the employment relationship would create enforceable contractual rights for the local members. However, this is not such a case because the governing collective-bargaining agreement specifically states that the parties have agreed that practices will not create contractual rights. Thus, subsection "E" of article VIII of the National Construction Agreement states, "[P]ractices not a part of terms and conditions of collective bargaining agreements will not be recognized."

The courts have long recognized that collective-bargaining agreements are not ordinary contracts and should not be construed strictly in accordance with ordinary contract law principles. *Transportation Union v. Union Pacific Railroad Co.*, 385 U.S. 157, 160–161 (1966). The courts have also recognized, however, that a collective-bargaining agreement should be construed in accordance with a number of well-defined common sense principles, one of which is that, when an agreement contains provisions which are clear on their face, the provisions should be construed in accordance with "their plain and literal meaning." *NLRB v. South Central Bell Telephone Co.*, 688 F.2d 345, 353 (5th Cir. 1982). Accord: *Kaufman & Broad Home Systems v. Firemen*, 607 F.2d 1104, 1109 (5th Cir. 1979). Here the governing collective-bargaining agreement unambiguously provides that practices which are not a part of the terms and conditions of the written agreement will not be recognized. I, therefore, am of the opinion that, even if there is a longstanding industrywide practice in the United States favoring local members

[42] Smith and Wareham did not testify about their work experience as travelers and the record does not otherwise reveal that they were competent to testify about a longstanding industry practice. Shouse testified that he had worked as a traveler in Anchorage, Alaska, and San Diego and San Luis Obispo, California.

over travelers in the assignment of unscheduled overtime work and in the selection for layoff, in view of subsection "E" of article VIII of the governing collective-bargaining agreement, the practice did not create any contractual rights for Respondent Union's members employed on the project. In so concluding, I have overruled the General Counsel's objection and have carefully considered the testimony given by Respondent Employer's expert witness, Arbitrator Melvin Lennard. Neither Arbitrator Lennard nor Respondents have advanced any reason why I should ignore subsection "E" of article VIII in determinining whether the disputed past practice has created enforceable contractual rights. See *McGraw-Edison Power Systems Division*, 53 Lab. Arb. 1024 (BNA LA) (1969) (Lewis, Arb.) (Under a contract stating that "unless specifically so provided in this contract to the contary, past practice shall not be binding on either party," the employer has the right to promulgate a rule banning the use of transistor radios in the plant, even though employees have been allowed to use such radios at work for 20 years).

2. Discussion and conclusionary findings[43]

a. *Respondent Employer's discrimination against the travelers in favor of Respondent Union's members*

Section 8(a)(3) of the Act makes it an unfair labor practice for an employer "by discrimination in regard to . . . tenure of employment or any term or condition of employment to encourage . . . membership in any labor organization." It is settled that "the policy of the Act is to insulate employees' jobs from their organizational rights"—that is, to ensure that employees may "join unions, be good, bad, or indifferent members, or abstain from joining any union without impairing their livelihood." *Radio Officers v. NLRB*, 347 U.S. 17, 40 (1954). Accordingly, Section 8(a)(3) and (1) prohibits an employer from laying off employees or otherwise adversely affecting their terms or conditions of employment because of their union status.

In those cases, such as this, where the Board's General Counsel issues a complaint alleging that an employer is discriminating against employees because of their union membership, the General Counsel has the burden of proving by a preponderance of the evidence that the employees' protected conduct was a motivating factor in the employer's action which adversely affected the employees' terms and conditions or tenure of employment. If the General Counsel meets this burden, the employer can avoid being held guilty of violating Section 8(a)(1) and (3) of the Act by proving by a preponderance of the evidence that there was a legitimate business justification for its adverse action and that the employees would have been the subject of the adverse action irrespective of their protected conduct. See *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983), where the Supreme Court approved the Board's *Wright Line* test. (*Wright Line*, 251 NLRB 1083 (1980).)

The complaint alleges that Respondent Employer violated Section 8(a)(1) and (3) of the Act by assigning overtime work to members of Respondent Union in preference to nonmember travelers, thereby causing 157 named travelers to receive less overtime work during the period from March 1 through May 30, 1982; and by selecting for layoff 130 named travelers from April 7 through May 19, 1982, because they were not members of Respondent Union. I am of the opinion that the General Counsel has made a prima facie showing of a violation by providing by a preponderance of the evidence that a motivating factor in Respondent Employer's decision to lay off each of the alleged discriminatees was their nonmembership in Respondent Union and in order to give preference to members of Respondent Union and I am also of the opinion that the General Counsel has likewise proven by a preponderance of the evidence that the identical motivating factor caused Respondent Employer to discriminate against the travelers employed between March 1 and May 30, 1982, in the assignment of overtime. My reasons for arriving at this conclusion are as follows.

(1) In selecting workers for overtime work and layoff from among the work force of travelers and members of Respondent Union, the grossly disproportionate number of travelers selected for layoff and the grossly disproportionate number of Respondent Union's members assigned overtime work are persuasive evidence of discriminatory motivation. *NLRB v. Townsend & Bottum*, 722 F.2d 297 (6th Cir. 1983); *Daugherty Co.*, 147 NLRB 1295, 1299 (1964). As the court in *NLRB v. Chicago Steel Foundry*, 142 F.2d 306, 308 (7th Cir. 1944), stated:

> To be sure, percentage evidence, standing alone, will not support or sustain an order based on Section 8(a)(3) of the Act. . . . But the disproportionate treatment of union and nonunion workers may be very persuasive evidence of discrimination . . . and may create an inference of discrimination leaving it to an employer to give an adequate explanation of the discharge or layoff.

Also see *Teamsters v. United States*, 431 U.S. 324, 339–340 (1977). During the months of March through May 1982 of the approximately 3678 hours of overtime worked by the pipefitters employed on the project, 3566 hours or approximately 97 percent was worked by members of Respondent Union and only 112 hours or approximately 3 percent was worked by travelers. When

[43] The original unfair labor practice charges which were filed June 10, 1982, pertain solely to Respondents' alleged discriminatory treatment of 13 named employees. The additional 140-plus alleged discriminatees named in the complaint were added to the charges, by virtue of an amendment, only after the expiration of the limitations period embodied in Sec. 10(b) of the Act. In view of this Respondents contend that Sec. 10(b) of the Act bars litigation with respect to all but the 13 alleged discriminatees named in the original charges. I disagree. Even absent the amended charges Sec. 10(b) did not preclude the Board's General Counsel from expanding the class of alleged discriminatees named in the complaint from the 13 named in the original charges to the over 140 named in the complaint. This is so because the additional allegations are inextricably intertwined with the original allegations and constitute the same class of violations as those set out in the initial charges. *NLRB v. Jack La Lanne Management Corp.*, 529 F.2d 292 (2d Cir. 1976). See also *Eastern Maine Medical Center v. NLRB*, 658 F.2d 1, 6 (1st Cir. 1981). (The Board is not prohibited "from adding to its complaint related matters not alleged in the charge which it uncovers during the course of investigation.")

the total number of travelers and Respondent Union members employed on the project during this period is compared with these percentages, it is plain, even when it is taken into account that the aforesaid figures include the pipefitters who were employed as foremen, that the travelers were assigned only a de minimis amount of the overtime work and that members of Respondent Union were assigned an amount of overtime which was so disproportionate to their numbers that common sense and the laws of mathematical probability indicate that the de minimis amount of overtime assigned to the travelers and the disproportionate amount assigned to Respondent Union members was not the product of chance but of a conscious intent to discriminate. Likewise, an examination of the figures pertinent to the layoffs reveals a similar intent to discriminate against the travelers in favor of Respondent Union's members. Thus, on April 5, 1982, the total number of pipefitters employed on the project, including foremen, totaled 378, of whom 140 or 37 percent were travelers and 238 or 63 percent were members of Respondent Union. During the period from the week ending April 9 through the week ending May 21, 1982, a total of 180 pipefitters were laid off, of whom 132 or 73 percent were travelers and 48 or 27 percent were members of Respondent Union. By May 24, 1982, at the completion of this series of layoffs only one of the pipefitters remaining on the project was a traveler. This was Paul Foster who Respondent Employer, as I have found supra, did not lay off because it mistakenly thought that he was a member of Respondent Union. And during the latter part of May 1982, in anticipation of the shutdown phase of the project and during the shutdown phase itself, Respondent Employer hired approximately 200 pipefitters to work on the project. None of them were travelers; all were members of Respondent Union. The aforesaid statistics demonstrate that the gradual layoffs of the travelers over a period of 6 weeks until they were eliminated from the project was not the product of chance but a conscious determination on the part of Respondent Employer to discriminate against the travelers in favor of Respondent Union members when selecting workers for layoff or, in other words, in selecting those who would work the shutdown phase of the project with the accompanying substantial scheduled overtime.

(2) The statements of Respondent Employer's foremen, the persons who selected the pipefitters for overtime work and layoff, that the travelers could not be assigned overtime work and would be laid off from work prior to the shutdown phase of the project because they were not members of Respondent Union constitute "an outright confession of unlawful discrimination." *NLRB v. Ferguson*, 257 F.2d 88, 90 (5th Cir. 1958). As described in detail supra, when travelers inquired why they were not receiving overtime they were told by Foremen Shouse, Springer, Moore, Poletti, and Breiter and General Foreman Cratsenburg that the reason that they were not being assigned overtime work was because the travelers on the project were not being assigned overtime work. And as described in detail supra, Foremen Barnes, Shouse, Springer, and Thuotte and General Foremen Stuart and Cratsenburg explained to the travelers that the reason they were being laid off was that all of the travelers were being terminated prior to the start of the shutdown phase of the project. Indeed, General Foreman Stuart, as described supra, on several occasions advised traveler Cangi that Cangi would be eligible to work the shutdown phase of the project if he became a member of Respondent Union and suggested that Cangi transfer his membership into Respondent Union if he wanted to work the shutdown. I realize that, in making the above-described explanations of why the travelers were not working overtime and were being laid off, the foremen used the word "traveler" rather than the phrase "nonmember of Respondent Union" and that the term was used by the foremen in this sense. Thus, for example, Respondent Employer's construction superintendent Bertrand defined a "traveler" as "a journeyman . . . that does not belong to the local that we are hiring out of" and Foreman Barnes defined "traveler" as "somebody that belongs to a local other than Local 250."

(3) The statements of the foremen, that the reason travelers were not working overtime and were being laid off because of their status as travelers was due to pressure from Respondent Union and the policy of that Union, are further evidence of Respondent Employer's illegal motivation. Thus, as described in detail supra, Foreman Wayne Springer told his crew which was made up of virtually all travelers that the instruction that the travelers would not work the unscheduled overtime had come from Respondent Union. Foreman Al Thuotte, as described in detail supra, informed the travelers on his crew that the reason the travelers were not being assigned any overtime work was that "it was the policy of Local 250." And, as described in detail supra, Foreman Bill Springer told traveler Gerald Mayes that Springer had been unable to remove Mayes' name from the layoff list as Springer had done once before because "word had come down from Local 250 that all travelers will go." Since the foremen were the ones who made the selections for overtime work and layoffs, I am of the opinion that it is reasonable to infer that the aforesaid foremen were authoritatively reporting information received from management and that it was on this information that they acted.

(4) Although the practice and procedure which was supposed to have been followed on the project with respect to the selection of workers for overtime work and layoff was that the crew foremen would make the selections, the record reveals that this procedure was not followed. The evidence of the deviation from the usual practice, which has already been set forth in detail supra, can be briefly stated as follows. After Foreman Wayne Shouse during the week had indicated to the travelers on his crew that they could expect to work overtime that weekend, the next day he was forced to retract this assignment with the explanation that the travelers on the project would not be assigned overtime. Foreman Wayne Springer told the members on his crew that he could not assign them overtime work and indicated that he did not think that this was fair and if left to his own devices he would have assigned them overtime. After Foreman Jack Moore informed his crew, which included several travelers, that they could expect to work some

overtime, the next day he was forced to retract his statement and explain to the crew that the travelers would not be allowed to work overtime. Foreman Joe Poletti apologized to the travelers on his crew for not assigning them any overtime work and explained that he had been given orders from higher up not to assign travelers overtime work. When Foreman Joe Fahey advised traveler James of his layoff he explained to James that he was not responsible for James' selection as he had been selected for layoff by General Foreman Stuart. Thereafter, General Foreman Stuart explained to James that in selecting people for layoff he had been told "by his superiors to get rid of the travelers." When travelers Mathieson, Bics, and Smith were laid off, General Foreman Cratsenburg, who had previously indicated that he wanted them to work the shutdown because of their good work, apologized to them for their layoff, and explained that the instructions to lay them off had been issued by someone above Cratsenburg in the managerial hierarchy who instructed Cratsenburg that no travelers would be working during the shutdown. And Foreman Wayne Springer, after indicating that traveler Colby could expect to work the shutdown by asking him which shift he wanted to work during the shutdown, thereafter told him he was being laid off because all of the travelers were going to be terminated prior to the shutdown. The aforesaid unexplained deviations by Respondent Employer from its usual policy of having the crew foremen select the persons for layoff and overtime work is further evidence of Respondent Employer's illegal motivation in selecting the travelers for layoff and denying them an opportunity to work overtime.[44]

(5) The testimony of Respondent Employer's foremen that the Respondent Employer selected workers for overtime and for layoff on the basis of their membership or nonmembership in Respondent Union and gave preferential treatment to the members of Respondent Union over the nonmember travelers constitutes a confession of unlawful discrimination and is evidence of discriminatory motivation. *NLRB v. Ferguson*, 257 F.2d 88, 90 (5th Cir. 1958). Head General Foreman Goldie testified that in selecting workers for layoff the foremen took into consideration the fact that the worker was a nonmember traveler and gave preference to members of Respondent Union over the travelers and that in selecting workers for overtime work the worker's status as a traveler or a member of Respondent Union was taken into account and the workers chosen to work overtime were members of Respondent Union, not the nonmember travelers. (Tr. 863, 870–871.) General Foreman Cratsenburg testified that the several foremen under his supervision gave preference to members of Respondent Union over nonmember travelers in selecting workers for layoff and that if the foremen had not given such preferential treatment to members of Respondent Union Cratsenburg would have stepped in and spoken to them about the matter. (Tr. 1004, 1026–27.) Cratsenburg also testified that the foremen gave the members of Respondent Union preferential treatment over the nonmember travelers in the assignment of overtime work and that the travelers were assigned overtime work only "in an emergency" and that otherwise only members of Respondent Union were assigned the overtime work (Tr. 997–998, 1043). Foreman Al Thuotte testified that even if the travelers on his crew had been doing an excellent job he would have had to lay them off ahead of the members of Respondent Union because the practice was to give preference to members of Respondent Union over nonmember travelers and that Thuotte in fact selected a traveler for layoff even though said traveler was as qualified as any members of the Respondent Union on his crew that were not picked for layoff. General Foreman Stuart testified that the nonmember travelers were laid off before members of Respondent Union because the custom is that travelers are laid off first. He admitted that on his crew there were some travelers whose work he thought was virtually as good as the work of the members of Respondent Union, but they were laid off nevertheless because, as Stuart testified, if Stuart allowed an exception for even one traveler he would have had to make an exception for all of them and as a result the best that he could do was to keep the more competent travelers employed until the last possible moment before the shutdown phase of the project. Foreman Barnes testified that, in deciding who to lay off on his crew, "I would not lay off any 250 hands. I would lay off travel cards before I would lay off 250 people." (Tr. 884.) He also testified that travelers would be selected for layoff even though they were more competent than members of Respondent Union and that in fact there were travelers on his crew who were competent pipefitters whose work he had no problems with but who were laid off because they were travelers. (Tr. 889–890.)

(6) The disparate treatment of traveler Foster as compared to the other travelers further demonstrates Respondent Employer's discriminatory motivation. Thus, while all of the other travelers were laid off prior to the shutdown, traveler Foster was retained and employed to work the shutdown because Respondent Employer mistakenly thought that he was a member of the Respondent Union. It is established that "the essence of discrimination in a Section 8(a)(3) violation consists of treating light cases differently." *Marathon Le Tourneau Co. v. NLRB*, 699 F.2d 248, 253 (5th Cir. 1983), quoting *General Motors Corp. v. NLRB*, 596 F.2d 1295, 1305 (5th Cir. 1979); *Babcock & Wilcox Co.*, 683 F.2d 858, 859–860 (4th Cir. 1982).

The aforesaid considerations, 1 through 6, viewed in their totality, have persuaded me that the General Counsel has proven by a preponderance of the evidence that Respondent Employer engaged in the discrimination alleged in the complaint for a discriminatory motive, namely, that the General Counsel has proven by a preponderance of the evidence that a motivating factor in Respondent Employer's selection of the 130 named travelers for layoff on the dates of their respective layoffs was their nonmembership in Respondent Union and in order to give preference to Respondent Union's members

[44] An unexplained departure from an employer's normal practice, as is the case here, is evidence of illegal motivation. See *NLRB v. Ra-Rich Mfg. Corp.*, 276 F.2d 451, 453–454 (2d Cir. 1960); *Aeronca Mfg. Co. v. NLRB*, 385 F.2d 724 (9th Cir. 1967); *United States Gypsum Co.*, 259 NLRB 1105, 1107 (1982).

and that the refusal of Respondent Employer to assign overtime work to those travelers employed during the period from March 1 through May 31, 1982, was motivated by identical considerations.

In reaching this conclusion I have considered Respondent Employer's argument that even if it gave preferred treatment to the members of Respondent Union because of their membership such conduct could not have encouraged the travelers to become members of Respondent Union within the prohibition of Section 8(a)(3) of the Act, and that in any event Section 8(f)(4) of the Act sanctioned Respondent Employer's preferential treatment of Respondent Union's members. My reasons for rejecting these contentions are as follows.

Respondent Employer's contention that its discrimination against the travelers in favor of Respondent Union members could not have encouraged the travelers to become members of Respondent Union is apparently based on the premise that the United Association, not its separate local affiliates, is the relevant labor organization for 8(a)(3) purposes because each member of a local union affiliated with the United Association is a member of the United Association and that, by joining the United Association, the member acquiesces in the United Association's rules restricting the transfer of membership between constituent local unions. However, contrary to Respondent Employer's position, the United Association for purposes of the National Labor Relations Act is a separate and distinct labor organization from its local affiliates. For the law is settled that a local union is a separate and distinct entity from the International union with which it is affiliated. *Carbon Fuel Co. v. Mine Workers*, 444 U.S. 212, 217 (1979); *Mine Workers (Blue Diamond Coal)*, 143 NLRB 795 (1963). And in *Radio Officers v. NLRB*, 347 U.S. 17 (1954), it was understood that Loner, the charging party in the *Gaynor* case, could not complain about the union membership rules that denied him the right to join the union at that time. Id. at 51. Nevertheless, the Supreme Court ruled, first, that the employer by granting certain benefits only to the union members in its work force had unlawfully encouraged Loner's interest in becoming a union member, and, second, that it made no difference that the union's rules made that objective for the moment unattainable. As the Court stated, "[T]he Act [does not] require that [a] change in the employees 'quantum of desire' to join a union have immediate manifestations." Id. at 51. Thus, in the instant case, what is alone relevant is the fact that Respondent Employer has been found to have preferred Respondent Union's members over the travelers because of their membership in Respondent Union. It makes no difference what conditions the travelers might have to satisfy to qualify for membership in Respondent Union or that Respondent Union during the time material was not accepting very many if any new members.[45] It is enough that the Company's discrimination had the foreseeable consequence of increasing their desire to obtain it.

Respondent Employer's contention that Section 8(f)(4) of the Act[46] sanctions its preferential treatment of Respondent Union's members over the travelers employed on the Shell Oil project is based on the further contention that the record establishes that there is a longstanding practice in the pipefitting industry of the United States whereby members of local unions affiliated with the United Association are accorded preferential treatment over nonmember travelers in the assignment of overtime and in the selection of workers for layoffs on those projects within the geographical jurisdiction of the local unions. As I have found supra, the record fails to establish such a practice and, even if such a practice has been proven, there is insufficient evidence that the practice was a part and parcel of the National Construction Agreement, the governing collective-bargaining agreement herein, or otherwise created enforceable collective-bargaining rights for the members of Respondent Union employed on the project. Moreover, Respondent Employer's 8(f)(4) defense rests on the further unproven contention that the aforesaid alleged discriminatory past industry practice was not based on considerations of union membership, but was really based on the preference of the employers in the industry for a pool of readily available skilled local craftsmen. As I have found supra, there is insufficient evidence to support this contention or the contention that the alleged industry practice of discriminating against nonmember travelers in favor of members of local unions for purposes of overtime work and layoff selection was based on any of the other objective criteria sanctioned by Section 8(f)(4) of the Act, rather than simply on considerations of union membership. Absent a showing that a practice of discrimination which on its face was based on considerations of union membership was in reality based on one of the objective criterion sanctioned by Section 8(f)(4), an agreement between Respondents embodying such a practice of discrimination would be illegal. *Iron Workers Local 444 (Newberg Construction)*, 174 NLRB 1108 (1969). Likewise such an agreement would not be sanctioned by those cases which recognize that a labor organization may waive the statutorily protected rights of bargaining unit employees. For, although a union may bargain away the economic rights of employees it represents, "it may not surrender rights that impair the employees' choice of their bargaining representative." *NLRB v. Magnavox Co.*, 415 U.S. 322, 325 (1974). Plainly an agreement which discriminates between workers on a

[45] In the instant case during the 18-month tenure of Business Manager Slawson (February 1982–August 1983) over 100 travelers had expressed an interest to Slawson about transferring their membership into Respondent Union, but only a few bothered to file membership applications and only 2 were accepted into membership by Respondent Union. The record reveals that one of the two travelers accepted into membership was employed on the Shell Oil project and that his membership was transferred during the construction phase of the project. The reason so few filed applications and so few were accepted into membership was that due to the lack of work within Respondent Union's jurisdiction Respondent Union was not accepting new members during this period.

[46] Sec. 8(f)(4) of the Act states, in pertinent part:

It shall not be an unfair labor practice . . . for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged . . . in the building and construction industry with a labor organization of which building and construction employees are members . . . because . . . such agreement specifies minimum training or experience qualifications for employment . . . based upon length of service with such employer, in the industry or in the particular geographical area.

basis of their union membership imposes "constraints on the employees' ability to choose which union will represent them." *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693 (1983). In any event, since a waiver of employees' protected rights must be expressed in clear and unmistakable terms; the past practice alleged to exist in this case, which is admittedly not even expressly or by implication included in the governing collective-bargaining agreement, is insufficient to establish a waiver of the rights of the nonmember travelers represented by the Union. See *Metropolitan Edison Co. v. NLRB*, supra. It is for all of the foregoing reasons that I reject Respondent Employer's 8(f)(4) defense.

Having found that the General Counsel has established by a preponderance of the evidence that Respondent Employer's conduct in issue in this case was discriminatorily motivated, namely, that Respondent Employer laid off the travelers and did not assign them overtime work because of their nonmembership in Respondent Union and in order to give preference to the members of Respondent Union, Respondent Employer can avoid being held guilty of violating Section 8(a)(3) and (1) of the Act by proving by a preponderance of the evidence that the travelers would have been the subject to the same adverse action for legitimate business reasons irrespective of their nonmembership in Respondent Union. *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983); *Townsend & Bottum, Inc.*, 259 NLRB 207 (1981), enfd. 722 F.2d 297 (6th Cir. 1983). In this respect Respondent Employer urges that the members of Respondent Union employed on the project were more experienced and competent pipefitters, as a group, than the travelers and that it was for this reason that the travelers were discriminated against, not because of their nonmembership in Respondent Union.[47] I have carefully considered this contention and for the reasons set forth hereinafter have reached the following conclusions: Respondent Employer has failed to demonstrate by a preponderance of the evidence that 75 of the laid-off travelers, who were pipefitters by trade,[48] would have been selected by their foremen for layoff for legitimate business reasons irrespective of their nonmembership in Respondent Union; nor has Respondent Employer established by a preponderance of the evidence that 12 of the laid-off travelers, who were plumbers by trade but who were either experienced pipefitters or whose work supervision regarded as competent,[49] would have been selected by their foremen for layoff for legitimate business reasons irrespective of their nonmembership in Respondent Union; but with respect to the remaining 42 laid-off travelers alleged as discriminatees,[50] who were plumbers by trade and for whom there is no evidence that supervision was satisfied with their work as pipefitters, I am persuaded that Respondent Employer has proven by a preponderance of the evidence that they would have been selected for layoff on the dates they were laid off irrespective of their nonmembership in Respondent Union, because they were not qualified pipefitters. And regarding the discriminatory denial of overtime work to the travelers, Respondent Employer has failed to prove by a preponderance of the evidence that the travelers in its employ during March through May 1982 would have been denied overtime during this period for legitimate business reasons irrespective of their nonmembership in Respondent Union.

Regarding the 75 travelers who, like the members of Respondent Union, were pipefitters by trade, there is insufficient evidence, as I have found supra, that as a group they were any less competent or experienced as pipefitters than the members of Respondent Union. Nor does the record contain sufficient evidence to warrant a finding that the crew foremen who observed their work and who selected them for layoff believed that their work was any less competent than the work of the members of Respondent Union who were retained to work the shutdown. As a matter of fact the foremen who were responsible for the selection of this group of travelers for layoff were not called by Respondent Employer to explain the motivation for their conduct.[51]

[47] Respondent Employer does *not* contend that it discriminated in favor of the members of Respondent Union because they were local residents, rather than members of Respondent Union. See *Bricklayers (Plaza Builders)*, 134 NLRB 751 (1961); *Operating Engineers Local 542 (Ralph Marino)*, 151 NLRB 497 (1965); *Everett Construction Co.*, 186 NLRB 240 (1970); *Electrical Workers IBEW Local 8 (Romanoff Electrical)*, 221 NLRB 1131 (1975). Respondent Employer's failure to make such a contention is understandable because the record establishes that membership in Respondent Union is not keyed to a circumscribed geographical area. Respondent Union's members are not required to reside within Respondent Union's geographical jurisdiction; some may reside as far away from the local area as the eastern coast of the United States. No evidence was presented about the percentage of the members of Respondent Union who were employed on the Shell Oil project during the time material who resided within the local area. Respondents, in particular Respondent Union, presumably had this information at their disposal, but for some unexplained reason failed to produce it and I will not presume that a substantial majority or even that a majority of the members of Respondent Union employed on the project resided within the geographical jurisdiction of Respondent Union. Such a presumption would be sheer speculation. Indeed, Respondents' unexplained failure to offer evidence on this point warrants an inference that a significant number of Respondent Union's members employed on the project were not local residents. For it is settled that "the omission by a party to produce relevant and important evidence of which he has knowledge, and which is peculiarly within his control, raises the presumption that if produced the evidence would be unfavorable to his cause." *Auto Workers v. NLRB*, 459 F.2d 1329, 1336 (D.C. Cir 1972), quoting *Tendler v. Jaffe*, 203 F.2d 14, 19 (1953). Accord: *Interstate Circuit v. U.S.*, 306 U.S. 208, 225–226 (1939).

[48] As indicated supra, the names of the 75 travelers and their dates of layoff are set forth in Appendix A of the decision.

[49] As indicated supra, the names of these 12 travelers and their dates of layoff are set forth in Appendix B of the decision.

[50] The complaint alleges that 130 travelers were illegally laid off during the time material herein. As indicated herein I have accounted for only 129 of these travelers. The reason for this discrepancy is that the complaint inadvertently named S. C. Reamer, who was a member of Respondent Union, as having been laid off illegally.

[51] Foremen Barnes and Thuotte, the only foremen who were asked during this proceeding how they decided on whom to select for layoff from among their crews, did not testify that their selections were motivated by a worker's competency. They testified in effect that their choice was based on considerations of union membership. Barnes testified, "I would not lay off any 250 hands. I would lay off traveler cards before I would lay off 250 people." He further testified that there were travelers on his crew who were competent pipefitters who were selected by him for layoff because they were travelers. (Tr. 884, 889–890.) Thuotte testified that when it got down to which pipefitters to select for layoff he

Continued

Respondent Employer presented no testimony from the foremen, who would be in the best position to know Respondent Employer's motivation for selecting these travelers for layoff, to support its contention that the foremen selected these 75 travelers for layoff for legitimate business reasons rather than because they were not members of Respondent Union.[52] It is for all of these reasons that I am of the view that Respondent Employer has failed to establish by a preponderance of the evidence that these 75 travelers would have been selected for layoff by their foremen irrespective of their nonmembership in Respondent Union because of their incompetency or lack of experience as pipefitters. Accordingly Respondent Employer has failed to rebut the General Counsel's showing of discriminatory motivation as to the selection of these 75 travelers for layoff. I therefore find that, as alleged in the complaint, by laying off the 75 travelers named in Appendix A on the dates opposite their names therein, Respondent Employer violated Section 8(a)(3) and (1) of the Act.

As to the 12 travelers who, as I have found supra, although plumbers by trade, were competent and experienced pipefitters or regarded as such by supervision, there is no evidence that in selecting them for layoff their foremen were motivated by either the fact that they were not pipefitters by trade or that their foremen believed that they were not competent pipefitters. Other than in the cases of George Bics, Paul Mathieson, and Gilbert Smith, discussed infra, the foremen of these 12 travelers were not called as witnesses to explain why they selected any one of them for layoff. In short, Respondent Employer produced no evidence that these 12 travelers would have been selected for layoff by their foremen irrespective of their nonmembership in Respondent Union because they were not competent or experienced pipefitters. It is for these reasons that I am of the view that Respondent Employer has failed to prove by a preponderance of the evidence that these 12 travelers would have been selected for layoff by their foremen on the dates they were laid off irrespective of their nonmembership in Respondent Union. Accordingly, Respondent Employer has failed to rebut the General Counsel's showing of discriminatory motivation as to the selection of these 12 travelers for layoff. I therefore find that, as alleged in the complaint, by laying off the 12 travelers named in Appendix B on the respective dates therein, Respondent Employer violated Section 8(a)(3) and (1) of the Act.

As to the remaining 42 travelers laid off during the time material, the record reveals they are all plumbers by trade who, as I have found supra, were presumably less qualified to perform the pipefitting work required of them than those pipefitters employed on the project who were pipefitters by trade. There is no evidence that any of the 42 was an experienced pipefitter or that supervision regarded any of them as just as competent as those pipefitters employed on the project who were pipefitters by trade. There is evidence that these traveler plumbers, who were referred to the project in derogation of Respondent Union's contractual obligation to refer only qualified pipefitters, due to their inexperience as pipefitters required closer supervision than the pipefitters who were pipefitters by trade. These circumstances persuade me that Respondent Employer has proven by a preponderance of the evidence that these 42 travelers would have been selected for layoff by their foremen on the dates they were laid off irrespective of their nonmembership in Respondent Union because they were not qualified pipefitters.[53] Accordingly, Respondent Employer has rebutted the General Counsel's showing of illegal motivation with respect to this group of layoffs. I therefore shall recommend that the complaint be dismissed insofar as it alleges that Respondent Employer violated Section 8(a)(3) and (1) of the Act by laying off the 42 travelers named in Appendix C.

As to Respondent Employer's refusal to assign unscheduled overtime work to the travelers, Respondent Employer presented no evidence that this conduct was motivated by the fact that the travelers who were not assigned overtime, which they ordinarily would have gotten, were either less competent or less experienced than the members of Respondent Union selected by the foremen. In this regard not one of the foremen who selected the workers to do the overtime work involved was called by Respondent Employer to explain why the foremen in the assignment of the overtime work discriminated in favor of the members of Respondent Union over the travelers. Rather, Respondent Employer's foremen admitted that this discrimination was based on a practice of discriminating in favor of local union members over travelers. Not a single foreman testified that this discrimination was based on considerations of competency and work experience, rather than membership considerations.[54] Unlike the circumstantial evidence surrounding the layoff of the above-described 42 traveler plumbers, the circumstantial evidence surrounding the disparate treatment accorded the travelers for purpose of overtime work does not establish by a preponderance of

followed the practice of laying off the nonmember travelers before the members of Respondent Union. (Tr. 1091.) I also note that General Foremen Stuart and Cratsenburg failed to justify the foremen's selection of travelers for layoff in terms of any legitimate business considerations. Rather, Stuart testified that the reason travelers were selected for layoff before members of Respondent Union was because "it's always been the custom that the travelers go first." Cratsenburg testified that the reason members of Respondent Union were given preferential treatment over travelers for layoff selection was because the "practice is that the travelers go first."

[52] See, e.g., *Goodyear Tire & Rubber Co. v. NLRB*, 456 F.2d 465 (5th Cir. 1972), where in a comparable situation the court noted that "the prime mover in Dobbs' discharge was [Foreman] Porter. Any examination of [the Employer's] motive for discharge, therefore, must necessarily concentrate on Porter's reasons for firing Dobbs." Id. at 468.

[53] In so concluding I have taken into account the failure of the foremen of these travelers to testify about what motivated the foremen to select the travelers for layoff. Nonetheless I am persuaded that the above-described circumstantial evidence warrants the inference that these travelers would have been selected by their foremen for layoff during the normal course of business irrespective of their nonmembership in Respondent Union.

[54] The vague testimony of Construction Superintendent Bertrand and Head General Foreman Goldie that some of the overtime was worked on Saturdays for safety reasons and to minimize the risk of injuring people on the project is no substitute for what is lacking in the record, namely, the testimony of the foremen who selected the workers for overtime as to their motivation for making their selections.

the evidence that the foremen would have refused to assign overtime to the travelers employed on the job irrespective of their nonmembership in Respondent Union because they were not qualified pipefitters. Accordingly, I am of the view that Respondent Employer has failed to rebut the General Counsel's showing that during the months of March through May 1982 in refusing to assign travelers overtime work and in giving preferential treatment to Respondent Union's members over the travelers in the assignment of overtime work, Respondent Employer was discriminatorily motivated. I therefore find that as alleged in the complaint Respondent Employer during the months of March through May 1982 violated Section 8(a)(3) and (1) of the Act by assigning overtime work to members of Respondent Union in preference to the travelers, thereby causing travelers who were employed during this period to receive less overtime work than they would have normally received.

As I have mentioned supra, there is evidence when viewed in isolation which indicates that travelers George Bics, Paul Mathieson, and Gil Smith, who were laid off on May 14, 1982, would have been laid off on that date irrespective of their nonmembership in Respondent Union because their crew, the rigging crew, was discontinued. Thus, Rigging Foreman Wayne Shouse testified that in April and May 1982 the rigging crew which he supervised was down to only three pipefitters—Bics, Mathieson, and Smith—and that about May 14, 1982, Shouse's general foreman T. J. Cratsenburg told Shouse that "all the rigging is done in [Cratsenburg's] area, we have to lay off the rigging crew," and that because of this Shouse laid off Bics, Mathieson, and Smith. Shouse, a member of Respondent Union, was not laid off, but remained on the job as a rank-and-file pipefitter and remained on the job in this capacity throughout the shutdown phase of the project. Shouse also testified that during the shutdown there was no rigging crew employed as such, but that each crew did its own rigging work with perhaps some members of a crew doing more of the rigging than others.

Shouse's aforesaid testimony when viewed by itself warrants the conclusion that travelers Bics, Mathieson, and Smith would have been laid off on May 14, 1982, irrespective of their nonmembership in Respondent Union. But there is other evidence in the record which seriously detracts from this conclusion and in my view neutralizes Shouse's testimony and makes it highly questionable as to whether Bics, Mathieson, and Smith if they had not been nonmembers of Respondent Union would have been laid off on May 14, 1982, or like Foreman Shouse, a member of Respondent Union, retained on the job to work the shutdown. Thus, contemporaneous with the layoff, General Foreman Cratsenburg was informing employees that he regarded Bics, Mathieson, and Smith as good workers and because of this wanted them to work the shutdown. In addition, on May 14, 1982, when Cratsenburg apologized to Bics, Mathieson, and Smith for having to lay them off, he did not explain to them that the reason for their layoff was that there was no more work for a rigging crew; rather his explanation was that he had been instructed by his superiors to lay them off because no travelers were going to work the shutdown. Likewise, when Foreman Shouse informed Bics, Mathieson, and Smith of their layoff, he did not explain to them that the reason was that there was no more work for the rigging crew, but like Cratsenburg he told them that they were being laid off because there would be no travelers employed during the shutdown. I also note that all three of these travelers performed work other than rigging work on the project. As a matter of fact, Smith at the time of the layoff had performed more than 3000 hours of pipefitting work within Respondent Union's jurisdiction which was sufficient to make him eligible for book 1 registration at the hiring hall. Also Mathieson had several years of experience working as a pipefitter and Albert Allen, one of the travelers on the job who was a pipefitter by trade, credibly testified that Bics and Mathieson worked with him on the project as fitters and did good work. Thus, when Shouse's testimony is viewed in the context of the aforesaid additional evidence, I am persuaded that, on balance, Respondent Employer has failed to prove by a preponderance of the evidence that on May 14, 1982, Bics, Mathieson, and Smith would have been laid off irrespective of their nonmembership in Respondent Union because of the fact that there was no more work for their rigging crew. Rather, the evidence indicates that there was a strong likelihood that Respondent Employer, but for their nonmembership in Respondent Union, would have continued to employ them on the job like Rigging Foreman Shouse.

In concluding that Respondent Employer with respect to the layoffs of Bics, Mathieson, and Smith, as well as the other instances where I have found, supra, failed to prove by a preponderance of the evidence that travelers would have been laid off or denied overtime for legitimate business reasons irrespective of their nonmembership in Respondent Union, I have been mindful of the statement of the Supreme Court in *NLRB v. Transportation Management Corp.*, 462 U.S 393, 403 (1983), that in cases of this nature in considering a respondent employer's argument that it would have taken the same adverse action irrespective of an employee's protected conduct, the Board should take into account that

> The employer is a wrongdoer; he has acted out of a motive that is declared illegitimate by the statute. It is fair that he bear the risk that the influence of legal and illegal motives cannot be separated, because he knowingly created the risk and because the risk was created not by innocent activity but by his own wrongdoing.

b. *Respondent Employer's supervisors' statements about Respondent Employer's discrimination against the travelers*

Having found Respondent Employer discriminated against the travelers employed on the project in favor of the members of Respondent Union with respect to the assignment of overtime work and the selection of workers for layoff and that said discrimination was illegally motivated in violation of Section 8(a)(3) and (1) of the Act, it follows that the several statements made to the travelers by Respondent Employer's foremen announcing

this illegal conduct likewise violated Section 8(a)(1) of the Act. More specifically, I find that Respondent Employer violated Section 8(a)(1) as follows: As described in detail supra, during April and May 1982 several of the foremen informed travelers that the travelers employed on the project could not be assigned overtime work and would be laid off from work prior to the shutdown phase of the project, because they were travelers, not members of Respondent Union; as described in detail supra, during April or May 1982 General Foreman Stuart told traveler Cangi that if Cangi transferred his membership into Respondent Union Cangi would be able to work the shutdown phase of the project; as described in detail supra, on May 13, 1982, Foreman Bill Springer told traveler Mayes that the reason for his layoff was that Respondent Union had given instructions that all of the travelers were to be laid off; as described in detail supra, during April 1982 Foreman Wayne Springer told traveler Mayes that the reason Mayes and another traveler could not work overtime was due to instructions from Respondent Union; and as described in detail supra, during April or May 1982 Foreman Al Thuotte told traveler William Grady and another traveler that it was the policy of Respondent Union that Respondent Employer could not assign the travelers overtime work. By engaging in the aforesaid conduct I find that Respondent Employer, as alleged in the complaint, violated Section 8(a)(1) of the Act.[55]

c. *The responsibility of Respondent Union for Respondent Employer's discrimination against the travelers*

Section 8(b)(2) of the Act declares it to be an unfair labor practice for a labor organization "to cause or attempt to cause an employer to discriminate against an employee in violation of" Section 8(a)(3) of the Act. I have found, supra, that Respondent Employer violated Section 8(a)(3) of the Act by not assigning overtime work to travelers and by laying off travelers because they were not members of Respondent Union and in order to give preference to members of Respondent Union. The question presented here is whether the General Counsel has proven by a preponderance of the evidence that Respondent Union caused Respondent Employer to engage in the aforesaid illegal conduct.

The law is settled that "[a] union cannot be found to have caused employer discrimination unless, at the very least, the evidence is sufficient to support a reasonable inference of a union request or a union-employer understanding." *Walter J. Barnes Electrical Co.*, 188 NLRB 183, 186 (1971). I am persuaded that the record herein will not support a finding that the General Counsel has proven by a preponderance of the evidence that Respondent Union engaged in conduct designed to secure the discriminatory treatment of the travelers or that there was an understanding between Respondents which resulted in the discriminatory treatment. The reasons for this conclusion are as follows.

There is no direct evidence that representatives of Respondent Union caused representatives of Respondent Employer to discriminate against the travelers in favor of the members of Respondent Union. As a matter of fact all of Respondents' representatives who were questioned during the hearing about this matter testified to the effect that Respondent Employer's discriminatory conduct in this case was not caused by any representative of Respondent Union. Likewise, there is insufficient circumstantial evidence to warrant a finding that Respondent Union caused Respondent Employer to discriminate against the travelers in favor of Respondent Union's members. I recognize, as described in detail supra, that one foreman told a traveler that the reason for the traveler's layoff was due to the instruction of Respondent Union that all travelers were to be laid off and, as described in detail supra, that two foremen told travelers that the reason travelers could not work overtime was due to instructions from Respondent Union. However, this evidence cannot be relied on to establish that Respondent Union caused Respondent Employer to discriminate against the travelers. *Walter J. Barnes Electrical Co.*, 188 NLRB 183, 186, 187 (1971); *Railway Clerks (Safety Cabs)*, 180 NLRB 126 (1969); *Stage Employees Local 776 (Film Editors)*, 124 NLRB 842, 843 fn. 2 (1959). And the fact that, as I have found infra, on May 14, 1982, Respondent Union's steward Wareham, in violation of Section 8(b)(1)(A) of the Act, threatened traveler Gilbert Smith with loss of employment if he attempted to contest Respondent Employer's discrimination against the travelers, while it is evidence that Respondent Union was more than happy to reap the benefits for its members of Respondent Employer's policy of illegal discrimination, is insufficient to prove that Respondent Union caused Respondent Employer to institute the discriminatory policy or was otherwise responsible for the policy. Likewise the fact that Respondent Union's steward Wareham, as found infra, told the employees about Respondent Employer's policy of discrimination against the travelers is not proof that Respondent Union caused Respondent Employer to institute and/or maintain this policy.

Nor has the General Counsel established by a preponderance of the evidence that Respondent Employer's discrimination against the travelers was the result of an understanding between Respondents. There is no evidence, direct or circumstantial, of either a written or verbal understanding between Respondents whereby Respondent Employer agreed to discriminate against the travelers in favor of the members of Respondent Union. I have considered that Respondents in their posthearing briefs have

[55] In so concluding I have considered that the foremen herein were members of the bargaining unit and represented by the Union. In *Montgomery Ward & Co.*, 115 NLRB 645 (1956), and its progeny, the Board has held that a supervisor who is a member of the bargaining unit is regarded by employees as one of themselves rather than as a representative of management. Accordingly, the Board has generally refused to hold such an employer responsible for the statements of such a supervisor absent evidence that the employer encouraged, authorized, or ratified the supervisor's activities or acted in such a manner as to lead the employees to reasonably believe that the supervisor was acting on behalf of management. Here, by actually engaging in the illegal conduct which the supervisors were telling the employees about, Respondent Employer in effect authorized or ratified the supervisors' activities or acted in such a manner as to lead the employees to reasonably believe that the supervisors were acting on behalf of management.

urged that the existence of a longstanding practice in the pipefitting industry of employers preferring local union members over travelers has resulted in the practice becoming a part of the National Construction Agreement, the agreement which governs Respondents' bargaining relationship in this case. This contention, however, does not amount to an admission by Respondents that there was an understanding between Respondents that Respondent Employer would grant preferential treatment to Respondent Union's members over the travelers for layoff and overtime work purposes. Respondents' argument in this respect is not based on the terms of either an oral or written understanding entered into between Respondents, but rather on the testimony of Arbitrator Melvin Lennard, who as an expert witness for Respondent Employer testified that if there was a longstanding practice in the pipefitting industry pursuant to which employers in that industry granted preferential rights to the members of local unions over travelers for purposes of layoffs and overtime, that by virtue of this longstanding practice the members of Respondent Union employed on the Shell Oil project would have, in his opinion, a right under the terms of the National Construction Agreement to be afforded preferential treatment over the travelers for purposes of overtime work and layoff selection. Arbitrator Lennard was very careful, however, to note that the right of the members of Respondent Union to such preferential treatment "was not based necessarily on the understanding of the parties but on the practice that you have described [referring to the alleged longstanding past practice whereby local union members were given preferential treatment over travelers by the employers in the pipefitting industry]." (Tr. 1240.) In short, the understanding relied on by Respondents in their posthearing briefs is not the type of understanding which exists by virtue of an overt or affirmative act engaged in by Respondent Union. Accordingly, it does not amount to evidence of union causation within the meaning of Section 8(b)(2) of the Act.

It is for all of the foregoing reasons that I am of the opinion that the General Counsel has not proven by a preponderance of the evidence that Respondent Employer's illegal discriminatory treatment of the travelers in this case was caused by Respondent Union. I therefore shall recommend the dismissal of these allegations of the complaint.

d. *The statements of Respondent Union's steward about Respondent Employer's discrimination against the travelers*

As described in detail supra, when the pipefitters were referred to the project from Respondent Union's hiring hall the first thing they did on their arrival was to give their referral slips to Richard Wareham, Respondent Union's steward, Respondent Union's representative on the jobsite. Wareham at this time informed the groups of newly arrived pipefitters about the various company rules and regulations which would govern their work on the project, including the fact that travelers would not be assigned any of the unscheduled overtime work as this work would be done by the members of Respondent Union. Also in April or May 1982, as described in detail supra, when traveler Michael Cangi spoke to Wareham about the fact that Cangi's foreman had assigned him to work Saturday overtime, Wareham explained to Cangi that the reason Cangi had been assigned this overtime was that the foreman mistakenly thought Cangi was a member of Respondent Union. Lastly, on May 14, 1982, as described in detail supra, traveler Gilbert Smith, who had been laid off that day, complained to Wareham that members of Respondent Union were being hired at the same time travelers were being laid off. Wareham replied, "[T]hat's the way it is," and in effect told Smith that only members of Respondent Union, no travelers, would work the shutdown phase of the project. Smith responded by stating that he did not think that this discrimination against the travelers was fair and that he intended to fight it. Wareham, in response, warned Smith that if Smith contested the matter Smith would never work in the area again.

The General Counsel contends that the above-described statements of Wareham that Respondent Union's members rather than travelers would be assigned overtime work violated Section 8(b)(1)(A) of the Act.[56] I disagree for these reasons. As I have found supra, Respondent Union did not cause nor was it otherwise responsible for the Employer's illegal discrimination against the travelers in the assignment of overtime work. Nor do the circumstances under which Wareham made the aforesaid statements lead to the conclusion that Wareham by his conduct placed himself in a situation reasonably calculated to lead the employees to believe that Respondent Union was a party to Respondent Employer's illegal discrimination. Rather, when new workers arrived on the jobsite Wareham was merely acting as a conduit for Respondent Employer in explaining to the employees the several company work rules which would govern their work on the job. Objectively speaking, the circumstances do not warrant the inference that Wareham's explanation of the various company rules was calculated to lead the employees to reasonably believe that the Union was responsible for these rules, rather than that Wareham in his capacity as union steward was simply performing the ministerial act of relaying to the employees the various company work rules which would govern their work on the project. Under the circumstances I am of the opinion that Wareham's above-described statements concerning Respondent Employer's discrimination against the travelers did not violate Section 8(b)(1)(A) of the Act.

I agree with the General Counsel that Respondent Union violated Section 8(b)(1)(A) of the Act by virtue of Wareham's above-described May 14, 1982 threat to traveler Gilbert Smith that Smith would never work in the area again if he attempted to fight Respondent Employer's illegal discrimination of laying off the travelers because of their nonmembership in Respondent Union. The threat that Smith would never work in the area again if he attempted to contest Respondent Employer's illegal conduct was reasonably calculated to coerce or intimi-

[56] Sec. 8(b)(1)(A) of the Act forbids a union "to restrain or coerce . . . employees in the exercise of the rights guaranteed in Section 7 of the Act."

date Smith from contesting the Company's illegal policy by exercising his rights under Section 7 of the Act to file unfair labor practice charges with the Board or to file a grievance with his collective-bargaining representative, Respondent Union, challenging the Company's illegal practice. I therefore find that Respondent Union violated Section 8(b)(1)(A) of the Act on May 14, 1982, when Wareham threatened traveler Gilbert Smith with a loss of employment if he attempted to fight Respondent Employer's illegal policy of laying off travelers because of their nonmembership in Respondent Union.[57]

B. *Respondent Union's Refusal to Allow Referral Applicants to Examine the Dispatch Book*

1. The evidence[58]

Respondent Union, which operates an exclusive hiring hall, dispatches applicants from its hall from 8 a.m until approximately 12 noon.

On approximately May 18, 1982, Gilbert Smith registered for work at Respondent Union's hiring hall. The next morning at approximately 10 a.m. Smith went to the dispatch window and spoke to the dispatch secretary. He asked where his name was located on the dispatch book and if he could examine the dispatch book to see where his name was located.[59] The dispatch secretary answered, "No," and when Smith asked how far his name was from the top of the list of registrants, the dispatch secretary told him, "[W]e don't have time right now" to furnish that information. The same dispatch secretary previously in September 1981 had refused Smith's request to examine the dispatch book.

On approximately May 4, 1982, at approximately 11 a.m., Virgil James, who had recently registered at Respondent Union's hiring hall, went to the dispatch window of the hiring hall and spoke to the dispatch secretary. He asked if he could examine the dispatch book in which he was registered.[60] The dispatch secretary replied, "No," and stated that she was too busy to show him the book, but told him that he was "way down" the list. Thereafter the dispatch secretary showed James the particular page in the dispatch book on which his name appeared, but refused to allow him to examine the book so that he could turn the pages and determine how many applicants were registered ahead of him.

Previously, in the fall of 1981, James, who at the time was registered for work at Respondent Union's hiring hall, asked Respondent Union's business agent Vic Urso, who was in the dispatch office, if he could examine the dispatch book. Urso, without explanation, denied the request, which was made during the period when the dispatch office was open for business. Subsequently, in May 1982, after James' unsuccessful effort to have the dispatch secretary allow him to examine the dispatch book, supra, James asked Urso if he and some other applicants could examine the dispatch books on which they were registered. The request was made at approximately 11 a.m. at the dispatch window where James and several other referral applicants had gathered. James asked Urso whether James and several other applicants who were with him could examine the dispatch book because they wanted to determine "how far down on the list [they] were."[61] Urso told them that they were "way down on the list." Urso also showed one or two of the applicants, including James, the particular pages in the dispatch book where their names were listed, but refused to allow them to examine the dispatch book. James explained to Urso that they would like to examine the dispatch book in order to count the number of applicants who were registered ahead of them. Urso, without explanation, refused this request.

On approximately May 10, 1982, William Grady registered for work at Respondent Union's hiring hall. Subsequently, about May 12, 1982, at approximately 11 a.m., Grady with another applicant asked the dispatch secretary if they could examine the dispatch book on which they were registered. The response of the dispatch secretary, who at the time had the dispatch book in her hands, was to close the book and, without any explanation, tell them they could not examine it.[62]

2. Discussion and conclusionary findings

As described in detail supra, during May 1982 on four separate occasions several applicants for employment who had registered for work at Respondent Union's exclusive hiring hall asked agents of Respondent Union for permission to examine the dispatch books on which they were registered and in each instance their request was denied. In two of the four instances the dispatch secretary in refusing to honor the requests, which were made during the business hours of the dispatch office, explained that she was too busy. In the other two instances the referral applicants' requests to examine the dispatch books, which requests were also made during the business hours of the dispatch office, were denied without any explanation.

The only evidence presented by Respondent Union with respect to this allegation is the testimony of Re-

[57] I have considered that although the complaint alleges Wareham's May 14, 1982 conversation with Smith as violating Sec. 8(b)(1)(A) of the Act, the violation found herein was not specifically alleged. However, "it is well established that a violation not alleged in the complaint may nevertheless be found where, as here, the unlawful activity was related to and intertwined with the allegations in the complaint, and the matter was fully litigated before the Administrative Law Judge." *Doral Hotel & Country Club*, 240 NLRB 1112 fn. 3 (1979).

[58] The evidence herein is based on the undenied and uncontradicted testimony of Gilbert Smith, Virgil James, and William Grady. Each impressed me as a sincere and reliable witness.

[59] Smith's reason for seeking this information was to determine whether he was far enough down in the order of referral so that it would be safe for him to take a vacation without having to risk his name being called for a job opening.

[60] James' reason for desiring to examine the dispatch book was to determine the number of applicants registered ahead of him so he would have some idea of his chances of being dispatched.

[61] The reason that James and the other referral applicants who were with him wanted to examine the dispatch book was to determine the number of applicants registered ahead of them and to determine whether the applicants who were registered were being dispatched in their order of registration.

[62] Grady and the other applicant wanted to examine the dispatch book in which they were registered in order to determine where they were on the dispatch list.

spondent Union's business manager Richard Slawson that the Respondent Union's policy is not to allow the dispatch books out of the dispatch office because they are important business records which, if lost or destroyed, would be virtually irreplaceable. Slawson further testified that Respondent Union's policy is that when referral applicants ask the dispatch secretary for permission to examine the dispatch books that the dispatch secretary tells them to go to Slawson's office to make their request and that, when they make their request to Slawson, Slawson escorts them into the dispatch office and in Slawson's presence the applicants are permitted to examine the dispatch books.

The Board has held that a union, such as Respondent Union, which operates an exclusive hiring hall, violates its duty of fair representation and Section 8(b)(1)(A) of the Act when it refuses to permit a referral applicant to view its referral records. *Operating Engineers Local 324 (AGC of Michigan)*, 226 NLRB 587 (1976); *Plasterers Local 90 (Southern Illinois Builders Assn.)*, 236 NLRB 329, 338 (1978). Respondent Union in defending against its refusal to allow the referral applicants in this case to examine its dispatch books urges that the dispatch secretary and union business agent were privileged to refuse the applicants' requests because, in the first place, the requests were made during business hours when the books were in use, thus, the Union's agents acted reasonably in refusing the requests and, in the second place, the applicants in making their requests to examine the dispatch books failed to follow Respondent Union's prescribed procedure which was a reasonable one. These defenses are without merit for the following reasons.

The referral applicants were not obliged to follow Respondent Union's alleged procedure for examining the dispatch books because they were not informed of the existence of this procedure; there is no evidence that at the time they were refused permission to examine the dispatch books or that at any other time the referral applicants were informed that the correct procedure was for them to speak to Business Manager Slawson if they wanted to examine the dispatch books. And with respect to the fact that the requests were made during the business hours of the dispatch office, I note that in two of the four instances where the requests to examine the dispatch books were denied no explanations were offered for the refusals. The applicants were not advised directly or by implication that they could return to the dispatch office after its business hours and at that time they would be permitted to examine the relevant dispatch books. Regarding the other two instances where the dispatch secretary did explain to the applicants that she was too busy to allow them to examine the dispatch books, the dispatch secretary did not indicate that if the applicants returned when she was not busy that she would allow them to examine the books. As a matter of fact, the dispatch secretary was not authorized to permit an applicant to examine the dispatch books because, according to Respondent Union's alleged policy, supra, an applicant before being allowed to examine the dispatch books must first get the permission of Business Manager Slawson who would personally escort the applicant into the business office to examine the books, apparently without limitation as to whether or not the dispatch office was open for business. It is for the foregoing reasons that I find that Respondent Union has not justified its refusal to allow the referral applicants permission to examine its dispatch books.

Based on the foregoing I find that Respondent Union during May 1982 unjustifiably refused to allow referral applicants Smith, James, Grady, and other unidentified applicants to examine Respondent Union's dispatch books in violation of Section 8(b)(1)(A).

CONCLUSIONS OF LAW

1. The Respondent Employer, M. W. Kellogg Constructors, Inc. is an employer engaged in commerce with the meaning of Section 2(6) and (7) of the Act.

2. The Respondent Union, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 250, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent Employer violated Section 8(a)(3) and (1) of the Act by refusing to assign overtime work to the travelers employed on the Shell Oil project from March 1 through May 31, 1982, and by laying off the 87 travelers whose names appear in Appendices A and B on the dates opposite their names, because said travelers were not members of Respondent Union and in order to give preference to members of Respondent Union.

4. Respondent Employer violated Section 8(a)(1) of the Act as follows: By informing employees on the Shell Oil project that travelers could not be assigned overtime work and would be laid off from work prior to the shutdown phase of the project, because they were travelers and not members of Respondent Union; by informing a traveler on the Shell Oil project that if he transferred his membership into Respondent Union he would be eligible to work the shutdown phase of the project; by telling a traveler on the Shell Oil project that the reason for his layoff was that Respondent Union had given instructions that all of the travelers were to be laid off; by telling a traveler on the Shell Oil project that the reason that the traveler and another traveler could not work overtime was due to instructions from Respondent Union; and by telling travelers on the Shell Oil project that it was the policy of Respondent Union that Respondent Employer could not assign the travelers any overtime work.

5. By threatening an employee with loss of employment if he contested Respondent Employer's above-described unlawful policy of laying off travelers because of their nonmembership in Respondent Union, Respondent Union violated Section 8(b)(1)(A) of the Act.

6. By refusing to permit applicants for employment, who were registered for work at its exclusive hiring hall, to examine its dispatch books, Respondent violated Section 8(b)(1)(A) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent Employer violated Section 8(a)(3) and (1) of the Act by refusing to assign overtime work to the travelers employed on the Shell Oil project during the period encompassing March 1 through May 31, 1982, because of their nonmembership in Respondent Union, I shall recommend that Respondent Employer make whole the travelers employed by it on the Shell Oil project during the aforesaid period of time for any loss of earnings they may have suffered by virtue of Respondent Employer's discrimination,[63] with interest thereon to be computed in the manner prescribed in *Florida Steel Corp.*, 231 NLRB 651 (1977). See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962).

Having also found that Respondent Employer violated Section 8(a)(3) and (1) of the Act by laying off the 87 travelers employed on the Shell Oil project, whose names appear in Appendices A and B on the dates opposite their names, because of their nonmembership in Respondent Union, I shall recommend that they shall be made whole for any loss of earnings or other benefits they may have suffered as the result of the discrimination against them,[64] as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest thereon to be computed in the manner prescribed in *Florida Steel Corp.*, 231 NLRB 651 (1977). See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962).

I have not recommended the usual remedy of reinstatement, inasmuch as the laid-off discriminatees had no expectation of continued employment with the Respondent Employer beyond the date on which work at the Shell Oil project was completed. However, I shall recommend that Respondent Employer inform each one of the discriminatees named in Appendices A and B, in writing, that he or she will be considered eligible for employment in the future at any of its projects, on a nondiscriminatory basis, if he or she should choose to apply for employment at any of them. *Steelcon, Inc.*, 266 NLRB 881 (1983), and *Franchi Bros. Construction Corp.*, 232 NLRB 179 (1979). I shall also recommend that Respondent Employer mail copies of the notice recommended herein to each employee employed by Respondent Employer on the Shell Oil project as a pipefitter during the period of March 1 through May 30, 1982, the time of the unfair labor practices herein.[65]

[Recommended Order omitted from publication.]

[63] The record reveals the names of the travelers employed during the period of April 7 through May 31, 1982, who were laid off during that time period (Jt. Exh. 1, app. E), but fails to reveal the names of the travelers, if there were any, who were employed from March 1 to April 7, 1982, but who were terminated prior to April 7, 1982. The identity of this latter group of travelers will be left to the compliance stage of this proceeding. *NLRB v. Iron Workers Local 433*, 600 F.2d 770, 778 (9th Cir. 1979). Of course the amount of overtime pay, if any, which any one of the discriminatees who were employed during the relevant time period is entitled to receive will be determined in the compliance stage of this proceeding.

[64] Respondent Employer's backpay liability will toll no later than the date that its work on the Shell Oil project ended, which, as I have found supra, occurred sometime in July 1982. Respondent Employer will have an opportunity in the compliance stage of this proceeding to prove that some or all of the discriminatees would have been selected for layoff even prior to the actual end of its operations on the project. But so there will be no misunderstanding of the intent of this remedial order, I also note that Respondent Employer is precluded in the compliance stage of this proceeding from attempting to prove that some or all of the 87 discriminatees would have been laid off on the dates opposite their names in Appendices A and B during the normal course of business irrespective of their nonmembership in Respondent Union. The question of whether Respondent Employer would have laid off those employees on those dates for legitimate reasons even absent their nonmembership in Respondent Union was an issue encompassed by the complaint in this proceeding and, as I have found supra, Respondent Employer in this proceeding failed to make such a showing. In short, the principles of res judicata preclude the relitigation of this issue during the compliance stage of this proceeding.

[65] Where, as here, an employer's termination of its operations precludes notification through posting, it is the Board's customary procedure to require that the appropriate notice be mailed to all the employees who were employed at the time the unlawful act occurred in order to eliminate, to the extent possible, the lingering effects on those employees who might have been exposed to that unfair labor practice. See *Daniel Construction Co.*, 239 NLRB 1335 fn. 1 (1979), enfd. 634 F.2d 621 (4th Cir. 1980); *Bell & Howell Schools*, 226 NLRB 601 fn. 2 (1976); *Wolfson Mfg. Co.*, 197 NLRB 970 (1972) Accord: *Sturgis Newport Business Forms v. NLRB*, 563 F.2d 1252, 1259 (5th Cir. 1977).

APPENDIX A

Employee name	*Layoff Date*
D. E. Meyers	4/7/82
P. R. Moore	4/7/82
D. B. Prince	4/7/82
M. L. Vessels	4/7/82
T. H. Dazey	4/8/82
D. R. Bauer	4/9/82
D. D. Beecham	4/9/82
W. D. Bell, Jr.	4/9/82
C. Brown	4/9/82
T. A. Casner	4/9/82
W. D. Harris	4/9/82
D. P. Hubbert	4/9/82
D. T. Jarvie	4/9/82
A. B. Kerfoot	4/9/82
K. M. Kidd	4/9/82
C. D. Miles	4/9/82
J. E. Pegg	4/9/82
E. C. Perez	4/9/82
L. R. Womack	4/9/82
R. J. Gurganus	4/14/82
D. N. Broskey	4/16/82
F. E. Lenz	4/16/82
J. W. Roland	4/19/82
L. J. Kroger	4/22/82
H. Osborne	4/23/82
R. F. Trusty	4/27/82
M. B. Burch	4/28/82
D. G. Harris	4/29/82
D. R. Robinson	4/29/82
J. P. Brunning	4/30/82
J. B. Burba	4/30/82
D. Estrada	4/30/82
C. R. Heckman	4/30/82
R. E. Hicks	4/30/82
G. J. Keller	4/30/82
M. V. Patrick	4/30/82
J. S. Pina	4/30/82
L. F. Raftery	4/30/82

Employee name	*Layoff Date*
R. A. Roche	4/30/82
D. V. Sillanpa	4/30/82
L. H. Thomas	4/30/82
E. Van Valkenburg	4/30/82
W. C. Wasson	4/30/82
C. A. Bledsoe	5/7/82
J. A. Kenowsky	5/7/82
W. M. Lamb	5/7/82
R. J. Lavin	5/7/82
J. F. Locke	5/7/82
V. Martinez	5/7/82
A. D. Moon	5/7/82
R. R. Oom	5/7/82
M. C. Pierce	5/7/82
M. L. Taber	5/7/82
B. E. Tillman	5/7/82
E. Underwood	5/7/82
C. L. Williams	5/7/82
J. J. Ward	5/7/82
A. E. Allen Jr.	5/14/82
J. R. Bostick	5/14/82
G. F. Griffith	5/14/82
A. E. Halter Jr.	5/14/82
J. M. Hulsey	5/14/82
D. E. Jacobs	5/14/82
G. Jones	5/14/82
H. J. Korff	5/14/82
D. R. Mock	5/14/82
F. Moore	5/14/82
J. W. Overton	5/14/82
A. R. Boutin	5/19/82
D. L. Cummings	5/19/82
J. R. Evans	5/19/82
C. Francis	5/19/82
A. F. Gonzalez	5/19/82
J. A. Rabun	5/19/82
J. K. Williams	5/19/82

APPENDIX B

Employee Name	*Layoff Date*
L. J. Lindquist	4/9/82
C. R. Colby	5/7/82
H. R. Martel	5/7/82
K. R. Pashby	5/7/82
J. P. Rabey	5/7/82
G. A. Bics	5/14/82
P. C. Mathieson	5/14/82
G. L. Mayes	5/14/82
P. E. Segura	5/14/82
G. L. Smith	5/14/82
M. A. Cangi Sr.	5/19/82
R. C. O'Bosky	5/19/82

APPENDIX C

Employee Name	*Layoff Date*
L. J. Trupiano	S. Ingianne
R. R. Andrews	V. James
D. R. Casteel	E. E. Nale
B. K. Chesser	D. G. Oberly
E. D. Datz	H. Robinson
A. G. Dawson	C. W. Rozar
M. M. Maloney	E. E. Shank
G. M. O'Brien	L. R. Valdez
A. D. Piper	C. E. Wittman
V. B. Richard	H. O Casner
K. E. Riley	G. H. Crandell
R. L. Riley	W. T. Grady
A. Ronholt	J. Jenkins
L. L. Strongman	W. T. McNulty
L. E. White	J. S. Miller
P. S. Younker	W. Teal Jr.
W. W. Davis	R. M. Bragdon
C. W. Beal	G. R. Judd
W. H. Clark	H. Q. Rendon
J. G. Davis	T. D. Wyer
E. L. Gonzales	D. Daniels

Wm. T. Burnett and Co., Inc. *and* **United Brotherhood of Carpenters and Joiners of America, AFL-CIO.** Cases 11-CA-10690 and 11-RC-5110

14 December 1984

DECISION, ORDER, AND DIRECTION OF SECOND ELECTION

BY CHAIRMAN DOTSON AND MEMBERS ZIMMERMAN AND HUNTER

On 26 August 1983 Administrative Law Judge Hutton S. Brandon issued the attached decision. The Respondent Company filed exceptions, a supporting brief, and an answering brief; the General Counsel filed cross-exceptions, a supporting brief, and an answering brief; and the Charging Party Union filed cross-exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions only to the extent consistent with this Decision and Order.

We would not on the basis of the 8(a)(1) violation found grant a bargaining order. There is no reason to believe nor have such findings been made that a fair rerun election would be precluded by the Respondent's commission of this 8(a)(1) violation.[2] Accordingly, the 10 November election will be set aside and a second election directed in the appropriate unit as set forth in the decision.[3]

ORDER

The National Labor Relations Board orders that the Respondent, Wm. T. Burnett and Co., Inc., Statesville, North Carolina, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Announcing and granting wage increases to its employees in order to dissuade them from supporting United Brotherhood of Carpenters and Joiners of America, AFL-CIO.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Post at its places of business in Statesville, North Carolina, copies of the attached notice marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Region 11, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that the election held on 10 November 1982 in Case 11-RC-5110 be set aside and remanded to the Regional Director for Region 11 to conduct a new election.

IT IS FURTHER ORDERED that the complaint be dismissed insofar as it alleges violations not found herein.

[Direction of Second Election omitted from publication.]

[1] We adopt the judge's finding that the Respondent did not violate Sec. 8(a)(1) of the Act when, through its president Townsend, it showed employee Holland a portion of Townsend's speech stating, inter alia, that "In the meantime, during this long negotiation period, your wages *would be frozen* by law . . . ." (Emphasis added.) While we do not quarrel with the judge's recitation of the law regarding wage increases during negotiations, we find that he misquoted Townsend's statement by substituting "could be frozen" for "would be frozen" which appears in the text of the speech. We would, nevertheless, affirm the judge's finding, see *R. L. White Co.*, 262 NLRB 575 (1982).

[2] *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969). *Walgreen Co.*, 221 NLRB 1096 (1975). We find it unnecessary to rule on the judge's discussion of circumstances warranting a bargaining order.

[3] Having found a bargaining order unwarranted we have no need to make findings on whether the Union represented a majority of the unit employees based on valid authorization cards.

[4] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT announce or grant a wage increase to our employees in order to dissuade them from supporting United Brotherhood of Carpenters and Joiners of America, AFL-CIO.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WM. T. BURNETT AND CO., INC.

DECISION

STATEMENT OF THE CASE

HUTTON S. BRANDON, Administrative Law Judge. This case was tried at Statesville, North Carolina, on June 20–22, 1983. The charge in Case 11–CA–10690 was filed by United Brotherhood of Carpenters and Joiners of America, AFL–CIO (Union), on November 19, 1982,[1] and a complaint and notice of hearing issued on December 30 alleging violations of Section 8(a)(1) of the National Labor Relations Act (the Act), by Wm. T. Burnett and Co., Inc. (Respondent or the Company). The complaint was amended on April 14, 1983, to include an allegation that Respondent's unfair labor practices were so serious and substantial in character as to warrant the entry of a remedial order requiring Respondent to recognize and bargain with the Union as the exclusive collective-bargaining representative of its employees in the appropriate unit specified in the amended complaint.

The petition in Case 11–RC–5110 was filed by the Union on September 22 and pursuant to a Stipulation For Certification Upon Consent Election approved by the Regional Director for Region 11 on October 12 a secret-ballot election was held on November 10.[2] A majority of valid ballots counted plus challenged ballots were cast against representation by the Union. On November 16 the Union filed timely objections to conduct affecting the results of the election. The Regional Director found three of the Union's numbered objections raised issues which could best be resolved by a hearing and recommended approval of the Union's request to withdraw certain other objections to the election. Noting that the evidence in support of the Union's objections was similar to the evidence submitted by the Union in support of allegations in Case 11–CA–10690, the Regional Director on April 18, 1983, in conjunction with his report on objections issued an order consolidating Case 11–RC–5110 with Case 11–CA–10690 for hearing.[3]

The pleadings in Case 11–CA–10690 raise the issue of whether Respondent violated Section 8(a)(1) of the Act by unlawfully soliciting employees' grievances and implying that they would be remedied in order to discourage employees' union activity, unlawfully threatening employees with loss of jobs and loss of existing benefits if they selected the Union as their collective-bargaining representative, soliciting employees to revoke union authorization cards, announcing and thereafter granting employees a general wage increase in order to dissuade employees from supporting the Union, and interrogating employees regarding their union sympathies. The issues to be considered in connection with resolution of the objections in Case 11–RC–5110 are coextensive with the alleged unfair labor practices. A final issue raised by the pleadings and to be determined herein is whether the Respondent's actions constituted such serious and substantial unfair labor practices as to warrant the entry of a remedial bargaining order based on the Union's majority status reflected by union authorization cards.

On the entire record, including my observation of the demeanor of the witnesses, and after due consideration of the briefs filed by the General Counsel and Respondent and the oral argument of the Union made at hearing, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent is a Maryland corporation engaged in the manufacture and sale of cotton and synthetic batting with facilities located in several States of the United States including the two facilities located at Statesville, North Carolina, which are the only facilities involved in this proceeding. During the 12-month period preceding issuance of the complaint, Respondent received goods and raw materials valued in excess of $50,000 at its Statesville, North Carolina facilities directly from outside the State of North Carolina. During the same period, Respondent also shipped goods and materials valued in excess of $50,000 directly from its Statesville, North Carolina facilities to points outside the State of North Carolina. The complaint alleges, Respondent by its answer admits, and I find that Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

The complaint alleges, Respondent admits, and I also find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

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[1] All dates are in 1982 unless otherwise stated.

[2] The unit in which the election was held is as follows: "All production and maintenance employees, truckdrivers, and lead persons employed by the Employer at its (Main) 2550 W. Front Street and (Cushion) Taylorsville Road, Statesville, North Carolina facilities, excluding all office clerical employees, guards, and supervisors as defined in the Act. Respondent admits the foregoing unit is appropriate, and I conclude, as alleged in the complaint, that it is an appropriate unit for the purposes of collective bargaining within the meaning of Sec. 9(b) of the Act.

[3] No exceptions to the Regional Director's report on objections were filed by the parties, and the Board, accordingly, adopted the Regional Director's recommendations on May 9, 1983.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Alleged Independent Violations of Section 8(a)(1)*

1. The alleged solicitation of grievances with the implication that they would be remedied

The Union began its organizational campaign in September according to Donnie Burris, an International representative who conducted the campaign on the part of the Union. Burris testified that while employed by another union, the United Furniture Workers of America, he had also been involved in another campaign with Respondent a year or so earlier and was acquainted with Respondent's employees. By September 17, the Union had secured employees' signatures on 24 union authorization cards. On September 21, the Union distributed a leaflet to Respondent's employees announcing that on September 20 it had filed a petition for an election with the Board. It was in the context of Respondent's response to the Union's September 21 leaflet that the General Counsel contends Respondent committed its first unfair labor practice.

The complaint alleges that Respondent's president, David D. Townsend, an admitted supervisor, violated Section 8(a)(1) of the Act by soliciting employees' grievances at an employee meeting on September 21 with the implication that they would be remedied in order to discourage employees from engaging in union activities. In support of this allegation, employee Larry Cass testified that in a speech to first-shift employees on September 22 in which Townsend denied the Union's claim that a petition had been filed,[4] Townsend reminded employees that they had been through a union election before, that it had been voted down, and that he did not see any need for having a union or third party to represent the employees. Further, according to Cass, Townsend told employees that, if they needed to discuss wages or needed to talk to him in any way, that he would be more than happy to talk to them about it. Cass related that he had never previously heard Townsend invite employees to speak to him personally concerning wages.

Similarly, employee Charles Holland testified that he also attended the meeting at which Townsend spoke to employees about the petition being filed by the Union for an election. Townsend had related that the Labor Board had been telephoned, and it was ascertained that the petition had not at that point been received by the Board. According to Holland, Townsend went on to make observations about the business being bad and about the Company not needing a Union inside the plant. Holland further testified that Townsend told employees that if they had any kind of problems, they could come to talk to him, that his door was always open. Like Cass, Holland said he had never heard Townsend invite employees to come and talk to him on an individual basis before. Employee William Holder corroborated Holland's testimony saying that Townsend invited employees to talk to him about their problems. Townsend in testifying for Respondent admitted that he had met with employees on September 22 to tell them that the Union was "knocking on the door." He admittedly told employees that they did not need a third party to speak for them and stated that if employees had any questions, they could ask the questions and he would try to answer. While he could not recall whether he mentioned wages, he specifically denied that he told employees if they needed to discuss wages or needed to talk to him in any way that they could come see him. Moreover, he denied saying that if the employees had problems, the door was always open.

Of the witnesses testifying about the September 22 meeting, I find the testimony of Holland most credible. Both Cass and Townsend exhibited some uncertainty regarding all of what was said. Cass' testimony that Townsend invited employees to talk to him about wages was not supported by Holland. And while wages became a substantial issue in the Union's organizational campaign, the Union's first leaflet distributed on September 21 did not refer specifically to wages. Under these circumstances, I find it unlikely that Townsend would have invited discussions with employees regarding wages. On the other hand, Holland's testimony that Townsend invited employees to talk to him concerning problems was convincing and corroborated by Holder. Moreover, it would not be at all improbable that Townsend invited employees to talk to him in light of Townsend's admission that he told employees that they did not need a third party to represent them. Accordingly, crediting Holland, I find that Townsend did offer to discuss with employees their problems.

The General Counsel contends that Townsend's offer to discuss employee problems on September 22 constituted a solicitation of grievances with the implication that they would be remedied in order to discourage employees from engaging in union activities. In my view, Townsend's offer to talk to employees regarding problems was no more than an exercise of free speech under Section 8(c). Even considering Townsend's offer to talk to employees to be a solicitation of grievances, it is to be noted that there is nothing inherently coercive about such solicitation in itself. A violation occurs when the solicitation is accompanied by the implication that Respondent will take some step to remedy the grievances and thereby dissuade employees from their union support. See *Uarco, Inc.*, 216 NLRB 1 (1974). There is no indication or suggestion that Respondent would act on any grievances or problems raised by any employees. Moreover, there is no evidence that any employees responded and sought to talk to Townsend individually in response to his invitation. The absence of any responses in itself reveals that the employees did not perceive Townsend's remarks as implying that any complaints would be remedied. The record is also devoid of evidence of specific promises of benefits which might tend to support a conclusion that Townsend's remarks here under consideration were intended to carry with them the unlawful implication of remedial action. *Mars Sales & Equipment Co.*, 242 NLRB 1097 (1979), cited by the

[4] It appears that the claim in the Union's leaflet that a petition had been filed with the Board was based on its mailing of the petition to the Board. The petition was not received and docketed by the Regional Office until September 22.

General Counsel in support of his argument on the violation I find to be inapposite. There, unlike in the instant case, the employer, already under a duty to bargain with the union, directed employees to come to it first regarding grievances prior to going to the union thereby implying early correction of the grievances making resort to the union unnecessary. Moreover, such direction was made in the context of other proposals to employees by the employer to bypass the union. Accordingly, because I find no implication of corrective action, I find that Townsend's invitation to talk to employees did not violate Section 8(a)(1) of the Act as alleged.

2. Threat of loss of jobs and benefits if employees selected the Union

The complaint alleges that Townsend on October 20 in remarks to employees at an employee meeting and through the showing of a film to employees entitled "Evelyn II" threatened employees with losses of jobs and losses of existing benefits if they selected the Union as their bargaining representative. In support of this allegation Charles Holland testified that he attended two meetings on October 20 at which Townsend spoke, the first at the end of the first shift and the second at the beginning of the second shift. In addition, he viewed the film shown by Respondent during the meetings. Holland testified that the film depicted a supervisor talking to an employee regarding union organization. In the course of the supervisor's remarks, according to Holland, the supervisor stated that, if an employee went on strike, he could be permanently replaced and lose benefits like paid holidays and other benefits. After the film was shown to the employees on the second shift, Townsend in his remarks to the second-shift employees stated that, if the Union came in, they would start from scratch during negotiations and wages would be frozen. Holland testified he raised his hand and asserted that the union representatives had previously told employees that during negotiations they would not lose any benefits. Holland testified Townsend replied that they would start from scratch in negotiations. Thereafter, Holland asked no further questions. Subsequently, Townsend came to Holland in the plant and showed him a paper which, according to Holland, stated that employees would start from scratch during negotiations and wages would be frozen.

Employee Cass testified regarding the showing of the film on the first shift on October 20. He testified that the emphasis of the film was on strikes. He attributed to Townsend no remarks regarding bargaining from scratch, nor did employee William Holder who testified that he also attended the October 20 meeting. Holder did testify, however, that Townsend related that bargaining could go on for years before a contract was signed and wages would be frozen during negotiations. Holder also added that Townsend told employees that they would lose the benefits they already had. Holder claimed that it was he rather than Holland who responded that the union representative had said that they would not lose their benefits, but he could recall no specific response by Townsend to that remark.

Townsend in his testimony conceded that he had two employee meetings on October 20 at which the film was shown. He testified that he made no remarks regarding the film other than to say that the film spoke for itself. He denied saying anything about employees losing their jobs as the result of strikes or losing benefits if they selected the Union. Moreover, he denied any assertion by Holland at the meeting that the employees had been told by the union representative they would not lose benefits. He conceded that he did have a conversation with Holland regarding the process of collective bargaining but stated that that occurred during October 8 at another employee meeting when Holland had stated that the Union had told employees that they would not lose benefits if the Union got into the Company. On this occasion, Townsend said he told Holland that the Company would negotiate with the Union on benefits and denied stating that if the Union got in the employees would lose benefits or that the Company would bargain from scratch in negotiations. According to Townsend, Holland responded by observing that negotiations were like a poker game, and Townsend agreed with Holland's remark. Townsend conceded, however, that he told Holland that during negotiations it was possible that their wages would be frozen. Later, on the same day, Townsend showed Holland a portion of a written speech prepared by Respondent's attorneys in response to a union organization effort a year earlier. The portion of the speech which Townsend showed Holland and which Holland identified at the hearing contained the following statement:

> Keep in mind that every word, every sentence, every working condition, every benefit, every penny of a written contract would have to be negotiated out between Company and Union representatives. Our attorney would be sitting at the bargaining table with us, protecting our legal rights. *And negotiations could last for many months.* In the meantime, during this long negotiation period, your wages would be frozen by law and we would be *prevented* by law from dealing *directly* with you or making any improvements in your working conditions and employee benefits until such time as a contract was actually signed with the Union.

In this instance I believe Townsend's testimony is more accurate than that of Holland, Holder, or Cass. All three employees exhibited some confusion about what Townsend said. Holland's testimony that Townsend said the employees would bargain from scratch is unsupported by any other employee witnesses. Holland was uncertain about the date of the remarks he attributed to Townsend and gave conflicting written statements to the Board regarding the timing of Townsend's alleged remarks. Further, despite Holland's claim that the document shown to him by Townsend contained the statement that bargaining would start from scratch, the only portion of the written speech which Holland identified as having been shown to him by Townsend contained no statement to the effect that bargaining would start from

scratch.[8] Holder's version of Townsend's remarks was not supported by any other employee. Accordingly, I credit Townsend's version of his remarks on October 20. Moreover, I accept Townsend's admission regarding his remarks to Holland on October 8 in the employee meeting on that date and the subsequent showing to Holland on that date of the old written speech with the reference to the freeze in wages during negotiations.

Since I credit Townsend's testimony concerning the October 20 meetings, I find he made no unlawful remarks on that date. I further conclude that his statement at the meeting on October 8 and his showing of the written matter to Holland on that date also did not unlawfully threaten employees with a loss of benefits. Townsend's statement that wages could be frozen during negotiations amounts to an accurate observation of the current law that an employer may not increase wages without fully bargaining with the union selected by those employees to represent them in the unit in which the employer seeks to grant the increase. *R. L. White Co.*, 262 NLRB 575 (1982). The written statements shown Holland add only that the freeze *could* last for "many months," and until an agreement was achieved. This too can be construed only as a truthful observation which cannot be stretched into coercive misrepresentation of the legal consequences of the employees' selection of the Union.

The General Counsel argues, citing *Gould, Inc.*, 260 NLRB 54 (1982), that Respondent had a semiannual wage review in existence as a condition of employment, and, therefore, Respondent's threat to "freeze" constituted a threat to deprive employees of benefits to which they would otherwise be entitled. This argument appears to run contrary to the General Counsel's other arguments, infra, regarding the lack of Respondent's predetermined schedule in granting its employees wage increases. Moreover, it ignores the fact that Respondent had in 1982 opted not to give a semiannual increase thus removing that as a condition of employment. It further overlooks the fact, discussed infra, that Respondent had told its employees in May that it could not grant them a wage increase because of poor business conditions. There is no showing that employees were ever told subsequently that conditions had changed. Further, there is no evidence that employees herein at the time of Townsend's remarks to Holland were anticipating a wage increase. Indeed, the Union made a substantial campaign issue out of the employees' failure to receive a wage increase. Under these circumstances, there was no specific wage increase that the employees could anticipate losing as a result of wages being "frozen." Accordingly, I conclude that Townsend's assertions about wages being frozen during negotiations could not have been reasonably construed as a threat of a deprivation of a specific wage increase to employees if they selected the Union. I, therefore, find no violation of Section 8(a)(1) by Respondent in this regard.

The General Counsel also argued in his brief that statements in the film shown by Townsend to employees on October 20 constituted an independent violation of Section 8(a)(1) because it failed to spell out, in the context of discussions of the rights of strikers, an employer's specific obligations under *Laidlaw Corp.*, 171 NLRB 1366, 1369 (1968), enfd. 414 F.2d 99 (7th Cir. 1969). Such failure, the General Counsel urges, constitutes a threat that if employees select the Union to represent them and go on strike they will lose their jobs "forever."

The disputed portion of the language contained in the film which was received in evidence by stipulation purports to be a conversation between a supervisor and an employee regarding strikes. That language is set forth below:

> Gene [the supervisor]: In effect [the Supreme Court] said, "Okay, the employees have a right to strike, but the company has the right to put a new employee in place of the ones who are out on the road." For every work station left unattended, the company has the right to put a replacement in there, and that replacement is permanent if the company wants it that way.
>
> Evelyn [the employee]: But what if somebody decides to come back to work?
>
> Gene: They can come back to their job if it hasn't been permanently filled by someone else, or on another job if they're qualified. But if there aren't any jobs they can handle, they're often out of luck.
>
> Evelyn: Forever?
>
> Gene: Who knows. All they can do is be placed on a waiting list in case some job they're qualified for happens to come open.
>
> Evelyn: I've never known that before.
>
> Gene: Well, it's something the union doesn't stress too hard to employees. They'll say "Oh yeah, we want a strike, we want this and we want that, and so on and so forth," (shakes head) so, even if you don't count the money you lose by not working . . . you could lose your job here . . . forever.

The General Counsel, citing *Harrison Steel Castings Co.*, 262 NLRB 450 (1982), urges that an employer who seeks to inform employees of the rights of strikers is charged with the obligation to do the job with accuracy and completeness and that where the employer fails to articulate the continuing rights of strikers to reinstatement (even after replacement) in their continuing status as employees, the employer implicitly threatens employees that they risk termination if they participate in an economic strike and are replaced at the conclusion of such strike. The General Counsel asserts here that the vague and ambiguous response of the supervisor in the film's response to the question of an employee regarding whether the jobs are lost forever, in context, is incomplete and fails to explain an employer's full *Laidlaw* obligations in that it failed to note the employer's specific obligation affirmatively to seek out strikers as positions are vacated.

In arguing that the film reflected an accurate and adequate summary of the law pertaining to the rights of strikers, Respondent relies on the Board's decision in

[8] It is clear, however, that the written speech did contain such a statement on a page other than the one shown to Holland.

Eagle Comtronics, Inc., 263 NLRB 515, 516 (1982). There the Board addressed the degree of detail required of an employer who undertakes to inform employees that they are subject to replacement in the event of an economic strike and stated:

> [W]e conclude an employer may address the subject of strikers' replacement without fully detailing the protections enumerated in *Laidlaw* [*Laidlaw Corp.*, 171 NLRB 1366 (1968)] so long as it does not threaten that, as a result of a strike, employees will be deprived of their rights in a manner inconsistent with those detailed in *Laidlaw*. To hold otherwise would place an unwarranted burden on an employer to explicate all the possible consequences of being an economic striker. This we shall not do. As long as an employer's statements on job status after a strike are consistent with the law, they cannot be characterized as restraining or coercing employees in the exercise of their rights under the Act.

The Board went on in *Eagle Comtronics* to find not unlawful an employer's statement to employees that in the case of an economic strike, strikers "could be replaced with applications on file."

In my view, remarks in the film here in issue were no more incomplete or misleading than the employer's remarks in *Eagle Comtronics*. The film statements here clearly relate that replaced employees can be "placeed on a waiting list in case some job they're qualified for happens to come open." The statements are clearly more accurate and complete as to the strikers' rights than the statements considered in *Harrison Steel Castings Co.*, supra where the employer only advised employees in a leaflet that "employees who go on strike and are replaced have no job to return to when the strike ends." Even considered in context of the supervisor's implication that ultimate recall from the replaced striker list may be uncertain and indefinite, I can find no clear threat in the film that replaced strikers lose all reinstatement rights. Accordingly, I find no violation of Section 8(a)(1) of the Act by virtue of Respondent's showing of the film "Evelyn II."

3. Solicitation of employees to revoke their union authorization cards

It was Holland's testimony that during the remarks to employees on October 20 Townsend told employees to ask their union representative for their cards back, that the employees did not need a union to represent them and that if they did not know how to get their cards back they could ask the union representative or ask the Company. Cass testified that Townsend mentioned the cards at the meeting and said that just because employees had signed union authorization cards did not mean that they had to vote for the Union and that they could see the union representative and get their cards back. Similarly, William Holder testified that at the employee meeting on October 20 which he attended Townsend stated that he wanted employees to go back and pick their union cards up from Donnie Burris. Holder conceded, however, that he could not recall Townsend's words exactly in this regard, but recalled only that Townsend wanted employees to ask for their cards back.

Townsend admitted in his testimony that he had referred to union cards in one of the meetings on October 20. More specifically he testified that employee Lynn Williams asked if she had signed a union card did she have to vote for the Union. Townsend told her that she did not and that she could vote any way she wanted and that she could possibly even ask for her card back if she found that she signed the card in error. He denied that he asked employees at either of the meetings to ask for their cards back, and he further denied suggesting that the Company would help them get their cards back.

Townsend's recall of the details surrounding his reference to employees getting their union authorization cards back appeared to be more complete. In this regard he specifically recalled the question of Lynn Williams which prompted his reference to the cards. Townsend's testimony on this point was more convincing and, I believe, accurate and credible. In reaching this conclusion I note also the absence of evidence of any actual assistance to employees in getting their cards back or for that matter that any employees sought, in fact, the return of their cards. Thus, I conclude the evidence shows no direct solicitation of employees to seek the return of their union cards. I conclude the evidence does show, however, a gratuitous suggestion to employees that they could seek the return of their cards if they so desired.

The General Counsel argues that Townsend's gratuitous suggestion can only be interpreted as an attempt to undermine the Union in violation of Section 8(a)(1). He relies on *Gibson Distributors*, 238 NLRB 491 (1978), in support of this argument, although he notes that *R. L. White Co.*, 262 NLRB 575 (1982), a later case cited in Respondent's brief, would suggest a contrary result. The General Counsel argues, however, that insofar as an employer's interest in employee revocation of union cards has no business justification, *Gibson* is a "sounder decision."

In *Gibson Distributors*, an administrative law judge found that the employer violated Section 8(a)(1) by telling employees that they "should" demand the return of their union authorization cards as soon as possible. The administrative law judge with Board approval found that the employer's remarks amounted to a solicitation to employees to withdraw their cards and such solicitation was an attempt to undermine the Union. On the other hand, in *R. L. White* the Board reversed an administrative law judge's finding that an employer had violated Section 8(a)(1) by gratuitously advising employees how to go about getting their union cards back from the union even though the advice included the observation that the decision to seek the return of the cards was "solely" that of the employee. The Board explained at 506:

> An employer may lawfully inform employees of their right to revoke their authorization cards, even where employees have not solicited such information, as long as the employer makes no attempt to ascertain whether employees will avail themselves of this right nor offers any assistance, or otherwise

creates a situation where employees would tend to feel peril in refraining from such revocation.

R. L. White appears to be the latest Board position on the issue and I deem it controlling here. Moreover, if *Gibson Distributors* has not been overruled sub silentio by *R. L. White*, I conclude it may be distinguished on the premise that the language utilized by the employer as reported in *Gibson Distributors* was more in the nature of a direction to employees to withdraw their cards. It was not simply the gratuitous provision of information to employees regarding how they might seek the return of their card.

Based on the foregoing and the credited evidence, I conclude that Respondent here did nothing more than tell employees of their right to revoke their authorization cards. It did not offer them assistance in this regard, and, as in *R. L. White*, it did not create a situation where employees would tend to feel peril if they refrained from revoking their cards. I, therefore, find that notwithstanding the absence of any business justification for providing the employees with such information, Respondent did not violate Section 8(a)(1) of the Act.

4. The announcement and grant of a general wage increase to dissuade employees from union support

It is undisputed that in the 9 years prior to 1982, Respondent had granted twice-a-year wage increases to its employees except for the years 1973, 1975, 1977, and 1980. In those years in which only one wage increase was given such increase was given either in May or July. In those years in which two wage increases were given, the first such increase was normally given in the first calendar quarter of the year and the second increase in the last calendar quarter. Prior to 1982, the largest single increase granted to Respondent's Statesville employees had been 30 cents per hour.

Respondent's wage increases at Statesville as referred to above contrasted with the more consistent pattern, timewise, of wage increases granted by Respondent to its employees at its Baltimore facility pursuant to a collective-bargaining agreement with United Furniture Workers.[6] Thus, for the 3 years prior to 1982, Respondent had granted such employees twice yearly increases on March 1 or March 25, and September 25 of each year. The single highest increase had been 50 cents per hour. Effective September 25, 1982, the Baltimore employees were granted a 40-cent increase with a 10-cent increase to take effect the following March.

It is undisputed that at a meeting with employees in May in Statesville Townsend advised employees that the economy was bad, business was bad, and he did not see how the employees could be given a raise.[7] Accordingly, no wage increases were granted at Statesville in the spring or summer, and Respondent's failure to grant a wage increase at Statesville became a substantial issue in the union campaign. Leaflets distributed to employees by the Union on October 5, 18, and 27 played upon the absence of the wage increase at Statesville through cartoons or specific references to wage increases granted to Baltimore employees in late September or early October and suggested the effectiveness of union organization in securing wage increases.

It is also undisputed that Townsend on October 29 announced a wage increase of 45 cents per hour to be effective for Statesville employees on November 1. It is undisputed that the wage increase was the largest single increase ever given to Respondent's employees at Statesville. It took effect within 10 days of the election which was set for November 10, and employees received the first fruits of the raise in the paychecks received the day following the election. This wage increase was alleged in the complaint herein to be violative of Section 8(a)(1) because it was granted to dissuade employees from their union support.

Townsend testified that a wage increase for Respondent's employees had been under consideration beginning in July. In this regard Townsend related that he proposed a wage increase to Richard Tucker, president and chairman of Respondent's board of directors, on July 22 during a visit by Tucker to Statesville. Both Tucker and Townsend testified that the ultimate decision regarding the wage increase was left to Townsend, but they agreed there was no reason not to put a wage increase into effect. Townsend admittedly initially proposed that the wage increase be effectuated in August prior to the contract negotiations in the Baltimore plant. However, Townsend also testified that in early August, Respondent encountered a substantial increase in hospitalization insurance rates and faced the decision of whether to absorb such rates or pass the increases on to the employees. It was decided to absorb such increases but reduced to a degree by a corresponding reduction in benefits. Following decision on the insurance, Townsend again talked to Tucker regarding the wage increase, and it was determined that a wage increase would be put into effect in the fall but no specific date or amount was decided upon. In this regard Townsend testified that he told Tucker on August 18 that he had changed his mind and was going to await the outcome of the Baltimore negotiations before making a decision on wages at Statesville. It is nevertheless clear that Townsend could have given a wage increase prior to such negotiations.

Townsend conceded that around October 7 he was aware of the results of the Baltimore negotiations and the 40-cents-per-hour increase agreed upon there and put into effect as of September 25. However, while he gave some consideration to the wage issue at Statesville, Townsend claimed he became preoccupied with other business and took no immediate action. He testified that it was not until the second or third week of October that he reached a decision to propose to Tucker an increase of 45 cents per hour to be effective November 1. According to Townsend, the November 1 date was chosen

[6] The total of the semiannual increases granted Statesville employees was usually equivalent to the increases granted to the Baltimore employees. However, prior to the November 1, 1982 wage increase at Statesville no single increase at Statesville had exceeded a single increase granted in Baltimore.

[7] It also appears that no wage increase had been given employees in the Baltimore plant in March 1982.

because it was the first Monday of the month, and he usually granted increases on the first Monday of the month. Tucker agreed with Townsend's plan. Townsend then on October 29 announced the wage increase and in announcing it told employees that business was still not booming, but things looked better. In announcing the increase, Townsend did not refer to the union campaign.

Briefly stated, the General Counsel's position is that the wage increase announced October 29 was not "preplanned" even though there had been discussions between Townsend and Tucker regarding such an increase. Because it was not preplanned, because the amount of the increase was substantially out of line with prior increases, and because of its timing just before the election the General Counsel contends the increase was directly responsive to the union campaign and thus designed to interfere with the employees' free choice in the election.

Respondent's argument as summed up in its brief is that the decision to grant a wage increase was made prior to any knowledge of union activity among the employees, was consistent with prior increases in terms of timing and amount, and was not made with antiunion motivation.

In *NLRB v. Exchange Parts Co.*, 375 U.S. 405 (1964), the Supreme Court in finding that an employer's grant of benefits to employees during the pendency of a union organizational campaign violated Section 8(a)(1) of the Act, stated at 409 that, "The danger inherent in well-timed increases in benefits is the suggestion of a fist inside the velvet glove," and "Employees are not likely to miss the inference that the source of benefits now conferred is also the source from which future benefits must flow and which may dry up if it is not obliged."

Thus, an employer's grant of benefits during the course of union activity has a substantial potential for impacting upon and interfering with such activity. An employer's course in granting benefits in such situations must be charted to avoid the perception that the grant of benefits is responsive to union activity. As stated by the administrative law judge with Board approval in *McCormick Longmeadow Stone Co.*, 158 NLRB 1237 (1966):

> An employer's legal duty in deciding whether to grant benefits while a representation case is pending is to determine that question precisely as he would if a union was not in the picture. If the employer would have granted the benefit because of economic circumstances unrelated to union organization, the grant of those benefits will not violate the Act. On the other hand, if the employer's course is altered by virtue of the union's presence, then the employer has violated the Act, and this is true whether he confers benefits because of the union or withholds them because of the union.

See also *KDEN Broadcasting Co.*, 225 NLRB 25 (1976); *Russell Stover Candies*, 221 NLRB 441 (1975); *Montgomery Ward & Co.*, 220 NLRB 373 (1975); *Gerbes Super Market*, 213 NLRB 803 (1974).

Because of the obvious impact on employees of the grant of a benefit during a union election campaign, the granting of such benefits raises a strong presumption of illegality. See, e.g., *Exchange Parts Co.*, supra; *J. P. Stevens & Co. v. NLRB*, 668 F.2d 767 (4th Cir. 1982); *Gordonsville Industries*, 252 NLRB 563 (1980); *Chester Valley, Inc.*, 251 NLRB (1980); *Wintex Knitting Mills*, 216 NLRB 1058 (1975); *International Shoe Co.*, 123 NLRB 682 (1959). More specifically, the presumption is that the employer's motive in granting the benefit is to influence employee choice in union representation. In view of this presumption, the burden is that of the employer to show that the grant of the increase was unresponsive to the organizational activity and the election.

Among the factors reflecting employer motivation in the grant of the wage increases are the timing of the increases,[8] the amount of the increases compared with prior increases,[9] whether or not implementation of the increases is consistent with a determination made prior to the advent of the union campaign,[10] and whether the increases are granted in the context of unfair labor practices.[11]

Considering the instant case in light of the foregoing principles, I am persuaded in agreement with the General Counsel's position that Respondent's wage increase was specifically designed to thwart the Union's campaign and influence the outcome of the election. The most significant factor in reaching the conclusion in this regard is the timing of the announcement of the wage increase only 12 days before the election. It is quite clear from undisputed testimony that Townsend was authorized to give the Statesville employees a raise anytime after his initial discussions with Tucker in July. And even though Townsend testified he was comptemplating giving an increase in August, no increase was granted.[12] Further, subsequent discussions between Tucker and Townsend looked only toward a wage increase in the indefinite "fall" with no monetary amounts decided upon. Based on Tucker's testimony, it was not until October 28 that Townsend told him he had reached a final decision on the date and amount of the increase to be granted.[13] This was more than 3 weeks after Townsend learned of the amount of the increase granted the Baltimore employees, the Baltimore increase being the event he assertedly awaited before deciding upon the Statesville increase. This delay is not credibly explained in Townsend's testimony. Moreover, even assuming Townsend had reached an earlier decision on the wage increase, a predetermination does not necessarily resolve the issue of

[8] *Soule Glass & Glazing Co. v. NLRB*, 652 F.2d 1055 (1st Cir. 1982); *NLRB v. Styletek*, 520 F.2d 275 (1st Cir. 1975); *B–P Custom Building Products*, 251 NLRB 1337 (1980); *Esquire, Inc.*, 250 NLRB 940 (1980).

[9] *St. Francis Hospital*, 263 NLRB 834 (1982); *San Lorenzo Lumber Co.*, 238 NLRB 1421 (1978).

[10] *Montgomery Ward & Co.*, 220 NLRB 373 (1975).

[11] *Alvin Metals Co.*, 212 NLRB 707 (1974).

[12] In view of Townsend's testimony that he had decided to do away with the semiannual wage increases at Statesville and his initial determination to give a wage increase in August, Respondent's past practice with respect to the timing of wage increases at Statesville becomes largely immaterial insofar as it relates to the timing of the increases ultimately granted.

[13] This testimony contradicted the vague and contradictory testimony of Townsend that he told Tucker the amount of the increase much earlier. Tucker appeared more specific on the point having recorded the date of his communication on the point with Townsend and is, therefore, credited.

the legality of the increase. An announcement regarding the increase can itself be calculated to interfere with an election. See *NLRB v. Styletek*, supra. While the record reflects that Respondent had in fact granted wage increases at Statesville during early November in the years 1976, 1978, and 1979, the last fall increase prior to the increase in the instant case was granted in October. Moreover, although Townsend testified that the effective date of the increase herein was decided on consistent with the practice of making the increases effective on the first Monday of the month, the record reveals that such practice was honored as much in the breach as in the observation. Thus, the increases effective on November 8, 1976, November 1, 1978, and November 12, 1979, were not effective on the first Monday of the month. Nor were the increases granted on February 9, 1981, July 11, 1976, or July 14, 1975. The timing then of Respondent's prior increases must be regarded as erratic and not totally consistent.

In view of the foregoing, the timing of the wage increases here is only understandable as a response to the union campaign, particularly in light of the undisputed fact that on October 27, 2 days prior to the wage increase announcement and 1 day before Townsend reached his decision and related it to Tucker, the Union had distributed to the employees a leaflet in which it had made much of Respondent's failure to give an increase at Statesville while granting an increase to Baltimore employees. It is more reasonable to conclude, and I so conclude, that the determination regarding the increase and its effective date was reached on October 28 in direct response to the Union's leaflet the day before. This conclusion is buttressed by the fact that the increase was substantially larger than any single prior increase[14] for Statesville employees and surpassed the 40 cents per hour 1982 increase negotiated for Respondent's Baltimore employees.

Respondent's motivation regarding the Statesville increase is further impugned by Townsend's own admission that at the time of the wage increase while business had improved some employees were still working short weeks. And Townsend, in order to emphasize Respondent's benevolence in the matter, admittedly advised employees when announcing the increase that Respondent could not raise its prices "sufficiently to pay for this kind of increase." The implication of Respondent's benevolence was not likely to be overlooked by the employees because of its timing in relation to the union October 27 leaflet and because Townsend failed to disavow any relationship between the increase and the union campaign.

Finally, it is to be noted that the increased wages did not show up in the employee paychecks until the day after the election. Accordingly, had Respondent's motive not been improper, it could have avoided any announcement of the wage increase without either disturbing the effective date of the increase or otherwise penalizing the employees. Under these circumstances, it is difficult to perceive, and there is no evidence in the record explaining, why the announcement could not reasonably have been delayed. As the General Counsel's brief points out, an employer's failure to show why preelection announcements of benefits could not reasonably have been delayed evidences improper motivation in such announcements. *J. P. Stevens & Co.*, supra, enfg. 244 NLRB 407 (1979); *International Shoe Co.*, supra.

Considering all the foregoing, I conclude that the record evidence establishes a prima facie case which Respondent has failed to rebut that Respondent's decision to grant the increase to Statesville employees and the timing of its announcement of the increase was calculated to interfere with the employees' Section 7 rights and to interfere with the outcome of the election. By this conduct with respect to the wage increase, I find Respondent violated Section 8(a)(1) of the Act as alleged in the complaint.

5. Interrogation of employees concerning their union sympathies

The General Counsel amended his complaint at the hearing to allege that Respondent through its supervisor, John McCall, interrogated employees concerning their union sympathies. The allegation is based on testimony of employee Allie Bunton who testified that on November 8, John McCall, an admitted supervisor within the meaning of the Act, tossed a button over on the table utilized by Bunton and employee Nancy Mayberry in their work. The button contained the legend, "2 is company, 3 is a crowd," an obvious reference to Respondent's position that employees did not need a Union. Bunton concluded that the button was flipped toward him and he picked it up and wore it for the remainder of the day. According to Bunton, he had in no way solicited the button from McCall.

William Holder gave a somewhat different version of what occurred. He testified that he saw McCall give out buttons to Mayberry and Bunton. According to Holder, McCall simply handed the buttons to the two. While Bunton put his on, Mayberry put hers in her pocketbook. Holland gave a similar version in his testimony but added that employee Robert Caldwell, observing McCall's giving the buttons to Mayberry and Bunton, asked McCall for a button. McCall's response was to shake his head negatively.

McCall testified that on or about November 8 he had one of the buttons in issue which had been given to him by his son, employee Ronnie McCall. McCall said he had no use for the button so he flipped it to one of his employees, specifically Nancy Mayberry. She missed the button, and it fell to the floor, but she picked it up. According to McCall, he gave out no other button to any other employee. McCall testified he did not know where the button originated, and he had never seen any before that evening. He did see Bunton wearing such a button the next day but insisted that he flipped the button only to Mayberry. McCall testified Mayberry had already told him she was against the Union.

The testimony of the four witnesses who testified on this issue cannot be reconciled. The testimony of Bunton and McCall is closest, and they appear to be in agreement at least to the extent that McCall flipped the button

[14] The November 1 increase also exceeded the cumulative increases each year for Statesville employees for all prior years except 1979.

toward Bunton's area rather than simply handing Bunton the button as the other witnesses claim. Accordingly, and because Bunton impressed me as a honest individual with a generally good recall of the affair, I credit his version where it differs from that of other witnesses. I conclude that Bunton picked up the button which McCall testified he had flipped to Mayberry.

It is the position of the General Counsel that McCall's unsolicited distribution of the antiunion button constituted unlawful interrogation because it forced Bunton to make a declaration of his union sympathies. Respondent argues, on the other hand, that in the absence of evidence of a general distribution of the buttons by Respondent, McCall's conduct with respect to the buttons cannot be regarded as designed to cause employees to indicate their union sympathies. Respondent contends that under these circumstances the incident with Bunton must be regarded as isolated and noncoercive. I agree.

In *Kurz-Kasch*, 239 NLRB 1044 (1978), cited in the General Counsel's brief, three supervisors were found to have solicited employees in the midst of a union organizational campaign to wear "NO" buttons. The Board in finding a violation of the Act stated:

> It is well established that an employer's request during an election campaign that an employee wear a "Vote No" button or other pro-employer insignia constitutes a form of interrogation because, by agreeing or refusing to wear the button, the employee is forced into an open declaration either for or against the Union. Thus, the request of [the three supervisors] to individual employees clearly constituted coercive interrogation in violation of Section 8(a)(1).

A similar decision was reached by the Board in *Kawneer Co.*, 164 NLRB 983 (1967). However, the distribution of antiunion material by an employer is not unlawful in itself absent some form of coercion or pressure on an employee to receive the material. *McDonald's*, 214 NLRB 879 (1974); *Farah Mfg. Co.*, 204 NLRB 173 (1973). Moreover, in *Acute Systems, Ltd.* the administrative law judge, with Board approval, found no unlawful interrogation even where a supervisor, without a prior request from the employee, pinned a "Vote No" button on the employee and then immediately left the plant. The administrative law judge stated at 882–883:

> Although [the employee] did not so characterize [the supervisor's] action, it appears to have been more a playful gesture than any serious campaigning. It occurred at the end of the day when people were about to leave. Since [the supervisor] apparently did not stay on to see whether [the employee] kept the button on or removed it, it can hardly be inferred that [the supervisor's] pinning the button on [the employee] was designed as a means of determining the employee's views.

I view the circumstances in the instant case based on the credited facts to be as innocuous as those circumstances reflected in *Acute Systems*. If McCall had been inclined to cause Bunton to declare his union sympathies, it is more likely that he would have offered the button directly to Bunton rather than flipping it on a table where it was accessible to another employee, Mayberry. Bunton could have left the button where it lay without in any way indicating his union inclinations. In addition, in considering the violative nature of McCall's conduct, it must be observed that no other violations of the Act were attributed to McCall in particular and no other violations consisting of unlawful interrogation were attributed to Respondent generally. Accordingly, I find this incident to be like the one considered in *Acute Systems*, which was termed "essentially isolated and noncoercive." I, therefore, find no violation of Section 8(a)(1) of the Act based on this incident.

B. *The Objections to the Election*

The violation of Section 8(a)(1) of the Act found above with respect to the wage increase is coextensive with the Union's Objection 5 to the election. A violation of Section 8(a)(1) of the Act a fortiori constitutes objectionable conduct affecting the results of the election. *Dal-Tex Optical Co.*, 137 NLRB 1782 (1962). Accordingly, merit is found to the Union's Objection 5, and it shall be recommended that the election held on November 10 be set aside. The Union's other Objections 3 and 7 and "other acts" are coextensive with the complaint allegations discussed above and found to be lacking in merit. Accordingly, it shall be recommended that these objections be dismissed as also lacking in merit.

C. *The Appropriateness of a Bargaining Order to Remedy Respondent's Unfair Labor Practices*

1. The validity of the union authorization cards for majority purposes

The complaint as amended alleges that Respondent's unfair labor practices are so serious and substantial in character and effect as to warrant the entry of a remedial bargaining order requiring Respondent as of September 22, the date it allegedly embarked on its alleged unfair labor practices, to recognize and bargain with the Union. In this regard, the General Counsel relies on the principles announced in *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969), wherein the Court established standards under which bargaining orders may be utilized to remedy unfair labor practices. Such standards are as follows: (1) a bargaining order may be granted where an employer's unfair labor practices are "outrageous" and "pervasive"; (2) a bargaining order may be granted in less extraordinary cases marked by less pervasive unfair labor practices which nonetheless still have a tendency to undermine majority strength; and (3) a bargaining order is not appropriate in cases involving minor or less extensive unfair labor practices "which, because of their minimal impact on the election machinery, will not sustain a bargaining order."

Important to the issue of the appropriateness of a bargaining order in a case such as this is the majority status of the union as reflected by some means other than an election, usually by authorization cards. To establish the Union's majority status here, the General Counsel intro-

duced in evidence the authorization cards executed by 24 of Respondent's employees in a unit which Respondent contends consists of 40 employees.[15]

The Union's International representative Donnie Burris identified the union authorization cards of five employees, Tony Bost, Robert Davidson, Leon Felts, Ben Mills, Herb Pinnix, and George Cauthern. With the exception of the card of Pinnix, which was dated October 19, the other cards solicited by Burris were dated September 16 and 17. According to Burris' testimony he solicited the cards from employees either at the home of the employee or in Burris' motel room. Burris testified that in each case he read the cards to the employees and stated the purpose of the cards was to designate the Union as their representative so that they could obtain a union. The cards solicited by Burris, as were all the cards involved in this case, were regular single purpose union authorization cards reflecting that the signer authorized the Union to act as his collective-bargaining agent in dealing with his employer in regard to wages, hours, and other terms and conditions of employment. The cards also contained language revoking all previous authorizations.

Respondent contested the validity of the cards solicited by Burris on the basis of the testimony of employees Davidson, Mills, and Bost. Davidson testified that he had signed his union card at a meeting after Burris had told employees at the meeting that the main purpose of the cards was to get an election at the plant. Davidson conceded on cross-examination that Burris had stated he was there to try to help the employees obtain a union and that the way they went about getting a union after they got cards signed was to file a petition with the Board.

Mills testified he could not recall who asked him to sign the card and even expressed some uncertainty as to where he was at the time his card was signed. Nevertheless, he testified that he was told that the cards were just to get enough people so that they could have an election. He admittedly read the card before he signed it, however, and conceded that he was also told that the Union wanted to get in the Company so it could be the employees' bargaining representative.

Bost exhibited confusion about the basis for having signed his card, and while admitting that he read the card before he signed it, he could not recall any specific misrepresentations made to him regarding the purpose of the card. Rather, he testified (contrary to a statement he had given to Respondent on June 9, 1983, to the effect that a union representative had told him that the card was only to get an election or it was to be used to get an election) that nobody actually told him what the union authorization card was for.

Even assuming that Burris referred to the use of the cards in obtaining an election, such reference in and of itself is insufficient to invalidate the cards for majority purposes. As the Supreme Court said in *Gissel Packing Co.*, supra at 606:

> [E]mployees should be bound by the clear language of what they sign unless that language is deliberately and clearly cancelled by a union adherent with words calculated to direct the signer to disregard and forget the language above his signature. There is nothing inconsistent in handing an employee a card that says the signer authorizes the Union to represent him and then telling him that the card will probably be used first to get an election.

Cards may be counted for majority purposes so long as it is established that the card signer was not told that the card was to be used solely for the purpose of obtaining an election. *Levi Strauss & Co.*, 172 NLRB 732 (1968); *Cumberland Shoe Corp.*, 144 NLRB 1268 (1963), enfd. 351 F.2d 917 (6th Cir. 1975). Subjective intent of the card signer does not bear on the validity of the card, and even where an employee signs a card on the belief it will be used to obtain an election, the card will still constitute a valid union designation so long as no misrepresentations were made by the solicitor as to the purpose of the card. *Henry I. Siegel, Inc.*, 165 NLRB 493 (1967).

Burris' testimony impressed me as honest and clearly more credible than Davidson, Mills, and Bost who were obviously confused and unclear regarding statements made attendant to their card signing. I credit Burris and conclude he made no statements in solicitation calculated to mislead or misrepresent the purpose of the cards. Accordingly, I find the cards of Davidson, Mills, and Bost valid designations of the Union for establishing the Union's majority status herein. I likewise find the other cards solicited and identified by Burris to be valid union designations.

Employee Charles Holland identified his own card and the cards of four other employees whom he had solicited, Robert Caldwell, Michael Blevins, Donnie Allison, and Nancy Mayberry. Holland testified that he told such employees that if they still felt strongly about the Union to read the card and sign it and that the card was for union representation.

Holland's testimony regarding the solicitations was disputed only by Michael Blevins who testified for Respondent. Blevins testified that Holland told him in soliciting the card that the card was just saying that Blevins agreed to come to the union meetings and hear what the Union had to tell him. Further, on cross-examination while admitting that he read the card before he signed it, Blevins added that Holland told him that the card meant simply that the individuals in the Union whom the employees would be dealing with would sponsor the employees. Additionally, Blevins related that although Holland explained that by signing the card Blevins would not be obligated to join the Union, Holland added that signing the card meant that the Union could help them with respect to wages and "things in the Company." Moreover, he conceded that Holland may well have told him the card was for the Union to represent the employees. Even accepting Blevins' testimony regarding Holland's representations, I find no material misrepresentations which would affect the validity of Blevins' card in establishing the Union's majority status.

[15] This includes Wanda Hector whom Respondent, contrary to the General Counsel, contends is not a supervisory employee, and Charlotte Sutton whom Respondent contends, again contrary to the position of the General Counsel, is a regular part-time employee. The inclusion of these two employees in the unit will be discussed infra.

Two cards were identified by employee William Holder, one signed by himself, and one signed by his brother David Holder. William Holder related that he read the card he signed and dated September 16 and testified that he observed his brother David Holder sign his card in the parking lot at the Company. He testified he observed David Holder read the card before he signed it. David Holder, called by Respondent, testified that no one specifically asked him to sign the union card but claimed he was told at some time by someone whom he could not recall that the card was to try to get the Union in where they could have a vote. Nevertheless, Holder executed a statement for Respondent dated June 9, 1983, in which he asserted that he went to several meetings where the Union explained the purpose of the cards and the Union agents said "the sole purpose of the cards was to get an election." David Holder also signed a statement for the General Counsel dated June 16, 1983, in which he stated that he had gone to union meetings in an earlier union campaign and "knew the cards were to get a union in at Burnett." David Holder impressed me as a very confused witness with an extremely poor memory which undermines the accuracy of his recall concerning his claim that he signed the card only after the representation by an unidentified solicitor that the "sole purpose" of the card was to get an election. Accordingly, I do not credit David Holder and based on his own admission that he read the card, I can find no reason why he should not be bound by the clear language of what he signed. I find the cards of William and David Holder to be valid designations of the Union for majority purposes.

Employee Geoffrey Moose, called by the General Counsel, identified his authorization card dated September 17 which Moose admittedly read before he signed. However, Moose also executed a statement for Respondent dated June 10, 1983, in which he related that an employee had asked him to sign a card stating "the sole purpose of the card was to get an election." But, in further testimony, he contradicted that statement stating that nobody really told him what the card was for. Nevertheless, he further testified that he was told at a union meeting that there was no obligation in signing the card and that the cards were just for an election. On still further questioning, he explained that such statements were made in an earlier union campaign and not during the campaign in the fall of 1982. In view of Moose's confused and contradictory statements regarding representations made to him concerning the use of the card, I find the circumstances do not clearly and convincingly show that any misrepresentations were made to Moose which would justify the disregard of the clear and unambiguous language on the face of the card signed by Moose. Accordingly, I find the card valid for majority purposes.

Respondent did not specifically attack the validity of the cards executed by Michael Moose, Jerry Brown, Larry Cass, James Speller, or Lynn Williams. Accordingly, the cards executed by these employees are found to be valid for the purpose of establishing the Union's majority status. The Respondent did contest the validity of the cards of John Brown, Martha Teastor, and James Parks. The card of John Brown, who had died prior to the hearing, was identified by his son Jerry Brown, also an employee of Respondent, who further testified regarding the circumstances of the execution of the card. Thus, Jerry Brown testified that he signed the card for his father after reading it to him. According to Jerry Brown, John Brown was illiterate and, although Brown could execute his name, he frequently had his son execute documents for him. Thus, Jerry Brown testified that he frequently endorsed his father's paycheck, and the banks customarily honored the endorsement. Moreover, he had authorization to conduct other banking transactions for his father. Jerry Brown testified that in addition to reading the card to his father, he explained to his father that signing the card would give the Union permission to act as his agent. With respect to an election, Jerry Brown told his father that they had to have over 51 percent of the employees' signatures on cards to have an election and that if the Union won the election the Union would try to negotiate a contract with the Company and the employees would be given an opportunity to then become union members. There was further discussion of the pros and cons of the Union before Jerry Brown was given permission to execute the card for his father. Jerry Brown's testimony impressed me as candid, accurate, and credible. Accordingly, and while recognizing that consideration of the statements and actions attributed to deceased persons must be "subject to the closest scrutiny before deciding what weight to be given it," [*Wallick & Schwalm Co.*, 95 NLRB 1262 (1951), enfd. 198 F.2d 477 (3d Cir. 1952)] I credit the testimony of Jerry Brown and find that he was authorized to execute the authorization card on behalf of John Brown. As the General Counsel's brief points out, the Board has long held that an individual may direct another to sign a union card in his behalf without affecting the validity of the card for majority purposes. See *Standard-Coosa-Thatcher*, 257 NLRB 304 (1981); *Essex Wire Corp.*, 188 NLRB 397 (1971). I, therefore, find that the card executed for John Brown constitutes a valid designation of the Union in establishing the Union's majority status here.

The card of employee Martha Teastor was identified by Alice Beck, an organizer for the Union. Beck testified that she solicited the card which is dated November 4, 1982, from Teastor stating that the card was to show that Teastor wanted to be represented by the Union. To Teastor's question whether anyone would know whether she had signed a card, Beck replied that they would if the matter ever went to a hearing but not otherwise. Teastor replied that she really did not care, that she wanted to be represented by the Union, and she went ahead and executed the card. Teastor, on the other hand, testified for Respondent that Beck told her that the authorization card was "to get the election in." Beck's testimony was clear and straightforward, and Respondent elected not to cross-examine her. I credit Beck over Teastor. Moreover, I find it highly improbable that Beck would have represented to Teastor that the card was to be used to get an election since the election was already scheduled at the time Teastor executed the card. Accordingly, I find Teastor's card to be a valid designation of the Union for majority purposes.

Respondent also attacks the validity of the cards of employees Joseph Gatton, Jesse Lewis, and James Parks claiming these employees also relied on misrepresentations as to the purpose and effect of their cards. In this regard Respondent points to the testimony of Gatton that he did not read the union card he signed, and he was told that "if we had enough participation filling out the cards that there would be a good possibility there would be an election." Similarly, Lewis also testified that at union meetings he attended there was reference to an election, and it was stated that "If we didn't get enough cards we wouldn't have an election." In concluding that the cards of Gatton and Lewis constituted valid union designations, I note that both Gatton and Lewis acknowledged other purposes of the card than "getting an election." Thus, Gatton, who also testified that no specific representation was made to him regarding the purpose of the card when he signed it, relied on his experience in prior union campaigns and asserted that the other union authorization cards he had previously read indicated the cards gave the union the right to be the employees' bargaining agent. He testified he had assumed the cards he signed herein stated the same thing. Further, considering the whole of Gatton's testimony including his failure to identify anyone as making a reference to an election in connection with the use of the cards in the instant case, I conclude Gatton was testifying about remarks made concerning the use of the cards in prior campaigns. Lewis in his testimony also referred to his experience in prior campaigns and explained that upon hearing what the Union was all about, he "liked" it. Indeed, in the campaign here involved, Lewis specifically asked for a union authorization card and, asked on cross-examination if anything else was said to him about the purpose of the card other than to obtain an election, Lewis responded, "To better ourselves," and "I was all for that."

Respondent attacks the validity of Parks' card on the basis of a prehearing statement of Parks, given to Respondent's attorney in which Parks said an unnamed union agent told him the card "was solely for the purpose of getting an NLRB election." However, in his testimony, Parks testified he was told by an employee that the card was to see about getting a union in. He added on further cross-examination, that he was also told that the card was "just to see if we can get the union in the plant, you know, if we got enough of them, we could get enough to hold an election." He testified he took the card home and talked the Union over with his wife and signed the card only after concluding that it would "be a good thing." He specifically revoked the use of the word "solely" in the statement he executed for Respondent's attorney and attributed the origin of the word to Respondent's attorney. Under these circumstances, I find Parks' card to be a valid union designation for majority purposes.

2. Disputed inclusions in the unit

Respondent asserts that Charlotte Sutton, a part-time sewer in its cushion plant, located more than a mile from its main plant was inadvertently excluded from the voting eligibility list and is appropriately includable in the unit in which the election was held. Sutton's job duties were no different from those of the regular cushion plant employees, but she received none of the fringe benefits of the regular employees. Although Townsend testified that Sutton was a part-time employee, and as such was limited to 32 hours of work per week, Respondent's payroll records for Sutton reflected that on at least two occasions in August, Sutton worked 40 or more hours per week. According to Townsend, Sutton not only filled in for vacationing or absent employees but was generally utilized on an as-needed basis. Sutton's last appearance on Respondent's payroll before the election was on the week ending October 31. She did not appear again on the payroll until the week of November 28 when she worked 24 hours. She did not appear on the payroll thereafter.

The General Counsel contends that Sutton was a seasonal, casual, or intermittent employee who had no community of interest with the unit employees and was, therefore, ineligible for unit inclusion. He urges that Respondent's failure to include her on the eligibility list was no error and that its present efforts to include her are simply afterthought.

Examination of the pay record of Sutton reveals that from May 23 through October 31 she worked in all but approximately 4 workweeks, and for the great majority of those weeks in which she worked, she worked in excess of 30 hours. There is no evidence that she quit or became unavailable after October 31, the last week she worked prior to the election. Since she did work in the week ending November 28, it is reasonable to infer that she remained available for part-time work between October 31 and November 21. I, therefore, conclude she was a regular part-time employee and was, therefore, eligible for inclusion in the unit. See *Davison Paxton Co.*, 185 NLRB 21 (1970).

The General Counsel would exclude from the unit Wanda Rector on the basis of her alleged supervisory status. Respondent denies the existence of any supervisory authority in Rector and argues for her inclusion.

Rector worked in the cushion plant with about five other employees. Prior to her retirement on September 17, Ann Peacock supervised the cushion plant and, according to the testimony of employee Cass, Townsend in announcing Peacock's retirement related that Rector would thereafter be in charge of the cushion plant. Employee Holland testified that Townsend said Rector would be a supervisor. Townsend denied both statements. I credit Townsend's denial here. The fact that Cass and Holland contradict each other leaves the impression they were testifying as to their own individual conclusions regarding Townsend's comments rather than his actual remarks. Moreover, Townsend's undisputed testimony that Rector, who is hourly paid as contrasted to Peacock's salaried position, received no raise or other increase in benefits as a result of Peacock's retirement, mitigates against an announcement that she had been elevated in position.

Respondent describes Rector as a leadperson for the past year and a half who spent over 50 percent of her time doing machine work. The remaining portion of her time was spent filling job orders, preparing shipments,

and communicating with the main plant manager. She received her directions and instructions from both the plant manager and Townsend. According to Townsend's testimony, uncontradicted in this regard, Rector had no authority to hire, fire, or discipline employees and had never recommended such action. According to Townsend, Rector would have authority to discipline employees only after obtaining approval of the plant manager.

It is undisputed that Rector possessed a key to the cushion plant and was responsible for its opening and closing. That fact in addition to the fact that Rector remained the only person with any degree of authority in the cushion plant the vast majority of the time strongly suggests that Rector possesses supervisory authority.[16] Ostensible supervisory authority is not determinative and suspicion does not establish supervisory status. Accordingly, and recognizing the need "to be alert not to construe supervisory status too broadly because the employee who is deemed a supervisor is denied employee rights which the Act is intended to protect" (*Westinghouse Electric Corp. v. NLRB*, 424 F.2d 1151, 1158 (7th Cir. 1970), cert. denied 400 U.S. 831 (1970)), I conclude that a preponderance of evidence fails to show that Rector possessed the authority required under Section 2(11) of the Act to constitute her a supervisor.

3. The Union's majority status

Based on the foregoing, I conclude that as of September 17 the unit consisted of 40 employees, including Sutton and Rector, and of those 40 employees the Union had obtained valid authorization cards from 22 employees. The Union increased its majority status to 23 having obtained a valid authorization from employee Herbert Pinnix on October 19. It enjoyed majority status through October 29 when Respondent engaged in the unfair labor practice found above in the announcement of the wage increase. The Union's majority status was not subsequently affected by the departure of employee Michael Blevins, a card signer, on November 4 because the Union received an additional valid union designation from employee Martha Teastor on that date as found above. I conclude, therefore, that the Union enjoyed a majority status based upon valid authorization cards at all material times herein.

4. Conclusions with respect to a bargaining order

Having found on the basis of the cards that the Union represented a majority of Respondent's employees in an appropriate unit and also having found Respondent engaged in unfair labor practices in announcing and granting a wage increase to thwart the Union, there remains the issue of whether Respondent's conduct falls within one of the *Gissel* categories set forth above so as to warrant the entry of a remedial bargaining order. Here the Respondent's violations of the Act consisted solely of its having unlawfully announced and granted a general wage increase to its employees. Board and Court precedent appear to have gone both ways on similar cases. Thus, no bargaining order remedy was provided by the Board in *Walgreen Co.*, 221 NLRB 1096 (1975), where the Board concluded that an unlawfully motivated wage increase, even when considered in conjunction with some other minor violations of the Act, had no irremedial effect on the election process. Its reasoning in this regard was briefly stated as follows:

> The wage increase, although found to have been unlawfully motivated, was not specifically tied to the organizing campaign by the Respondent. Similar raises had been granted some 4 months earlier at the Respondent's other stores and the increases did no more than bring the employees up to the prevailing rate. Indeed, the later point was relied on by the Respondent to explain the increases to the employees.

A different result was reached in other cases involving very similar situations. See, e.g., *J. J. Newberry Co.*, 249 NLRB 991 (1980), enf. denied in pertinent part 645 F.2d 148 (2d Cir. 1981); *Appletree Chevrolet*, 251 NLRB 666 (1980), enf. denied in pertinent part 671 F.2d 838 (4th Cir. 1982); *Honolulu Sporting Goods Co.*, 239 NLRB 1277 (1977); *Skaggs Drug Centers*, 197 NLRB 1240 (1972), enfd. 84 LRRM 2384 (9th Cir. 1973); *Tower Records*, 182 NLRB 382 (1970), enfd. 79 LRRM 2736 (9th Cir. 1972); *C & G Electric*, 180 NLRB 427 (1969); *J. C. Penney Co.*, 160 NLRB 279 (1966), enfd. 384 F.2d 479 (10th Cir. 1967). See also *Royal Aluminum Foundry*, 208 NLRB 102 (1974); *Soil Mechanics Corp.*, 200 NLRB 544 (1972).

In *J. J. Newberry*, supra at 993, the Board said "Respondent's grant of a substantial wage increase to all unit employees in violation of Section 8(a)(1) of the Act, is sufficient to render it unlikely that a fair election could be held." In *Appletree Chevrolet*, supra at 668, the Board stated that "the granting of benefits or announcement thereof is conduct which cannot be erased, for the benefits will remain in effect and serve as a constant reminder to employees of the Respondent's use of economic weapons to defeat the Union." And in *Soil Mechanics Corp.*, supra, where a wage increase to only three of six union adherents was found to be sufficient to justify a *Gissel* bargaining order, the Board concluded at 545 that, "The impact of such increases on employees was as great as, if not greater than, a general wage increase and would have a lingering effect making the possibility of holding a fair and free election unlikely."

The Board's justification for granting a bargaining order in such cases was detailed in the administrative law judge's decision, adopted by the Board, in *Tower Enterprises*, supra at 387:

> It is a fair assumption that in most instances where employees designate a Union as their representative, a major consideration centers on the hope that such representative may be successful in negotiating wage increases. Certainly this appears to have been an important consideration in the instant case. A unilateral award of a wage increase by an employer

[16] In this regard the record shows that while the plant manager visits the cushion plant daily, Townsend and Respondent's treasurer only visit the cushion plant two to three times a week. One of Respondent's salesmen daily visits the plant, but appears to have no supervisory authority there.

> following a Union's demand for recognition results in giving the employees a significant element of what they were seeking through Union representation. It is difficult to conceive of conduct more likely to convince employees that with an important part of what they were seeking in hand union representation might no longer be needed. An employer may have the right to persuade the employees that representation is not in their best interest, but it does not have the right to threaten them or confer benefits on them which are designed to influence the employees against choosing a representative. When, as here, an employer does so, free choice in a subsequent election becomes a matter of speculation so long as the effects of the interference remain unremedied.

Further explication was set forth by the Board in *Skaggs Drug Centers*, supra at 1241:

> It is apparent that the wage increase was granted to thwart the employees' organizing initiative. It is also apparent that our traditional remedies, which do not include a requirement that the wage increase be rescinded, cannot irradicate the impact of Respondent's action. Such impact would continue to influence employee choice in a rerun election were one to be directed, for, whether or not the wage increase remained in effect, employees are not likely to miss the inference that "the source of benefits now conferred is also the source from which future benefits must flow and which may dry up if it is not obliged." *NLRB v. Exchange Parts*, 375 U.S. 405. We conclude therefore that by the grant of a substantial wage increase, Respondent has precluded the running of a fair rerun election and that the authorization cards signed by employees are a more reliable measure of their desire for union representation than would be the results of a rerun election. Accordingly, to effectuate those desires, and as a bargaining order is 'the only available effective remedy,' we shall order Respondent to bargain with the Union as the representative of the employees in the appropriate bargaining unit.

It appears that the *Walgreen* case, if not outside the mainstream of Board law in this area, must be regarded as a rather narrow exception to what appears to be the Board's general position that unlawfully motivated wage increases are sufficient in themselves to justify a bargaining order under *Gissel*. In any event, I believe the *Walgreen* case may be distinguished from the instant case, for there the wage increases simply brought employees up to the prevailing rate at the employer's other locations. In the case sub judice Respondent granted Statesville employees a greater single increase than that granted its Maryland employees which were represented by a union. There was no evidence that employees herein were told that the increases were simply to put them on a par with the Baltimore employees. The Statesville increases, having gone beyond what employees might have hoped to secure through selection of the Union serve to remove a substantial motivation for the selection of the Union. Secondly, while Respondent here in announcing the wage increase did not, as in the *Walgreen* case, specifically tie the wage increase to the Union, it was not necessary, for the wage increase followed by only 2 days the union leaflet which made much of the absence of an increase for Statesville employees. The employees were hardly likely to escape the connection, particularly since the Respondent did not disavow the obvious connection.

I deem the reasoning and conclusions of the Board in determining the appropriateness of a bargaining order in *Tower Enterprises* and *Skaggs* and that line of cases[17] fully applicable to the instant case. Accordingly, I conclude that here a fair rerun election cannot be held in the face of Respondent's grant of the general wage increase, an unfair labor practice which cannot be eradicated by traditional remedies. Under these circumstances, I conclude that the authorization cards executed by a majority of Respondent's employees remains the more reliable measure of their desires for representation and a bargaining order "the only available effective remedy." Consistent with the teachings of *Trading Port*, 219 NLRB 298 (1975), the bargaining order here recommended shall run from October 29, the Union having achieved its majority status prior to that time and the Respondent having embarked on its unfair labor practices on that date.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. Respondent did not solicit grievances of its employees and imply that they would be remedied, threaten employees with loss of jobs or loss of existing benefits if they selected the Union, solicit employees to revoke union authorization cards, or interrogate employees concerning their union sympathies and, therefore, did not violate Section 8(a)(1) of the Act in these respects.
4. By announcing on October 29, 1982, and thereafter granting on November 1, 1982, to its employees a general wage increase in order to dissuade employees from supporting the Union, Respondent engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(1) of the Act.
5. All production and maintenance employees, truckdrivers, and leadpersons employed by the Employer at its (Main) 2550 W. Front Street and (Cushion) Taylorsville Road, Statesville, North Carolina facilities; excluding all office clerical employees, guards, and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.
6. At all times on and after October 29, 1982, the Union has represented a majority of the employees in the unit described in paragraph 5 above and has been the ex-

[17] As already indicated herein, the Board's orders in *J. J. Newberry* and *Appletree Chevrolet* were not enforced by the respective courts of appeals. However, I must respectfully observe that I am bound by Board precedent which the Board or the Supreme Court has not reversed. See *Iowa Beef Packers*, 144 NLRB 615 (1963); *Novak Logging Co.*, 119 NLRB 1573 (1958); *Insurance Agents' International Union*, 119 NLRB 768 (1957).

clusive bargaining representative of the employees in said unit.

7. By engaging in the unfair labor practices set forth in paragraph 4 above, Respondent undermined the Union's majority status and precluded the holding of a fair rerun election thereby making a bargaining order an appropriate remedy for such unfair labor practices.

8. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent engaged in certain unfair labor practices, I recommend that it cease and desist therefrom, and that it take certain affirmative action which I find necessary to remedy and remove the effects of the unfair labor practice in which it engaged and to effectuate the policies of the Act.

Having found that by unlawfully granting a general wage increase to its employees in order to thwart their union activity Respondent engaged in conduct which interfered with the election held on November 10, 1982, I recommend that the election in Case 11–RC–5110 be set aside. Having further found that a bargaining order is warranted under the circumstances of this case, I further recommend that the petition in Case 11–RC–5110 be dismissed and that all proceedings held in connection therewith be vacated and set aside.

[Recommended Order omitted from publication.]

Eugene M. Tigani, Francis G. Tigani, F. Gregory Tigani, J. Vincent Tigani, Jr. and the Trustee of J. Paul Tigani d/b/a Standard Wine & Spirits Company; Century Wine & Spirits, Inc.; N.K.S. Distributors, Inc.; Major Distributing Company, Inc.; Park Distributing Company, Inc.; State Distributors, Inc.; Wilson Beverage Company; Harry Jarels, Harry Waldman, Thomas Armstrong and Bernard Armstrong d/b/a Delaware Beverage Company, Inc. *and* General Teamsters Local Union No. 326. Cases 4–CA–12835, 4–CA–12836, 4–CA–12837, 4–CA–12838, 4–CA–12839, 4–CA–12840, 4–CA–12841, and 4–CA–12842

14 December 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS ZIMMERMAN AND HUNTER

On charges filed on 12 April and 22 December 1982[1] by General Teamsters Local Union No. 326 (the Union) and duly served on Standard Wine & Spirits Company et al. (the Respondents) the General Counsel of the National Labor Relations Board, by the Regional Director for Region 4, issued a consolidated complaint and notice of hearing on 29 March 1983 alleging that the Respondents had engaged in and were engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act.

On 8 April 1983 the Respondents filed an answer admitting in part and denying in part the allegations of the complaint, submitting an affirmative defense, and requesting that the complaint be dismissed in its entirety. On 25 April 1983 the Regional Director for Region 4 issued an amendment to the consolidated complaint.

Thereafter on 23 May 1983 the Respondents filed with the Board a Motion for Summary Judgment and a brief in support thereof. The Respondents move the Board for summary judgment because the alleged unfair labor practices set forth in the complaint and notice of hearing, as amended, occurred more than 6 months prior to the filing of the relevant charge with the Board and the service of a copy thereof on the Respondents.

On 20 June 1983 counsel for the General Counsel of the National Labor Relations Board filed a memorandum in opposition to the Respondent's Motion for Summary Judgment. On 7 July 1983 the Union also filed a memorandum in opposition to the motion.

On 23 June 1983 the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the Respondents' Motion for Summary Judgment should not be granted.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

On the entire record, the Board makes the following

Ruling on the Motion for Summary Judgment

On the issue of whether the amended charge is, in effect, a new charge time-barred by Section 10(b) of the Act, the Respondents contend that the initial charge filed 12 April was incapable of being amended on 22 December because all allegations set forth therein had been resolved on or before 5 June by either dismissal or private settlement. One portion of the initial charge alleges that the Union unlawfully refused to comply with its collective-bargaining obligation to pay the Union a 72-cent-per-hour pay increase. This allegation was the subject of a grievance filed by the Union. In a letter of 28 May, the Regional Director informed the parties that he was administratively deferring further proceedings on the issue of the 72-cent-pay increase in accordance with the Board's policy of deferring to the grievance and arbitration procedures of an existing bargaining agreement under *Collyer Insulated Wire*, 192 NLRB 837 (1971). The Regional Director simultaneously dismissed all other allegations in the 12 April charge as lacking in merit.

The Respondents aver that the parties resolved the issue of the 72-cent-per-hour pay increase when they agreed to a new collective-bargaining agreement on 5 June. Since on that date all other allegations in the original charge had been dismissed, the Respondents contend that there existed no viable allegation thereafter that could have formed the basis for an amendment to that charge. Thus, the Respondents argue, when on 22 December the Union filed a charge alleging, inter alia, that the Respondents unlawfully failed to meet a contractual obligation to pay employees for a Good Friday holiday on 9 April,[2] it was in fact filing a new charge time-barred by Section 10(b) of the Act.

The General Counsel in his statement in opposition to the Respondents' motion does not dispute the accuracy of the Respondents' averment that all allegations in the initial charge had been either resolved during contract negotiations or administratively dismissed as without merit by 5 June. To the

[1] All dates hereinafter refer to 1982 unless otherwise indicated.

[2] Other allegations in the 22 December charge were dismissed by the Regional Director by letter of 11 March 1983.

contrary, the General Counsel concedes that "all allegations of the amended charge except that involving the $.72 per hour wage increase were dismissed before the amended charge was filed," and that the parties had arranged for informal settlement of the wage increase dispute before 22 December.[3] Counsel for the General Counsel argues solely that, as long as the portion of the charge concerning the wage increase was "still pending" on 22 December, there was a charge on file to which the amendment may relate back.

Under Federal Rules of Civil Procedure 56(b), the defending party may move for summary judgment, in whole or in part, at any time with or without supporting affidavits. Federal Rules of Civil Procedure 56(e) also provides in pertinent part that:

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest on the mere allegations or denials of his pleadings, but his response, by affidavits, or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

In their Motion for Summary Judgment, the Respondents set forth facts concerning settlement with regard to the 72-cent-per-hour wage increase, the 8-month delay before dismissal of the wage increase portion of the charge, and the dismissal of all other allegations contained in the original charge. These facts form the basis of the Respondents' affirmative defense. The General Counsel, having failed to controvert these facts, has not met the burden imposed on an adverse party by the aforementioned rule.[4] In these circumstances, we are satisfied that there are no material facts in dispute concerning the timeliness under Section 10(b) of the Union's 22 December charge that would require a hearing before an administrative law judge.

Further, we agree with the Respondents that on 22 December when the Union filed its second charge, there was no longer —or should no longer have been—a viable charge capable of being amended. Although the Union did not withdraw the initial charge and reiterated the wage increase allegation in the 22 December charge, the Regional Director ultimately dismissed that allegation on 11 March 1983 on the ground that the Respondents had substantially remedied any unfair labor practice conduct in June 1982 by paying the 72-cent increase to the employees, and the General Counsel has neither alleged nor offered evidence that this delay in disposition was occasioned by the Regional Director's examination of some issue connected with the charge. However, even though the Regional Director had learned of the settlement disposing of the wage increase dispute in early October, he did not dismiss the charge for another 5 months. Certainly, the original charge should have been either dismissed or withdrawn well before the Union sought to amend it. Thus, it should not have existed on 22 December to be used as the linchpin for issuing a complaint that was otherwise barred by Section 10(b).[5]

Our dissenting colleague argues that our conclusion concerning the disposition of the initial charge circumscribes the General Counsel's discretion in determining how to proceed with pending unfair labor pratice charges. It does not. In his 11 March 1983 letter, appended to the Respondents' motion, the Regional Director based his refusal to issue a complaint as to the 72-cent-per-hour wage increase allegation on his determination that "the Employer subsequently paid that increase due under the expired contract, thereby substantially remedying any unfair labor practice conduct." Thus, the General Counsel's decision not to proceed with the charge turned ultimately on one undisputed fact: that the Respondents agreed in June 1982 to pay the 72-cent increase retroactively. Once the Regional Director was notified of this agreement and had the opportunity to verify its existence, all facts relevant to the ultimate disposition of this charge were established, and the General Counsel does not contend that the charge was the subject of further investigative proceedings. Under these circumstances, given the Regional Director's determina-

[3] Our dissenting colleague contends that we have misstated the position of the Generla Counsel in this regard. The dissent considers as a rebuttal to the facts stated in the Respondents' pleadings the General Counsel's statement that the Union "may not have felt" that the pay increase issue was resolved and that the Union may have been at this point still "interested in pursuing the charge." Such interest is demonstrated, the dissent argues, by the Union's reiteration of its allegation concerning the pay increase in the amended charge—a practice that the Regional Offices routinely advise charging parties to perform under Sec. 10064.1 of the NLRB Casehandling Manual (Part One) whenever amending an outstanding charge. To demonstrate the inadequacy of the General Counsel's pleadings as an effective rebuttal, we need only cite to the very passage quoted in the dissent, *U.S. Contractors v. NLRB*, 697 F.2d 695 (5th Cir. 1983), addressing the function of the Board as a forum for the adjudication of public, as opposed to private, rights. What is germane, in terms of effectuating the Act's policies, is not whether the Union demonstrated a continued interest in pursuing the pending charge but whether the unfair labor practice complained of had been substantially remedied. The General Counsel's dismissal letter of 11 March 1983 demonstrates that the misconduct alleged in the pay increase charge had been so remedied.

[4] See *Western Electric Co.*, 198 NLRB 623 (1972); *Williams v. Baltimore & Ohio Railroad Co.*, 303 F.2d 323 (6th Cir. 1962).

[5] Having concluded that the original charge could not properly have been amended at the time the second charge was filed, we find it unnecessary to consider the Respondents' alternative argument that the charges are insufficiently similar to permit the latter to relate back to the former.

tion to dismiss the charge, we perceive no basis for concluding that a requirement that he do so promptly interferes with the General Counsel's discretion under Section 3(d) of the Act.[6]

We therefore conclude that further proceedings with respect to the Respondents' alleged failure to pay employees holiday pay for Good Friday, 9 April 1982, are precluded by the provisions of Section 10(b) of the Act. Therefore, we grant the Respondents' Motion for Summary Judgment.

ORDER

The National Labor Relations Board grants the Respondents' Motion for Summary Judgment and orders that the complaint is dismissed in its entirety.

MEMBER ZIMMERMAN, dissenting.

Contrary to my colleagues, I would deny the Respondents' Motion for Summary Judgment. Their determination that the General Counsel, in the person of the Regional Director, was bound by what they refer to as the "settlement" of the dispute underlying the initial charge in this case contravenes longstanding principles of law which dictate the opposite result from that which they have reached.

Section 3(d) of the Act vests in the General Counsel exclusive authority to prosecute unfair labor practices. This authority is not subject to review by the Board or by the courts.[1] More specifically, Section 3(d) precludes Board or court review of the General Counsel's decisions about the disposition of unfair labor practice charges.[2] Thus, Section 3(d) of the Act plainly gives the General Counsel broad discretion in determining whether or not to dismiss a charge. Once, as in the instant case, a charge has been timely filed, the General Counsel has virtually unlimited discretion to proceed on such a charge as he sees fit,[3] and in the absence of a showing of abuse of that discretion, the Board will not interfere with the General Counsel's exercise of it. Here, there is no showing of any abuse of discretion on the part of the General Counsel in not dismissing the charge.

The General Counsel was not required or obligated to dismiss the outstanding unfair labor practice charges as to the 72-cent wage increase, when he was notified by the Respondents in October 1982 that they and the Union had agreed to a contract the previous June, under the terms of which the disputed wage increase would be paid retroactively to April. Simply stated, the General Counsel will only be bound to settlement agreements to which he is a party.[4] Thus:

> The Board . . . acts in the public interest by enforcing public, not private rights, and "parties cannot by contractual agreement divest the Board's function to operate in the public interest." . . . While private parties might conclude that it is in their best interest to settle a charge, the Regional Director could conclude that the public interest would be better served by a formal resolution of the dispute and thus [the Regional Director] would be under a public duty not to approve the settlement.[5]

Indeed, here there was no request from the Union to withdraw the charge. Consequently, the agreement reached by the parties as to the payment of the 72-cent wage increase in no way curtailed the General Counsel's discretionary authority over the disposition of the outstanding unfair labor practice charges. Accordingly, I conclude that my colleagues have erred in finding that the General Counsel was required to dismiss the unfair labor practice charges when advised by the Respondents of the terms of their new contract with the Union.

Finally, I note that my colleagues misstate the General Counsel's position in this case when they assert that the General Counsel does not dispute the accuracy of the Respondents' averment that all allegations in the initial charge had been either resolved during contract negotiations or administratively dismissed. To the contrary, the General Counsel contends:

> The fact that the charge [re the 72-cent increase] was ultimately dismissed rather than withdrawn suggests that the Union may not have felt the question of the $.72 increase was resolved and was still interested in pursuing this aspect of its charge at the time it filed its amendment [re holiday pay]. The fact that the amended charge reiterated the [72-cent] wage increase allegation strengthens this conclusion.

Thus, far from not disputing the accuracy of the Respondents' averment, the General Counsel directly attacks it.

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[6] We likewise reject the dissent's expansive reading of this ruling as obligating the General Counsel to defer to the terms of a private settlement agreement. The determination that the June 1982 agreement "substantially remedied" the charge over the 72-cent pay increase was made by the Regional Director in the course of his investigation. Had the Regional Director not made such a determination, we would not, of course, require him to do so on the sole basis of a party's contention that a private settlement had taken place.

[1] *Machinists v. Lubbers*, 681 F.2d 598, 602 (9th Cir. 1982).

[2] *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 138–139 (1975).

[3] *K & E Bus Lines*, 255 NLRB 1022, 1029 (1981); *California Pacific Signs*, 233 NLRB 450, 451 (1977).

[4] *U.S. Contractors v. NLRB*, 697 F.2d 692, 695 (5th Cir. 1983).

[5] Ibid.

Also, contrary to my colleagues' expansive reading of the Respondents' motion, there is no "set [ting] forth facts concerning settlement with regard to the $.72 per hour wage increase." In their brief in support of their Motion for Summary Judgment, the Respondents assert that the parties "resolved" the 72-cent-per-hour issue when they agreed to a new collective-bargaining agreement incorporating this increase and the Union withdrew its related grievance. The Respondents attach to their brief a copy of a 4 October 1982 letter from the Respondents' attorney to the Regional Office, stating that:

> In settlement of the current labor agreement, the parties resolved this claim and the union withdrew its grievance for the monies. Accordingly . . . that part of the dispute was settled by the parties. Thus, there is no need for further processing of this matter by your office and the case should be marked closed.

My colleagues assert that once the Regional Director received this letter from the Respondents and had an opportunity to verify its contents, all facts relevant to the ultimate disposition of the charge were established. I do not share my colleagues' post facto assessment on this subject, and I particularly do not substitute it for the discretionary assessment apparently made by the Regional Director, at the time, that the charge in question should not yet be dismissed.

However, on 20 December the Union filed an amended charge, specifically reiterating the alleged unlawful failure to pay the 72-cent-per-hour wage increase, and alleging for the first time that the Respondents unlawfully failed to pay Good Friday holiday pay. It was not until 11 March 1983, based on his investigation of the amended charge, that the Regional Director dismissed the allegation of unlawful failure to pay the 72-cent-per-hour wage increase. In any event, less than 3 months after the Respondents informed the Regional Director that the issue involving the wage increase had been resolved, the Union reiterated its allegation of unlawful activity in this regard. Thus, even viewing these facts in the light most favorable to the Respondents, I cannot agree with my colleagues that the pleadings themselves establish that the General Counsel abused his discretion. Accordingly, I find that this matter is not suitable for summary judgment.

New York University *and* United Staff Association of NYU, Local 3882, New York State United Teachers, AFT, AFL–CIO. Case 2–CA–17974

14 December 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS ZIMMERMAN AND DENNIS

On 10 December 1982 Administrative Law Judge James F. Morton issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed a brief in support of the judge's decision.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

The judge found that the University violated Section 8(a)(5) and (1) of the National Labor Relations Act by granting merit wage increases to two employees without bargaining with the union certified as the employees' collective-bargaining representative. It is undisputed that the University granted wage increases to employees Jean MacNab and David Fier without bargaining with the Union. The University contends, however, that those increases were authorized by the collective-bargaining agreement. We find merit in that contention.

The 1980–1981 collective-bargaining agreement did not establish a single rate of pay for office clerical employees in job grades 4 though 10 and legal secretaries III through I. Rather, it establishes salary ranges, with minimum and maximum rates for those job grades. The wage increases granted MacNab and Fier came within the salary ranges specified for their jobs in the 1980–1981 collective-bargaining agreement.[1]

The University contends that it was authorized under the agreement not only to hire employees at any wage rate within the contractual salary ranges, but also to grant employees wage increases within those ranges. On its face, the agreement appears to authorize the payment of any wage rate within the contractual minimum and maximum rates for the particular job grade. The General Counsel seeks to explain the contractual salary ranges on the ground that the University was paying employees in the same job grade widely disparate wage rates when the Union was certified in December 1978, so that it would have required a major reorganization of the clerical grade structure to make the wage rates within each job grade uniform. Accepting that as one of the reasons for having salary ranges in the agreement, we nonetheless conclude that the Union made a significant concession when it agreed, without any restriction, that the University might pay employees in the same job grade different rates of pay within the contractual salary ranges.[2]

The General Counsel appears to contend that the contractual salary ranges authorize the University merely to maintain the wage disparities that existed when the Union was certified and give the University no discretion to increase an employee's wages within the salary range specified for the employee's job. But the General Counsel concedes that the management rights clause of the collective-bargaining agreement authorizes the University to promote employees unilaterally. Thus, had the University raised the wages of employees MacNab and Fier by promoting them to higher job grades, without bargaining with the Union, it is conceded that there would have been no violation of the Act. The General Counsel urges that the collective-bargaining agreement makes a distinction between promotions, which the University is admittedly authorized to make without bargaining with the Union, and within-grade wage increases, as to which bargaining is allegedly required before each increase, even though the increase comes within the salary range expressly authorized in the agreement.

Other provisions of the collective-bargaining agreement belie that contention. The 1980–1981 agreement provides that when a Code 106 (office clerical) employee bumps a junior employee in a job more than one grade below the employee's

[1] MacNab's increase (from $261.26 to $275) was within the $221 minimum and $306 maximum listed for her grade 9 job in the 1980–1981 contract. Fier's increase (from $278.36 to $300) was within the $233 minimum and $323 maximum listed in the 1980–1981 contract for his grade 10 job. Although MacNab's increase was granted in late August 1980, 2 months before the expiration of the 1979–1980 contract, and exceeded by $2 the $273 maximum listed for her job in that contract, there appears to have been a mid-term renegotiation and increase of the contractual wage rates in early 1980. In any event, the General Counsel does not allege that MacNab's increase exceeded the contractual maximum for her job and does not attempt to predicate the alleged violation in this case on any alleged deviation from the contractual wage scale. By the time Fier was granted his increase in January 1981 and the dispute over the wage increases arose between the parties, the 1980–1981 contract was in effect and, as noted, MacNab's and Fier's increases were well within the contractual salary ranges listed in that contract.

[2] Salary ranges were established in the initial collective-bargaining agreement (1979–1980) and were retained in subsequent agreements (1980–1981 and 1981–1982), with increased minimum and maximum rates for the various job grades in each subsequent agreement. As discussed, infra, new job grades were established in the 1980–1981 agreement and salary ranges, with minimum and maximum rates, were established for those jobs, as well.

own, the employee shall be paid the rate of the bumped employee or the employee's own rate, whichever is less, or "*at the discretion of the Employer, receive a rate not to exceed the maximum for the grade*" (art. XI, sec. 5, emphasis added). The agreement also sets limits on the minimum rate that may be paid a Code 104 (laboratory/technical) employee bumping into a lower rated job and then provides, "*At the discretion of the Employer, the employee may be paid a higher rate not to exceed the maximum earned by any employee working in that job title*" (ibid., emphasis added). Similarly, the agreement provides that, under certain conditions, when employees are required to perform a higher rated unit job on a temporary assignment of 20 work days or more, they "shall be paid *no less than* the minimum rate for the higher rated job or an additional $5.00 per week, whichever is greater" (art. VII, sec. 3, emphasis added). Unless the words "no less than" are mere surplusage, they recognize the University's authority to pay a higher rate for the job up to the contractual maximum.

Moreover, after the University in late 1980 unilaterally upgraded the secretaries in its legal counsel's office, giving them new job titles and wage increases, the parties agreed in the 1980–1981 agreement not only to establish new job grades for Legal Secretaries III–I, but also to establish new salary ranges, with minimum and maximum rates for each of the new grades.[3] Since those grades had not existed before the Union's certification, the new salary ranges cannot be explained as merely preserving precertification wage disparities for employees in established job grades. In our view, the evident explanation is that just as the agreement admittedly authorizes the University unilaterally to promote employees to higher job grades within the contractual structure, so it authorizes the University to grant within-grade increases within the contractually established salary ranges for each particular job grade. See *Markle Mfg. Co.*, 239 NLRB 1353, 1363 (1979). Accordingly, we conclude that the wage provisions of the collective-bargaining agreemeent, construed as a whole, clearly authorize the University to pay higher wages for each job up to the contractual maximum, without bargaining with the Union during the term of the agreement.

Nor do we find persuasive the General Counsel's reliance on the bargaining history of the parties to support the alleged violation in this case. The General Counsel relies on a rejected wage proposal of the University for the 1980–1981 contract. That proposal provided for a 7-percent increase in the base rate for all employees and a 7-percent increase in the minimum and maximum rates for all groups effective 25 August 1980. In addition, the University's proposal provided:

> The Employer will grant merit increases, based on its sole discretion, to employees covered by this Agreement on October 6, 1980 in an amount, to be agreed on, equal to a percent of the base payroll for covered employees on August 24, 1980.

Because the Union successfully resisted this proposal and the parties instead agreed on a flat 10-percent annual increase for all employees, the General Counsel argues that the parties recognized that the University was not contractually authorized to grant any within-grade wage increases without first bargaining with the Union.[4]

But, as the University points out, prior to the Union's certification, all wage increases were within the University's sole discretion and there were two kinds of merit increase. First, the University granted an annual wage increase, consisting of a percentage increase for the employees of each administrative unit of the University; that increase was to be allocated by the administrative unit among its employees on the basis of merit. Second, the University granted additional individual merit increases to about 20–25 employees during the course of the year.[5] We find persuasive the University's argument that its unsuccessful wage proposals concerned the annual wage increase rather than the individual wage increases granted throughout the year. Although the University sought unsuccessful-

[3] At the same time, it was agreed that if the University instituted a new job grade, outside the contractual structure, "the job rate shall be negotiated with the Association" (art. VII, sec. 2). In the absence of agreement, the dispute was to be resolved under the contractual grievance and arbitration procedure. Ibid.

[4] In negotiations for the 1981–1982 contract, the University again proposed that the annual wage increase should consist of a percentage increase for all employees and an additional percentage increase to be distributed to unit employees in the form of merit increases as the University saw fit. The Union again rejected the proposal to allocate part of the annual increase to merit raises and the parties instead agreed on a 10-percent across-the-board annual wage increase retroactive to 31 August 1981.

[5] The University's director of labor relations testified that the University continued to grant these individual increases after the Union's certification. But the Union's chief steward denied knowledge of any postcertification individual wage increases granted without a contemporaneous promotion, except for the increases at issue here and a $10 increase granted to the Union's president, Jack Kraft. The record shows that Kraft received only a $5 increase when he was promoted to a grade 7 mail sorter in 1978 and that he received an additional $10 increase in 1980, ih circumstances that need not be explored here. Because we find that the collective-bargaining agreement authorized wage increases within the contractual salary ranges, we find it unnecessary to pass on whether the Union could be deemed to have acquiesced in the University's practice of granting individual wage increases absent the agreement. We note, however, that the record does not support the judge's finding that the University's individual wage increases were limited to employees outside the bargaining unit or that they were granted only on infrequent occasions during the course of the year.

ly to retain some of the merit increase characteristics of the annual wage increases, it did not agree to cease the individual wage increases granted during the year in addition to the annual increase. On the contrary, as discussed above, we find that the contractual salary ranges agreed to by the Union authorized the University to continue to grant individual wage increases up to the maximum rates prescribed in the contract. Accordingly, we find unpersuasive the Union's reliance on the history of rejected bargaining proposals to vary the terms of the contract.

In sum, we conclude that the University did not violate Section 8(a)(5) and (1) of the Act by granting to employees Jean MacNab and David Fier the wage increases alleged as violations in the complaint because those increases were authorized by the collective-bargaining agreement between the University and the Union.[6] We shall therefore dismiss the complaint in its entirety.

ORDER

The complaint is dismissed.

MEMBER ZIMMERMAN, dissenting.

I find, for the reasons given by the administrative law judge, that the Respondent unlawfully granted merit increases to two employees represented by the Union without collectively bargaining with the Union over such increases.

As the judge observed, the Board, historically, has not lightly inferred a waiver by contract of a labor organization's statutory right to be consulted about changes in wage rates, hours of employment, or other terms and conditions of employment for unit employees. He correctly found that the facts here do not support a finding that the Union waived its bargaining rights concerning the granting of merit increases. Thus, in two successive contracts the union successfully opposed the Respondent's proposal that the Union permit it to grant merit increases at the Respondent's sole discretion. To construe the broad management rights clause of the current contract as a waiver of the right to bargain over merit increases is to improperly ignore a bargaining history which addressed the specific point at issue.

Nor do the salary ranges established by the contract within each job grade prove a waiver of the Union's bargaining rights concerning merit increases. As the judge found, those ranges reflect wage disparities that existed when the Union was certified. The clause permits the Respondent to maintain the disparity; it does not permit the Respondent to increase unilaterally the wages of a given employee within the salary range of his job grade.[1]

I agree with Judge Morton, and find my colleagues' efforts to bolster the Respondent's case in the face of adverse facts unpersuasive.

[6] On the view we take of this case, it is unnecessary to reach the additional arguments raised by the University concerning the scope of the management rights clause, the zipper clause, and the grievance and arbitration clauses of the collective-bargaining agreement. In addition, we note that no issue is present concerning deferral to contractual grievance and arbitration procedures, as no party has urged that the matter at issue here could be resolved under those procedures.

[1] That other contract provisions give the Respondent discretion to select a rate within the salary range for employees who bump to lower grades is not evidence to the contrary. Those provisions involve a change in job *grade* and not merely an increase *within* the grade. Moreover, it could well be argued that failure expressly to allow discretion in the clause setting forth salary ranges, while so allowing discretion in clause regarding bumping rights, is evidence that the parties *did not* intend to grant the Respondent the right to give merit increases unilaterally.

DECISION

STATEMENT OF THE CASE

JAMES F. MORTON, Administrative Law Judge. On April 3, 1981, United Staff Association of NYU, Local 3882, New York State UNited Teachers, AFT, AFL–CIO (Union) filed the unfair labor practice charge in this case against New York University (Respondent). On November 24, 1981, the Regional Director of the New York field office of the National Labor Relations Board (Board), on behalf of the General Counsel of the Board, issued a complaint against Respondent which alleged that Respondent had violated Section 8(a)(1) and (5) of the National Labor Relations Act as amended (the Act) by having granted merit wage increases to employees represented by the Union without having obtained the consent of the Union. Respondent, in its answer to the complaint, denied that allegation and has asserted that the Union in fact had consented to the granting of those merit increases.

I heard the case in New York City on September 13, 1982.

On the entire record, including my observation of the demeanor of the witnesses and on careful consideration of the briefs filed by counsel for the General Counsel and by counsel for Respondent, I make the following

FINDINGS

I. THE STATUS OF RESPONDENT AND THE UNION

Based on the pleadings, I find that Respondent is an employer within the meaning of Section 2(2) of the Act and that it is engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that the Union is a labor organization as defined in Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

Respondent is a private university in New York City. The Union is the certified exclusive collective-bargaining representative of aproximately 1500 office clerical employees, laboratory/technical employees, and "special" employees employed by Respondent.

In the years before the Union was so certified, Respondent had conducted annual wage reviews of its employees and had been in the practice of granting them a general wage increase once a year. In addition, it gave some of its employees, about the same time of the annual general increase, merit increases, over and above the general wage increase. It appears that Respondent, on infrequent occasions, had also given other merit increases to individuals at other times during the year.

After the Union was certified, the parties discussed the matter of merit increases, as discussed in detail below.

The events giving rise to the instant case took place in 1980 and early 1981. The Union learned of them in early 1981.

B. *The Merit Increases in this Case*

In early 1981, the Union's representatives had heard from various employees that a unit employee had been given a $22 weekly increase even though his duties had been unchanged. They broached this matter with Respondent's director of personnel and when she confirmed the report, the Union protested that Respondent had given that employee a merit increase without bargaining with it. The Union offered to settle the matter either by Respondent's giving the unit employee a bona fide promotion or by agreeing to a new salary grade for the job then being done by that employee. Respondent's director of personnel then informed the Union that Respondent had, some 5 months previously, given another unit employee a raise (in that case, of $14 a week) and a new job title, even though that employee's job duties were not changed.

Respondent's director of personnel then informed the Union that she had not thought that the Union would object to the wage increases given those two employees but that, as it did object, Respondent would have to rescind those wage increases. The Union's executive board met about a week later to consider what it should do. It decided to insist that Respondent rescind the two merit increases and, on February 24, 1981, the Union wrote Respondent to advise it that Respondent cannot grant a salary increase without a corresponding promotion or without reaching agreement with the Union on a new salary group. On March 18, 1981, Respondent wrote the Union to state that, after reviewing the matter, Respondent was of the view that there was no violation of the contract by its having granted merit increases to the two unit employees involved in this case. At the hearing, the General Counsel advised that the Union is not now seeking to have those merit increases rescinded.

C. *Other Wage Increases During the Term of the Contract*

In the summer of 1980, Respondent changed the job title of the secretaries in its legal department to legal secretary and gave them salary increases. It did this to remain competitive. The Union objected to the change as it was done without notice to it or its consent. That objection was resolved by the addition then of a new clause to the contract that, if Respondent institutes a job grade not listed in the contract, the job rate shall be negotiated with the Union and, if not agreed to, the job rate shall be resolved by arbitration.

There was one time that Respondent increased a unit employee's salary during the term of a contract and without a contemporaneous change in duties.[1] In particular, the Union's president was promoted in October 1978 to mail sorter, grade 7, but was not given a promised wage increase then. He protested and finally wrote to Respondent's director of labor relations in February 1980. He received the $10 increase on February 11, 1980.

D. *Negotiations on the Issue of Merit Increases and Relevant Contract Clauses*

Respondent contends that the merit increases it granted to the two employees involved in this case were authorized by the provisions of its collective-bargaining agreement with the Union. The General Counsel asserts that they were not.

As noted earlier, prior to the Union's certification, Respondent conducted annual salary reviews of its employees and had been in the practice of granting some merit increases each year in conjunction with a general wage increase and, on infrequent occasions during the ensuing year, it granted a few other merit increases.

The Union was certified on December 26, 1978. Since November 1979 it has had successive contracts with Respondent. In the summer of 1980 the parties met to discuss the salary scales of the unit employees. Respondent offered at that time to increase the salaries of all unit employees by 7 percent and that the Union permit Respondent to grant additional increases, on October 6, 1980, based on Respondent's sole discretion. According to Respondent's proposal respecting those merit increases, the total amount to be granted as merit increases would be "an amount to be agreed on, equal to a percent of the base payroll." The Union rejected that proposal and Respondent then withdrew its entire offer. Negotiations continued. The parties then agreed to a 10-percent raise "across the board."

As related earlier, the Union learned in January 1981 that Respondent had given two employees merit increases and that led to this very case.

In the negotiations for the 1981–1982 contract, Respondent offered a general wage increase and it further

[1] Respondent's director of labor relations testified that each year from 1977 to 1981 (when Respondent discontinued giving merit increases upon the filing of the unfair labor practice charge in this case), Respondent granted about 25 merit increases. It appears that those increases were given to employees who were not included in the Union's bargaining unit and were given without notice to, or the knowledge of, the Union.

proposed that a sum equal to a 2-percent across-the-board wage increase be distributed by it to unit employees in the form of merit increases as it saw fit. The Union "very firmly" rejected the merit increase proposal. On December 8, 1981, the parties reached agrement on the basis of a 10-percent general wage increase, retroactive to August 31, 1981.

Respondent relies on various provisions of the contract to support its contention that the Union had agreed that Respondent could grant the merit increases involved in this case.

The 1980–1981 and the 1981–1982 contracts both contained the following clauses which had been put into those contracts by Respondent's associate general counsel who drafted the final documents. There was no evidence offered to indicate that the parties discussed those clauses during the negotiations. Both of those contracts have been signed by the parties. The clauses read:

ARTICLE XXVIII—MANAGEMENT RIGHTS

> The operation and mangement of the University and the supervision and direction of the employees are and shall continue to be solely and exclusively the functions and prerogatives of the [Respondent]. All of the rights, functions and prerogatives of management which are not expressly and specifically restricted or modified by one or more explicit provisions of this Agreement are reserved and retained exclusively by the [Respondent] and shall not be deemed or construed to have been modified, diminished or impaired by any past practice or course of conduct or otherwise than by express provision of this Agreement. Without in any manner limiting or affecting the generality of the foregoing, the right and power to select and hire all employees, to suspend, discipline, demote or discharge them for cause, to promote them to supervisory or other positions, to assign, transfer, supervise, and direct all working forces, to maintain discipline and efficiency among them to determine the facilities, methods, means, equipment, procedures, and personnel required to conduct activities, to promulgate rules and regulations and to exercise the other customary functions of the [Respondent] for the carrying on of its business and operations, are recognized as vested exclusively in the [Respondent].

ARTICLE XXIX—ENTIRE AGREEMENT

> The [Respondent] and the [Union] agree that all matters desired by either party have been presented, discussed and incorporated herein or rejected. Accordingly, it is agreed that for the life of this Agreement each party voluntarily and unqualifiedly waives the right and each agrees that the other shall not be obligated to bargain collectively with respect to any subject or matter, whether or not referred to in this Agreement. This Agreement constitutes the complete understanding of the parties with respect to all issues between them, supersedes all oral or written agreements heretofore made, and may only be modified by a written agreement signed by the parties.

There is one other section of the contract which is relevant to the issue to be decided in this case. Section 1 of article VII sets out a minimum salary and a maximum salary for each grade. Thus, grade 4 has a $178 minimum and a $224 maximum. The respective ranges were put into the initial contract to take into account that, at the time the Union was certified, all the employees in each grade were not receiving the same wage rate. In fact, there were considerable differences. Respondent's director of labor relations testified that he also viewed the ranges as a basis for Respondent to grant merit increases up to the respective maximums. It appears clear from the overall record that the Union had never expressly assented to that view.

E. *Analysis*

The General Counsel asserts that Respondent granted two merit increases to unit employees without notice to and bargaining with the Union. Respondent contends that the Union, by having assented to the broad management-rights clause set out in article XXVIII and other clauses discussed above, had agreed that Respondent could grant such increases. The Board has long held that it will not lightly infer a waiver by contract of a labor organization's statutory right to be consulted about changes in wage rates, hours of employment, or other terms or conditions of employment of the unit employees.[2] Where the history and nature of the parties' negotiations demonstrate that a labor organization, in agreeing to the terms of a broad management-rights clause, understood that it granted an employer significantly expanded authority to implement changes in employment terms, the Board will find that, by those negotiations, a labor organization will have understood that acceptance of the management-rights clause "amounted to a broad waiver of its right to be notified of and to bargain about such changes."[3]

The facts in the instant case do not support Respondent's contention that the Union waived its bargaining rights as to the granting of merit increases to unit employees. To hold otherwise would be tantamount to finding that a party, by signing a contract drafted by the other side which contained broad waiver language, had thereby agreed to a proposal it had vigorously and successfully opposed.[4]

Respondent urges that the zipper clause, i.e., article XXIX, precludes the Union from seeking to reopen negotiations on the subject of merit increases. That argument overlooks the fact that the Union was but seeking to give Respondent a way to redress the unilateral change. To construe the zipper clause so as to exonerate Respondent, I would first be required to find that Respondent and the Union had agreed that Respondent

[2] *Southern Florida Hotel Assn.*, 245 NLRB 561, 567 (1979).

[3] Ibid. at 568.

[4] Cf. *Rockwell International Corp.*, 260 NLRB 1346 (1982); *Pepsi-Cola Distributing Co.*, 241 NLRB 869 (1979); *Peerless Publications*, 231 NLRB 244, 258 (1977).

could grant merit increases as it saw fit. That is simply not so.

Respondent further points to the fact that the salaries of the unit employees are set in a range from minimum to maximum. It then suggests that it was free to pay the unit employees any salary within their respective ranges and that it could do this by granting merit increases.[5] There is no evidence to support that view. Rather, the evidence indicates that the respective ranges were set up initially to reflect the status of the applicable salary scale as of the time the Union was certified.

Based on the entire record in this case, I find that Respondent unilaterally granted merit increases to two unit employees without having bargained collectively with the Union, and Respondent thereby violated Section 8(a)(1) and (5) of the Act.[6]

[5] *Markle Mfg. Co.*, 239 NLRB 1353, 1363 (1979), relied on by Respondent, is factually distinguishable from the instant case. More to the point is the discussion at fn. 3 in *GTE Automatic Electric*, 261 NLRB 1491 (1982), and the discussion of *Pepsi-Cola*, supra.

[6] The General Counsel's brief notes that, if Respondent were to contend that the issue presented in this case can best be resolved via arbitration, Respondent would thereby be conceding that the Union did not clearly and unequivocally waive its right to bargain as to merit increases. Respondent's brief raises no deferral claim. Respondent addresses its argument toward the basic issue in this case—whether the contractual language in overall context establishes that the parties had agreed that Respondent could at its discretion grant merit raises at various times during the contract term. Respondent does assert that the Union is seeking via this case to secure something that it could not obtain in contract negotiations. That argument is fallacious as it assumes as a fact the very issue in controversy, i.e., whether the parties had agreed that the Respondent could grant merit increases unilaterally.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization as defined in Section 2(5) of the Act.

3. The following unit of employees is appropriate for purposes of collective bargaining:

> All full-time and regular part-time office clerical employees in Code 106, and all full-time and regular part-time laboratory/technical employees in Code 104 employed by Respondent, including those employees receiving tuition remission, and all "special" employees who have been employed for at least twelve (12) consecutive weeks and have worked an average of 20 hours or more per week, but excluding all employees in Codes other than 104 and 106, Medical Center employees, full-time students, work-study students, students receiving financial aid through New York University, casual employees, confidential employees, professional employees, guards and supervisors as defined in the National Labor Relations Act.

4. The Union is the exclusive collective-bargaining representative of the employees in the unit described in paragraph 3.

5. Respondent violated Section 8(a)(1) and (5) of the Act by having granted merit wage increases to unit employees without having bargained collectively thereon with the Union

[Recommended Order omitted from publication.]

Universidad Central de Bayamon *and* Union de Profesores Universitarios (UPU). Cases 24–CA–4348, 24–CA–4349, 24–CA–4363, 24–CA–4383, and 24–CA–4508

14 December 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS ZIMMERMAN AND HUNTER

On 30 March 1984 Administrative Law Judge Benjamin Schlesinger issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[1] and conclusions as modified and to adopt the recommended Order.

Respondent University is a private, nonprofit institution established in 1961 with the approval of the Order of the Dominican Fathers of Puerto Rico, Inc. The University contends that it is a religious institution exempt from the coverage of the National Labor Relations Act under *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979). In rejecting this contention we agree with with the judge's findings that the University is not owned, financed, or controlled by the Dominican Order[2] or by the Roman Catholic Church, and that the University's academic mission is secular.

We find, however, that based on the religious training conducted at the University's Center for Dominican Studies in the Caribbean (CEDOC),[3] the University is not obligated to bargain with the Union concerning any terms and conditions of employment relating to the CEDOC program. CEDOC began operation in 1980. It was originally envisaged as a 4-year, postgraduate program which would provide seminarians the academic training required for ordination to the priesthood in the Roman Catholic Church. Dominican Order priests designed the program, prepared the curriculum and instructed the courses.

The University was unable, however, to obtain accreditation of the original program. As a result, in 1982 the University restructured the program to provide 2 years of study leading to a Master of Divinity in Theology degree. The program is open to both lay persons and seminarians. Furthermore, the University's application for accreditation of the program[4] explicitly states that one of the program's objectives is the teaching of lay persons who wish to acquire a thorough knowledge of the science of theology.

The program's primary objective, however, remains the training of priests for the ministry even though it concededly does not provide the entire prescribed academic training for entry into the priesthood.[5] The program is also intended to instruct those who desire to teach in Roman Catholic educational institutions. The CEDOC curriculum remains primarily religious in content. Approximately two-thirds of the required courses are in the areas of sacred scripture, systematic theology, moral theology, and Ecclesiastical History. Furthermore, all curricula must be taught "within the limits of the Roman Catholic tradition."[6]

In light of the primary purposes of CEDOC and its regulation of program curriculum pursuant to the tenets of the Catholic religion we will not impose an obligation on the University to bargain collectively concerning the instructors' terms and conditions of employment within CEDOC.[7] This exclusion of CEDOC from the University's bargaining obligation does not affect our finding that the University's refusal to bargain with the Union as the certified bargaining representative violated Section 8(a)(5) of the Act. The CEDOC program was not referred to in the representation proceeding, and has not involved more than a few university instructors. Furthermore, the Union's general bargaining request did not refer to CEDOC and the University's refusal to bargain was not based on any stated concerns specifically regarding CEDOC. We therefore find that the University was not justified in its refusal to bargain.

[1] In adopting the judge's finding that the Respondent's faculty coordinators are not supervisors within the meaning of the Act, Member Hunter places no reliance on *Adelphi University*, 195 NLRB 639 (1972).

[2] Because the Order of the Dominican Fathers of Puerto Rico does not control the University, we shall not exclude members of the Order from the bargaining unit on the basis that they have a special relationship with their employer. See *D'Youville College*, 225 NLRB 792 (1976). Cf. *Mercy Hospital*, 266 NLRB 944 (1983), enfd. 730 F.2d 1175 (2d Cir. 1984).

[3] This is an acronym for the Spanish "Centro de Estudios Dominicos del Caribe."

[4] The Middle States Association of Colleges and Secondary Schools accredited the program on 27 December 1982 based on the University's application.

[5] Francisco Domingo, director of the University's humanities department, testified that a minimum of 4 years of graduate-level study is required prior to being ordained as a Roman Catholic priest.

[6] In regard to the student makeup of the program, of the 24 students enrolled during the 1982–83 academic year only 5 were laypersons. It should also be noted that the program is financially assisted by the Dominican Order of Puerto Rico which has made $25,000 in scholarships available to students who attend CEDOC.

[7] The record indicates that most university instructors who have assignments relating to CEDOC also have duties unrelated to CEDOC. With respect to these individuals, the University's bargaining obligation shall not include any aspect to their assignments relating to CEDOC.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Universidad Central de Bayamon, Puerto Rico, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

DECISION

PRELIMINARY STATEMENT

BENJAMIN SCHLESINGER, Administrative Law Judge. Respondent Universidad Central de Bayamon (Respondent or University) is and has been at all time material herein a nonprofit corporation, duly organized under and existing by virtue of the laws of the Commonwealth of Puerto Rico, and has engaged in the operation of a postsecondary educational institution in Bayamon, Puerto Rico. At representation hearings held in November 1979 in Case 24-RC-6383, Respondent contended that it was not subject to the Board's jurisdiction for two reasons: (1) that under the decision of the Court of Appeals for the Second Circuit in *NLRB v. Yeshiva University*, 582 F.2d 686 (1978), its employees, being managerial or supervisory or both, were excluded from the coverage of the National Labor Relations Act (the Act); and (2) that under *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979), it was a religious institution exempt from the Act's coverage. The Regional Director for Region 24 rendered his Decision and Direction of Election on December 21, 1979, rejecting both of Respondent's defenses. Pursuant to Section 102.67 of the Board's Rules and Regulations, Respondent requested review of that decision. On January 29, 1980, the Board denied Respondent's request "as it raises no substantial issues warranting review." The Charging Party Union de Profesores Universitarios (UPU) (Union) was, after an election, duly certified as the collective-bargaining representative on February 7, 1980, for the following unit held appropriate for collective bargaining:

> All full-time teaching personnel employed by Respondent at its Bayamon, Puerto Rico campus, including lecturers, instructors, temporary faculty, auxiliary professors, associate professors, professors and athletic instructors/coaches; but, excluding all other employees, all part-time teaching personnel, maintenance personnel, director, [sic] all administrative, office clerical employees, guards and supervisors as defined in the Act.

Thereafter, Respondent failed and refused to bargain with the Union on the principal ground that it had no obligation to do so. Indeed, the Supreme Court decided *NLRB v. Yeshiva University*, 444 U.S. 672 (1980), only 13 days after the issuance of the Certification of Representative; and Respondent has steadfastly relied on this decision (hereafter *Yeshiva University* and *Catholic Bishop* to support its refusal to bargain. That is what gives rise to this unfair labor practice proceeding,[1] which involves not only Respondent's obligations under Section 8(a)(5) of the Act but also its responsibilities to certain of its professors, whom it terminated allegedly because of Respondent's unilaterally imposed terms and conditions of employment or whom it refused to reinstate after the Union had sought to end its unfair labor practice strike against Respondent and offered on behalf of certain professors to return to work.

I. THE BOARD'S JURISDICTION

As stated above, Respondent's defense to the complaint is grounded primarily on the following contentions: (1) Respondent is exempt from the provisions of the Act under *Catholic Bishop*; (2) the professors are managerial employees within the meaning of *Yeshiva University*, and (3) certain of the professors, primarily those designated as coordinators of departments, are supervisors. I deal with these contentions seriatum.

A. *Jurisdiction over Respondent Under Catholic Bishop*

The Regional Director's Decision and Direction of Election in Case 24-RC-6383, at footnote 3, dealt directly with Respondent's claim that, as a religious institution, it was exempt from the jurisdiction of the Act, as follows:

> The Employer (herein at times called the University), a non-profit corporation duly organized and existing by virtue of the laws of the Commonwealth of Puerto Rico is engaged in the operation of a postsecondary educational institution in Bayamon, Puerto Rico. During the past calendar year, which period is representative of its annual operations generally, the Employer purchased and caused to be transported and delivered to its educational institution goods and materials valued in excess of $50,000 of which goods and materials valued in excess of $50,000 were transported and delivered to its educational institution directly from points and places located outside the Commonwealth of Puerto Rico. During the same period, the Employer derived gross revenues from the operation of its educational institution in excess of $1 million exclusive of contributions.
>
> The Employer, contrary to Petitioner, contends that the United States Supreme Court decision of

[1] The Union filed unfair labor practice charges in Cases 24-CA-4348 and 24-CA-4349 on July 14, 1980; in Case 24-CA-4363 on August 8, 1980; in Case 24-CA-4382 on September 12, 1980; and in Case 24-CA-4508 on May 12, 1981. The proceedings were consolidated and a complaint issued on August 14, 1981. A complaint against the Union in Case 24-CB-1112 was also consolidated in the instant proceeding, but the matter was settled and severed at the hearing, which was held in Hato Rey, Puerto Rico, on March 15-19 and 22-23, 1982, and on March 9 and 10, 1983.

Finally, based on the Regional Director's Decision and Direction of Election, in Case 24-RC-6383, quoted in part infra and which I adopt, I conclude that Respondent is an employer within the meaning of Sec. 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Sec. 2(5) of the Act.

Catholic Bishop of Chicago, 440 U.S. 490 (1979) precludes the assertion of jurisdiction herein as the Employer is "controlled" by the Order of the Dominican Fathers of Puerto Rico, Inc., and the Catholic Church, and thus, the assertion of jurisdiction would constitute an impermissible entanglement between Government and religion.

When it addressed this same issue in *Barber-Scotia College*, 245 NLRB 406, the Board limited the scope of *Catholic Bishop, supra*, to "parochial elementary and secondary schools" and, therein, asserted jurisdiction over a church-related institution of higher learning. Citing *Tilton v. Richardson*, 403 U.S. 672 (1972), the Board recognized that, "there are generally significant differences between the religious aspects of church-related institutions of higher learning and parochial elementary and secondary schools." *Id.* at 685. This observation was based on the Court's findings that college students are less impressionable and less susceptible to religious indoctrination, that the internal discipline inherent in college courses minimizes the possibility of sectarian influence, and that a high degree of academic freedom often exists at church-related colleges and universities. *Id* at 686. The Court further stated that, "Since religious indoctrination is not a substantial purpose or activity of these church-related colleges and universities, there is less likelihood than in primary and secondary schools that religion will permeate the area of secular education." *Id.* at 687.

The undisputed record evidence reflects that, as in *Barber-Scotia College, supra*, the Employer herein, "closely resembles the institutions on which the Supreme Court based its general distinction between church-related colleges and parochial schools." As noted above, the Employer is a private, non-profit college located in Bayamon, Puerto Rico, and was established in 1961 by Father Mariano Neauwenhiuzen Casanova with the approval of the Order of the Dominican Fathers of Puerto Rico, Inc. (hereafter the Order). Thereafter, in 1964, the college was incorporated by three members of the Order and transferred to the Order's Seminary in Bayamon, Reparto Flamingo, Puerto Rico. Although financed during this period with funds from the Order, it is undisputed that since 1970, the Employer has operated as a self-sufficient institution, receiving no financial assistance from the Order, and independent of the Catholic Church. Moreover, the Roman Catholic Archdiocese of San Juan in which the college is located: neither exercises administrative nor secular control over the institution; does not own any of the land on which the institution is located or other property used by the institution; nor does it contribute any funds to it. Indeed, the highest ranking official in the Catholic Church in San Juan testified, without contradiction, that as the Employer does not comply with any of the requisites set forth by the Catholic Church, the Employer is not a Catholic university and that it has repeatedly refused to submit to any direction or control by the Catholic Church.

The Employer relies on its Articles of Incorporation and By-Laws to support its contention that it is controlled and operated by the Order. In this regard, Chapter XIII, Article 54 of the By-Laws provide that, "ultimate control of the property resides in the Board of Trustees," and Article 57 provides that, in the event that the university is dissolved, its assets will be distributed by said Board to the Archdiocese of San Juan. In establishing the Board of Trustees, while the By-Laws and the Articles of Incorporation are at variance as to the requirement that a particular number of the trustees be members of the Order, it is undisputed that presently 6 of the 10 trustees are, in fact, members of the Order. Further, the record reflects that the Board of Trustees is empowered, under Chapter V, Article 13 with, *inter alia*, the authority "to ratify appointments for the rank of Professor, submitted by the University President;" "to approve the Salary Scales for the University employees;" and "to review and approve the annual budget submitted by the University President." However, the University's President testified that in exercising its broad authority over University matters, including the hiring, retention or tenure of academic personnel, the Board of Directors is not obliged, and indeed does not consult with or report to the Order. Finally, the only financial or other assistance rendered by the Order to the University consists of an interest-free mortgage on certain University property.

As set forth in its Articles of Incorporation, the aim of the Employer is entirely secular; namely, to provide "a humanistic education at an academic level," a purpose common to both public or private, nonsectarian institutions of learning. The Employer is open to the general public and records for the fiscal year 1977–78 reveal that it receives direct federal grants and participates in various federal student scholarship and loan programs. Although the University offers an optional, specialized program leading to a Bachelor of Arts or a Master's Degree in religion, the study of the Catholic religion is neither required nor stressed in its curriculum. While students are required to take a standard, three credit hour course in religion, said course is primarily devoted to a comparison of various religions, stressing their common areas of belief. While Mass is said daily in its chapel, student attendance is not mandatory. All decisions concerning the admission of students, as well as the hiring of teaching personnel, are made without the involvement of either the Catholic Church or the Order; rather, decisions relating to student admissions or the hiring of personnel are made solely upon the basis of ability and experience.

In view of the above, as an independent board of trustees, and not the Catholic Church or the Order independently formulate and administer all matters

> relating to either the curriculum and labor relations cocerning [sic] the Employer's faculty, I find that the Employer is not a "church-operated school," *College of Notre Dame*, 245 NLRB 386, but, rather, a college of the kind "concerned with providing a secular education rather than with inculcating particular religious values." *Barber-Scotia College, Inc., supra.*

Respondent's contentions regarding *Catholic Bishop* concern allege facts that occurred after the close of the representation hearing. The prime allegations are that: (1) on August 5, 1980, pursuant to a certificate of Catholic religiosity, Respondent was recognized by and affiliated with the Sacred Congregation of Catholic Education in Rome as a Catholic institution and, as such, is subject to the supervision of the Holy See; (2) that Respondent now operates the Center for Theological Studies (CEDOC),[2] which prepares students for the Catholic priesthood and offers a master's degree in theology; and (3) that Respondent owns the elementary school La Milagrosa and the elementary and secondary school Santa Rita (referred to collectively as the Schools), acquired in 1978 and 1979, respectively, as Catholic schools and as Christian teaching laboratories for Respondent's students. In support of all contentions, Respondent alleges an identity of purpose or close interrelationship between the University, the Schools, and CEDOC, on the one hand, and the Catholic Church, on the other hand, because Respondent's president, Father Vincent Van Rooij, is the highest officer of the Dominican Order of Respondent (which allegedly includes CEDOC) and of the Schools.

CEDOC began operating in 1980 but, as late as the last hearing, it really had not taken final shape. Originally, it was intended to be a 4-year program to permit students to be ordained; and the program and its curriculum was devised by priests of the Dominican Order of Puerto Rico. Then, because the program was not acceptable for accreditation by the Middle States Association of Colleges and Secondary Schools (Middle States), a master's degree, 2-year program has been developed; but it had been accredited only on December 27, 1982, and had not commenced as such. In any event, only 3 students participated in CEDOC classes during the 1980–81 school year; 14 in the 1981–1982; and 24 in 1982–83, out of approximately 1700–1800 students enrolled at the University. The program is not listed in the University's 1982–84 catalogue.

It is true, however, that its classes are taught on the university campus, but is is not wholly and structurally integrated with Respondent. Rather, it has its own board of directors consisting of seven members of the Dominican Order. Five are members of Respondent's larger board of trustees. With possibly one exception, it hires and pays for its own professors,[3] although 18 of its professors also teach at the University.[4] Only four of them, however, were teaching at the University at the tie of the representation election. CEDOC has its own director, Father Felix Struik, who was chosen by CEDOC's directors and who interviews candidates for admission. Some of CEDOC's courses parallel those taught in Respondent's undergraduate program designed for seminarians which grants, through Respondent's department of humanities, a bachelor's degree in philosophy.

The Schools have the same board of trustees and president as Respondent and have their own director, who is Respondent's vice president and who is the immediate supervisor of the two principals of the Schools. Contracts of the Schools' teachers are approved by both the principal and the director and grant the teachers the same rights as those enjoyed by the University's professors. The finance department of the University administers the finances of the Schools and the Schools' checks must be signed by the principal and an officer of the University. The director of the physical plant of the University and the director of the Schools oversee the maintenance and upkeep of the Schools' grounds and buildings, and all construction orders must be approved by the Schools' director and the University's board of trustees. The Schools' students are entitled to use the University's library and athletic facilities. Two spiritual counselors at the Schools are part-time professors at the University, three teachers of religion at the Schools are students at the University (but at least two became students after they taught at the Schools), the spiritual counselors supervise the three students, and Respondent's director of humanities supervises both the spiritual counselors and the student-teachers.

However, each School has its own principal and budget. Teachers are hired by the respective principal, with the approval of the director, and are paid by the Schools. Where academic disciplines of Respondent's department of education and social work program require that students engage in practice teaching, some of the students teach at the Schools, as well as at other institutions. The Schools require their teachers to "keep those norms of moral behavior which are dictated by the School and the Catholic Church"; whereas the University imposes no such requirements. Further, although the University's aim, inter alia, is to provide "a humanistic education at an academic level," the School's regulations

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[2] This is an acronym for the Spanish "Centro de Estudios Dominicos del Caribe."

[3] Father Teodoro Veerkamp, a trustee of and professor at both institutions, was granted the status of full-time professor at Respondent, even though he taught only 9 credits at the University, rather than 15 credits required by Respondent's faculty contract. I infer that he had the extra time to teach the CEDOC program and thus was not paid directly by CEDOC because he was already being paid full salary for a partial schedule at the University.

[4] This finding stems from a stipulation between the parties and I feel bound by it. I would be remiss, however, if I did not indicate some inkling of disbelief. One of the "professors" stipulated as teaching at both institutions is the president. I was unaware that he taught at the University. Of greater curiosity is an individual, whose work performed at both institutions is listed of R. Exh. 256 as "Maintenance-Carpentry." The work of two others is listed as "Vocational Counselling" and "Principal-Elementary Academy LaMilagrosa." Furthermore, in R. Exhs. 265, 266, which are primarily memoranda from Franciso Domingo, the University's humanities department director, to Father Felix Struik, CEDOC's director, setting forth the tentative teaching schedules of faculty members in the department of humanities so as to avoid a conflict with their responsibilities in the CEDOC program, Domingo sets forth the schedules of only four professors. And in an attached untranslated memoranda from Struik to Domingo setting forth the CEDOC schedule for the spring semester, 1983, only six professors are listed.

state that admission is open to students who must "[c]onfirm and strengthen with their family and matrimonial life the testimony of Christian life that the child needs for the emotional security that guarantees him the interest and spiritual and academic progress in the Catholic School." The operations of the Schools, including publication of a manual for parochial schools relating to curriculum, Catholic doctrine, hiring of faculty and academic calendar, are supervised by the superintendent for Catholic studies of the Archdioscese of San Juan, to whom the Schools' budgets must be submitted. The University's operations are not supervised in this manner.

There is no dispute that Respondent has been recognized as a Catholic university, but this recognition has had no effect on the manner that the University has been administered or on its curriculum offerings. The recognition agreement vests on the Bishop of San Juan only the authority to oversee those aspects of university life and functions dealing with pastoral or religious matters and is specific in adding: "This right to oversee is understood not to extend to matters which usually fall within the university administration competency." Although the agreement grants the Bishop the right to attend meetings of the board of trustees where pastoral matters are going to be discussed, no such meetings have been held and the Bishop has not attended any meetings, nor has he been invited to them or solicited an invitation. Respondent has continued to receive substantial Federal aid to its programs and for the benefit of its students.[5]

I conclude that not one fact has arisen which dictates that the Regional Director's Decision and Direction of Election be overturned. CEDOC and the schools are functionally and administratively independent of Respondent. While it might be argued that the assertion of jurisdiction over CEDOC and the Schools would constitute an impermissible entanglement between government and religion, no such entanglement is present in the relationship of Respondent's professors and the University. The grant of Catholic affiliation with Respondent has changed not one aspect of the administration of Respondent, which continues to provide a secular education to students of all religions.

The Board has continued to hold that the scope of *Catholic Bishop* is limited to parochial elementary and secondary schools. *Barber-Scotia College*, 245 NLRB 406 (1979); *College of Notre Dame*, 245 NLRB 386 (1979); *Thiel College*, 261 NLRB 580 (1982); *Duquesne University of the Holy Ghost*, 261 NLRB 587 (1982); *Lewis University*, 265 NLRB 1239 (1982). Furthermore, although Respondent is now affiliated with the Catholic Church, that affiliation is at best minimal and has no application to the purpose of the University, which is primarily secular. The University remains an open college, with admission restricted only by the requirement that applicants have graduated from high school and have taken college board examinations.

The Catholic Church contributes nothing to the University's budget. There is no requirement that students take religious courses or engage in worship. In addition, neither students nor teachers need be Catholic, nor of the Dominican Order, and the teachers do not have to commit themselves in writing to support the mission of the Church. The day-to-day administration of the University has not been interfered with by the Church's representatives and, except for CEDOC, the Church appears to have no interest in the University. Even regarding CEDOC, it may well be that Respondent's professors, who also teach courses at CEDOC, may be excluded from the bargaining unit, which specifically excludes part-time employees.

Furthermore, to permit the status of CEDOC to control the Board's jurisdiction would constitute Board approval of the principle that the "tail wags the dog." A minor portion of students are enrolled in CEDOC's programs, and the most substantial portion of Respondent's operation is devoted to nonsecular purposes. Finally, Respondent's posture regarding its religious affiliation is hardly consistent with its demonstrated, repeated attempts, often successful, to receive Federal grants for its programs.

Accordingly, I conclude that the Board is not precluded from taking jurisdiction herein. This accords not only with Board law but also with decisions of the United States courts of appeals which have dealt with similar issues. *St. Elizabeth Community Hospital v. NLRB*, 708 F.2d 1436 (7th Cir. 1982); *NLRB v. St. Louis Christian Home*, 663 F.2d 60 (8th Cir. 1981).[6]

II. THE MANAGERIAL STATUS OF THE FACULTY

A. *The 1978 Changes*

Since the University started operations as a self-sufficient institution in 1970, the university senate, with minority faculty participation, played a substantial role in recommending university policies. However, effective as of July 20, 1978, the administration unilaterally amended the faculty regulations,[7] which substantially altered the functions of the faculty and increased the powers of the president. For example, the power to appoint faculty became vested in the president alone, deleting reference to the requirement that appointments were to be made on the recommendation of the academic dean and the college of deans; no longer would probationary contracts of 1 year be counted to compute requirements for tenure; there was eliminated the requirement that, before an academic load would be assigned to a professor, the faculty member would have to be consulted, and the new regulations permitted the work load to be assigned at the discretion of the department director, with the approval of the academic dean; the structure of faculty evaluations

[5] From August 5, 1980, to the date of the last hearing, the University received $3.75 million in Federal grants, 75 percent of which is student aid and $425,000 in direct institutional assistance and aid to develop curriculum, provide funds for research, et cetera. From October 1, 1977, to September 30, 1978, Respondent received various Federal grants totaling $5,042,298.

[6] To the extent that Respondent has objected to my rulings at the hearing refusing to permit it to introduce evidence which was available at or could have been presented in the representation proceeding and to the extent that, in its briefs, Respondent makes arguments which also could have been presented earlier, I have not considered such evidence or contentions. *Noranda Aluminum*, 268 NLRB No. 223 (Feb. 29, 1984).

[7] New regulations for the senate were also unilaterally issued on July 12, 1978.

was changed to vest in the president all authority over the approval of faculty evaluations, criteria, and methods, which previously had been established by the academic council and approved by the university senate, or the president; disciplinary action was vested in an ad hoc committee appointed by the president, authority which was earlier that of the committee of faculty standards; and faculty members were required for the first time to sign daily attendance sheets and to pay special attention to reporting hours devoted to "office work to attend to [their] students." In addition, on December 14, 1978, the board of trustees issued a clarification of the faculty regulations that no more than 10 percent of the full-time faculty of a given department may be granted tenure.

B. *The State of the Record; Credibility*

Any discussion of the facts in this proceeding must include a reply to certain statements and arguments contained in Respondent's brief, either because Respondent misunderstands the nature of the rulings made at hearing or because Respondent is attempting now to make objections which were not properly made at trial or to argue facts which are not sustained by the record. For example, I have not considered herein as proof any of Respondent's proffered exhibits which were not admitted into evidence. Although the receipt of many of Respondent's exhibits in evidence was stipulated by the General Counsel and the Union, the General Counsel withheld her consent from a number of them on the grounds of relevance and authencity. I sustained her objection solely on the latter ground, preserving for argument the relevance of the proposed exhibits. Respondent was offered several opportunities to introduce proof of the authenticity of the documents, but rejected the offers.

Respondent claimed that there were new facts which arose after the representation proceeding and which it wished to introduce herein, but was forbidden from so doing. The record will reflect that Respondent was not denied the right to introduce any new evidence relating to the managerial status of members of the unit. To the extent that Respondent relies on an affidavit which accompanied its Motion for Summary Judgment, made at the beginning of the hearing, an affidavit is not a substitute for oral testimony subject to cross-examination. I have not considered the affidavit and never stated to the parties that it was proof of anything.

Furthermore, among the more than 400 exhibits received in evidence are numerous committee reports and other documents indicating faculty participation actions, and recommendations of numerous and various proposals. However, there was nothing to indicate that actions and the recommendations amounted to anything more than words on pieces of paper. Without proof that the proposals or recommendations were effected or implemented, I have disregarded the same as lacking any basis for a finding of managerial status, or, at least, have discussed why I have not found the faculty functions claimed by Respondent. Finally, insofar as the 1978 faculty regulations contain new rules, regulations, and procedures, I have, in general, not considered Respondent's proof of various facts by exhibits which preceded Respondent's new faculty regulations, which were put into effect solely by Respondent's administration without the advice, contribution, or consent of the faculty. Respondent cannot rely on past practices which have effectively been rescinded by new written regulations and directives and new practices.

In reciting the functions of the faculty, I have given great weight to Respondent's own unilaterally established, written rules which provide the powers and duties possessed by its board of trustees and each of its component administrators compared with the alleged managerial functions now claimed to be those of its faculty members. Even if there were substantial evidence that its faculty engaged in many actions which would constitute them as managerial employees—and the massive number of exhibits simply do not support Respondent's position—where there is contrary documentary proof, the oral testimony of its department directors or academic dean should not be accorded the weight urged by Respondent. For example, to credit Humanities Department Director Domingo, all he was was a conduit for the faculty's wishes and desires, and all decisions were made collegially, despite the fact that it was *his* duty and no one else's to make the recommendations and decisions which he averred he did not make.

Further, the testimony of Nelida Melendez, director of the education department,[8] was, at best, confused, hesitant, unresponsive, and contradictory; oftimes, she stated one proposition on direct examination, only to recant completely on cross-examination. Some examples are her descriptions of when oversubscribed classes may be divided, how the planning committee was instituted, and the method of placing students for the practice of teaching.

I credit the testimony of neither witness when their testimony attempts to impeach the written bylaws and faculty regulations unilaterally imposed by the university president, where their testimony is unsupported by documentary evidence, and where their testimony is contradicted by witnesses for the General Counsel. Their attempts to inflate the authority of the faculty and minimize their own would, if credited, lead me to the conclusion that department directors did nothing—they do not teach—and that they served no useful purpose, other than to transmit messages. I find that wholly improbable. Rather, I credit the testimony of Sonia Flores, who, when she was the director of the education department, testified that her responsibilities included the selection, supervision, and evaluation of professors, educational orientation of students, preparation of course schedules, and the planning of the future of the department.

C. *The Structure of the University*

The University is governed by a board of directors, which is also known as the board of trustees. The board, whose "executive official is the University President, who shall manage it with the collaboration of a University Senate and other officials," is composed of 11 mem-

[8] Domingo and Melendez were directors to two of the University's four departments, the others being business administration and natural sciences. The directors of the latter two departments did not testify.

bers, and the certificate of incorporation requires that 3 shall be the original 3 incorporators and at least 5 shall be members of the First Dominican Order residing in Puerto Rico.[9] Three "de jure" members, who serve as trustees as long as they retain their offices of positions, are the Regional Vicar of the Dominican Fathers of Puerto Rico, Inc., the Prior of the Convent of Our Lady of the Rosary in Bayamon, Puerto Rico, and the university president; the eight others are elected by majority vote of the trustees, serve for terms of 3 years, and may not be reelected for more than three consecutive terms. Among the duties of the board of trustees are to "be responsible for the framework, operation and future of the University . . . designate the University President . . . review and approve the annual budget submitted by the University President . . . approve the Salary Scales for the University employees . . . ratify appointments for the rank of Professor, submitted by the University President . . . [and] authorize and give the final approval to all the Regulations that shall be in effect at the University and to approve the Academic Programs."

The duties of the university president, "the University's Chief Executive," are to effectuate the policies adopted by the board of trustees, "exercise leadership in the University's internal development . . . preside over meetings of the University Senate . . . attend and preside over, with voice and vote, meetings of all the University groups or organizations . . . appoint all the University officials and employees . . . dismiss from office . . . officials or other University officers . . . establish, at his option, all the committees which he deems necessary . . . approve or, on the contrary, to invalidate through his veto the decisions of the University Senate . . . adopt all the University's curricula, standards, administrative frameworks, policies and procedures . . . submit the annual budget before the Board of Trustees . . . [and] grant tenure as employees of the institution to those who qualify for it pursuant to institutional standards and regulations."

The university senate is described as "the representative Body of administration, of the professoriat and of the student body." It is, however, controlled by the University's administration; for not only does the university president preside over it as the president of the senate but, according to the original bylaws, more than one-half of its membership, excluding the president, are members of the administration of directors of departments (excluded from the unit) or are appointed by the president. The provost, vice president, academic dean, dean of students, finance director, the four academic department directors, and the educational resources director automatically serve as senate members. In addition, the administrative personnel elects one member and the president appoints an additional member from the administrative personnel. Thus, including the president, there are 13 members closely aligned with the president's views. The remaining 10 members of the senate consist of 4 selected by the faculty of each department, 4 elected by the students of each department, and 1 elected by the entire faculty. Yet another is designated by the president from the faculty.[10]

The senate has only the *power* to "create Senate Committees . . . to be designated by the University President." Other than that, it may only make *recommendations* regarding "requirements for admission, advancement and graduation of students . . . the general approach to be adopted in the teaching and research programs pursuant to the University's objectives . . . procedures to develop courses of study . . . [and] the University's curriculum . . . the organizational framework of each Academic Department [and] . . . general policy pertaining to the appointment, promotion, and tenure, rank and leave of the professoriat." The president, as president of the senate, presided at its meetings, gave the opening statements, set forth the agenda, and defined the limits of the senate's jurisdiction. In the April 1980 meeting, he explained that the senate was not an executive or fiscal body, but was legislative, and that the board of trustees had defined the senate's general areas as: (1) criteria and requirements for admission, promotion, and graduation of students and for the programs of study and research according to the objectives of the University; (2) procedures and requirements for the development of courses of study and recommendations concerning the curriculum of the University; (3) recommendations concerning the "organic structure" of each department and academic division; (4) general policy concerning appointments, promotions, tenure, ranks, and leaves for the members of the faculty; (5) recommendations concerning amendments to the University's bylaws and regulations and recommendations concerning rules and procedures in the senate; and (6) creation of permanent or ad hoc committees. The president made clear, however, that decisions are not final but need the endorsement of the president and then "many times" of the board of trustees.[11]

[9] However, the bylaws provide that: "The Board of Trustees shall have an absolute majority or [sic] members belonging to the Dominican Fathers of Puerto Rico, Inc." Six members, not five, would constitute that absolute majority.

[10] The percentage of faculty representatives in the senate subsequently declined. An examination of the senate minutes shows that in March 1976, 7 of 19 members were faculty, 8 were administration staff, and 4 were students. A change in the composition of the senate was presented by the president and was approved. Thereafter, in December 1976, 10 of 29 were members of the faculty; in November 1977, 10 of 29; in April 1980, 8 of 21. Because the attendance quorum is two-thirds of the members and because decisions require, as a minimum, one-half plus one votes and, in some cases, two-thirds of those present, it is impossible for the faculty alone to make a binding decision.

[11] In December 1976, the president reported to the senate, in part, as follows:

> *Composition of the Senate*: Pursuant to the new rules as to the composition of the University Senate, approved at the meeting of the 4th of March 1976, the Senate represents the different areas and interests of the Institution and of the university community of Universidad Central de Bayamon; not exactly the interest of a single area or group. Therefore, the Senators should think above all of the good of the whole Institution as such, also when they may be defending the interests of a specific area, which they represent.
>
> *Functions and Responsibilities*: The University Senate has several functions and responsibilities; the most important are the following three:
>
> (1) *The Legislative Aspect*: The University Senate has a legislative aspect, in respect to the university policy and regulations, academic

Continued

The president's description, in application, does not appear to be wholly accurate. The president appointed all committees, and some of the witnesses testified that, although they were appointed to committees, the committees did not meet or met once, to hear what they were supposed to do, met again. The limitations on the functions of the senate, leaving aside the veto power of the president and the board of trustees, are also clearly demonstrated. At the same April meeting, an administration representative proposed a definition of the functions of the chancellor. The president stated that the motion was unnecessary because it was incumbent on the board of trustees to do so, and it *and* the president have already done so, and the chancellor had already instructed his subordinates regarding their functions. Another motion was made to permit the union representative of unionized administration employees to be an ex officio member of the senate. The president considered the motion to be out of order because the senate did not have jurisdiction over labor-management relations.

In May 1980 a motion was presented that members of the senate should be aware of the financial structure of the University and, therefore, should be given financial statements. The president declared the motion to be out of order, stating: "The finances, financial statements and financial transactions are exclusively and directly incumbent upon the Board of Trustees and the financial officials of the University." Another motion was declared out of order—about needs and ideas for improvement of the physical plant for athletic activities. The president held that these were unrelated to the functions and responsibilities of the senate and were under the direct control of the executive officials and the board of trustees.

The University's bylaws prescribe that the administration officials are all appointed by the president. The provost assists the president in university affairs. The vice president is responsible for the University's financial and administrative matters and has jurisdiction over and establishes the duties of all officials and employees hired by the University. However, in February 1980, Respondent changed its administrative structure by the appointment of a chancellor who was placed in charge of the University's day-to-day academic matters previously discharged by the vice president. The academic dean is the chief administrator of academic affairs and is responsible for planning the University's educational activities, for putting the academic standards into practice, for advising the president on academic policy, and for recommending faculty appointments to the president. The academic dean is empowered to authorize or deny the application to hold any activity of an academic or cultural nature. The dean of students, on the other hand, is the chief administrator of student affairs. He is responsible for planning student activities and for putting into effect the standards pertaining to students and is empowered to authorize or deny the application to hold any type of student activity.

On the academic side, the bylaws set forth the duties and powers of the academic department directors, as follows:

> He shall be responsible, under the Academic Dean's authority, for the general functioning of his Department.
>
> They shall advise the Academic Dean in relation with the teacher's recruitment, appointment, promotion, salary increase, and fulfillment of contractual obligations.
>
> He shall preside over the meetings of his Department's professoriat. He shall inform all the members of the professoriat about his Department's standards, objectives and procedures.
>
> He shall have authority to designate committees from his Department's professoriat to study, plan and recommend programs concerning the educational, student or teacher's aspect.
>
> He shall submit to the Academic Dean the proposal for the teachers' teaching hours.
>
> He shall prepare an annual report on the functioning, achievements and needs of his Department, and shall submit it to the Academic Dean forwarding a copy to the President.
>
> He shall recommend to the Academic Dean, after asking for his Faculty's advice, the curriculum of studies and shall indicate courses that are prerequisites for majoring and those that shall constitute the necessary sequence to achieve it.
>
> After examining their contents, he shall recommend to the Academic Dean the approval of the textbooks and materials.
>
> He shall see to it that students taking courses offered by his Department have the opportunity to seek advice and receive guidance and he shall provide an adequate program for students whose major is related to his Department.
>
> He shall send the minutes of the meetings to the President and to the Academic Dean.
>
> He shall evaluate annually his Department's members and shall submit the pertinent report to the Academic Dean.

The faculty consists of professors, associate professors, assistant professors, and instructors. Appointment of faculty is made by the president after receiving recommendations from the academic dean. The functions of the faculty are described as including "teaching classes, giving and grading examinations, handing in grades on time, orienting the students, participating actively in the

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programs, general promotional policy, standards for tenure, academic ranks, etc. But always subject to the subsequent approval of the Board of Trustees.

(2) *The Counseling Aspect*: The University Senate has a counseling aspect, to make recommendations to the executive branch, in respect to candidates to the Presidency of the University, higher Officials, deans, etc.

(3) *The Fiscal Aspect*: The University Senate also has, to a certain point, a fiscal aspect, to maintain control over the application of the laws approved; for example, ratification of promotions in rank, compliance with requirements for graduation, etc.

Responsibility: It is the responsibility of each senator to seek the good of the entire Institution as such; he should vote according to his own judgment and conscience, and not be led by what others may say or by indications from a group. He should have sufficient independence in his judgment, always taking into account the good of the Institution.

university life, doing research work and seeking his professional development, and any others assigned by the academic dean." Furthermore, the faculty "shall teach its classes adhering to the University standards and guidelines and shall cooperate with their Department Head in all matters pertaining to its functioning. . . . The faculty's rights, powers, and duties shall be established in their contract and in the manuals or regulations that the authorized university entities may publish."

On July 20, 1978, 3 days after the effective date of the revised bylaws, the president issued new faculty regulations, which had been approved by the board of trustees 8 days before, when it had also approved the revised certificate of incorporation and bylaws. Faculty functions are listed, as follows:

> To carry out the student's teaching process.
>
> To coordinate said process in an interdisciplinary manner.
>
> To deliberate when summoned to do so by the Academic Dean and to make recommendations on the University's educational policy, its curriculum and teaching methods.
>
> To annually elect its Representatives before the University Senate and bring its academic positions and proposals to their consideration.
>
> To exercise initiative in the teaching of their subjects within the institutional standards.
>
> To know, respect and uphold the University's philosophy, its objectives, purposes and educational policy.
>
> To fully comply with their contract with the University.
>
> To know and respect the By-laws, regulations and administrative orders of the University.
>
> To assume responsibility before their Department's Head, the Academic Dean and the University President for the performance of their work.
>
> To efficiently participate in the institutional committees to which they are appointed.

In addition, the regulations require that the faculty shall exercise the functions and obligations stipulated in their contract and in the regulations and those assigned to them by their superiors and that the following are considered to be professional functions of each faculty member:

> To assume responsibility for teaching groups of students differing in size.
>
> To create and prepare the necessary materials for the courses he teaches; also the syllabi of their courses.
>
> To be accessible to the students during office hours, for guidance and advice.
>
> To develop study projects and external experiences that will contribute to the teaching process of the students.
>
> To participate in the meetings of the interdisciplinary coordinator groups that his superiors designate.
>
> To design and perform his students' evaluation process.
>
> To keep a record of his students' work that includes the evaluation of their work and other descriptive notations which he deems proper.
>
> To collaborate in the academic orientation of new Faculty members.
>
> To advise his students about their work and internal or external academic alternatives and recommend professional help, if necessary.
>
> To prepare and annually file, if he deems it proper or it is required of him, a self-evaluation report with the Academic Dean and a copy to the President.
>
> To annually review and evaluate the contents of his courses and to eventually submit recommendations to the Academic Council on possible changes to them.
>
> To prepare a program for his own professional betterment.
>
> To devote some time, especially during periods where there are no classes, to scientific research, publications, and other intellectual and cultural activities in accordance with his academic and intellectual standing.

The faculty contracts in use add little to the description of functions set forth above. All are entered into by the university president with the member of the faculty and state that the monthly salary was computed by taking into account the salary scale approved by the board of trustees and the merits of each case. The teacher undertakes to work full time or part time, teach classes, and carry out the extracurricular and administrative schedules which may be assigned to him pursuant to the faculty regulations.

In addition to the foregoing description of the titles and duties of administration staff and faculty, there are a number of other organizations which play some part in the management of the University. Primitivo Martinez, the director of the library and former director of the learning resources center,[12] testified that he was a member of the president's staff, along with the vice president, director of finance, academic dean, dean of students, and provost. They would meet with the president and advise him on such matters as the planning of the University, promotions in rank, discharges, and grant of scholarships. There was also an academic board or council, which consisted of the academic dean, the directors of the four departments and other administrative personnel, but its specific functions were never described.

D. *Faculty Functions*

The above broad institutional guidelines clearly limit the authority and the limitations of the powers of the professors. I turn now to findings of fact as to what Respondent's faculty does and does not do, the latter being particularly in response to Respondent's claims that the faculty exercises managerial powers.

[12] The learning resources center consists of two main divisions, library services, and educational technology, such as studios and dark rooms.

1. Hiring and firing

Some of the professors who appeared at the hearing testified that they were interviewed, first by the department director, then by the academic dean, and finally by the president or by the vice president. Others testified that they were interviewed by one, if not all, of the same administration personnel, although not in the same order. There was no participation by any faculty in the process of hiring of those faculty members and no evidence to demonstrate that faculty opinion was solicited. Nor does the record reflect any faculty participation in decisions to discharge, promote, or demote faculty members. Indeed, Flores was appointed acting director of the education department by the president, then was appointed director of the department by the president, and then was demoted to professor in May 1978 by the president. The discriminatees herein were terminated or were not reinstated solely by action of the administration.

There have been a few instances where there have been recommendations made by faculty members, and the persons recommended by a faculty member have been hired. No causal connection, however, was shown; and the record also indicates that faculty support was sometimes not persuasive. In any event, there is nothing in any document that demonstrates that faculty approval is required or that faculty recommendations are sought by those who ultimately hire personnel. The president testified that he has the ultimate responsibility for the hiring of all faculty and other employees. The new university regulations, unilaterally issued by the president, leave to him alone the power to hire, as contrasted with the earlier regulations which authorized departmental action. The president appoints all faculty members on recommendation of the academic dean and department directors. Terms of contracts for probationary, provisional, and permanent appointments are specified in the faculty regulations. Similarly, the faculty has no power to hire or recommend for hiring any of the university officers and administrators, a power that the bylaws leave to the president and vice president.[13]

The evidence of faculty participation in the hiring of personnel is minimal. Faculty have, in preparing new programs in social work, set forth job descriptions of the director of social work and the supervisor of student practice of social work. Although there appears to be no faculty action relating to who should be appointed to these positions, the recommended job descriptions limited the applicants to those who were able to fulfill the requirements. However, in the case of the director of social work, that position was filled prior to the faculty's completion of the social work program and the qualifications that were used were those of the council on social work, which is an accrediting institution for social work programs in the United States and is wholly unrelated to the University. In June 1977, Sylvia Mulling, the coordinator of the language laboratory, proposed to the director of the personnel office, the academic dean, and the director of the humanities department, the hiring of a part-time employee as a full-time employee because many students were unable to take full advantage of the laboratory. That employee was hired.

In 1978, the tenure and rank committee, consisting of a majority of administration representatives, agreed on the procedure for the hiring of full-time professors. However, those procedures did not include the participation of any faculty in the process of recommending or hiring of professors. In June 1981, a unit employee interviewed a candidate for the position of social work director, and her favorable recommendation was included in the favorable report of the director of the department of humanities to the academic dean.[14] The coordinator of the English department interviewed a candidate for English teacher in December 1981 and recommended her hire to the director of the humanities department; but there is no evidence that the candidate was hired

Finally, without faculty participation, Chancellor Luis Roberto Pinero unilaterally issued a memorandum on May 20, 1980, to the academic dean requiring that no faculty members would be hired unless they possessed at least a master's degree. On July 11, 1980, Pinero issued another memorandum again unilaterally and without faculty participation, requiring that faculty members, to be eligible for hiring, also possess 12 graduate credits in the courses to be taught.

2. Salaries

In 1976, unit members were polled on whether they preferred to have salaries fixed, with increases given for all in the same amount, or whether they wished to have a system of maximum and minimum salaries, or had no preference. Another poll was taken in 1978, which covered not only salary increases, but opinions on numerous other matters. It can almost be cast as a popularity poll. Nonetheless, the faculty voted 40–6 to abandon the then present system of basing salary increases on faculty evaluations and to substitute a system of fixed increases for all based on criteria such as inflation and academic title, rank, and length of employment of faculty members. The record does not reflect what action, if any, was taken to implement the faculty's wishes, but it appears that at some time the board of trustees prepared salary scales based on the professor's preparation and degrees held. The record does not prove that the trustees' action was the result of the faculty vote. The only other faculty input into salaries occurred in 1976, when a faculty representative moved that the university senate change the method of payment of part-time teachers from one payment at the end of each semester to monthly payments. That change was unanimously approved, with one abstention, and was implemented by the University.

3. Rank and tenure

Respondent contends that rank and tenure decisions are made or effectively recommended by unit employees,

[13] There is evidence that faculty participated in recommending the hiring or firing of administrative personnel in 1972 and 1974. Whatever powers they may have had then were abrogated in the new bylaws.

[14] Domingo testified that, in hiring the director, he relied on the interview of the coordinator with the applicant. But he admitted that he also interviewed the applicant twice and that, even if the coordinator had not concurred, he might have appointed her.

but all except one of its supporting documents predate the changes of the faculty regulations. Prior to July 20, 1978, the tenure committee was appointed by the president and usually consisted of four members, two of whom were faculty. Their recommendations and reports almost always were referred to the university senate, which would either approve or disapprove the report. But this method of operation had a checkered history. For example, the senate disapproved tenure for Professor Zulma Delgado de Raffo, despite the recommended approval by the committee. However, the president refused to grant her tenure. The senate overruled the committee on other occasions; and in 1974, the president granted tenure to Mulling, without action by the senate.

In any event, on July 20, 1978, this procedure was changed by the establishment of the new faculty regulations. Under them, the president still designated the members of the committee, and he designated the director of the department in which the professor taught, two other members of the administration, and one faculty member.[18] Their recommendations were given directly to the academic dean, and her recommendation went directly to the president. Not only was the senate bypassed, but at least once was the committee itself; for in the case of the application for tenure of Professor Ernesto Valladares, while the committee was examining the various recommendations, they found out that the president had granted tenure some months before, without having consulted with the committee. In addition, as noted above, the president's staff also considered promotions in rank. The application for tenure of Professor Alejandro Apesteguia was given short shift. When his application came before the staff, all favored the granting of tenure, but the vice president noted that he was not qualified and "he is out." And he was.

Finally, the trustees' requirement that not more than 10 percent of the faculty of a department may obtain tenure effectively meant that the decision to grant tenure on the basis of the professor's qualifications will rarely be necessary. On the basis of the record, it cannot be held that the proof sustains the general proposition that the unit employees control or effectively recommend promotions, rank, or tenure of faculty members.

4. Faculty evaluations

Prior to the 1978 regulations, faculty evaluation, criteria, and methods were to be established by the academic council and approved by the university senate or the president. The 1978 regulations changed that vesting in the president all authority over the approval of faculty evaluation, criteria, and methods. There is in the record an evaluation form to be filled out by professors and which was prepared by a committee of six persons, of whom two were professors, but there is no evidence that the forms served any purpose, either changing the status or ensuring the continued employment of any professor. Rather, Struik and Flores, both former department directors, testified that they were in charge of evaluating professors. Martinez testified that the president's staff would review the evaluations made by the directors. Furthermore, the faculty appears to have opposed the entire system of evaluations and specifically requested in February 1978 that there be no evaluation of faculty by faculty or department colleagues. It is unclear whether this request was honored or, if it was not, what effect is given to the evaluations.

5. Student orientation

Faculty were required to participate in the registration and orientation of students. Students would prepare their proposed class schedules and professors would review them to ensure that the student had taken the prerequisite courses, that they were qualified to undertake their major concentration, and that the selected courses were being given, and whether there were still openings in the classes. If the documents from the registrar's office showed that the class had been filled, the professor would suggest a substitute course to the student. Faculty members have also been required to participate and have participated in a variety of orientation activities to interest prospective students to apply to the University.

On one occasion, professors assigned themselves the orientation of students who had previously been assigned to another professor who had assumed another position. There is also slim evidence that, on occasion, professors assigned to themselves various students for orientation and guidance, but it is not clear whether this was on the direction of the department director.

6. Assignment to courses

Domingo testified that the assignment of professors to teach specific courses is carried out in three ways. First, a preliminary schedule is prepared and professors are asked to indicate what courses they would prefer to teach and what times and days that they are unavailable to teach. Sometimes the preliminary schedule is prepared without any consultation with professors; other times it is necessary for the department director or coordinator to discuss with certain professors their availability because certain ones of them specialize or are proficient in particular courses. Second, the coordinator would prepare the schedule based on his or her familiarity with the professors' schedules of courses elsewhere—many professors were pursuing degree programs for their master's or doctorate degree—and the areas of each professor's specialty. Third, the director would ask each professor what he could teach and the director would prepare the schedule. Academic Dean Delfina Fernandez testified in the representation proceeding to yet a fourth method—the coordinator would ask faculty members what they desired to teach and what would be a convenient schedule. The coordinator would then give a list to the department director, who would assign the academic load and then obtain approval from the academic dean. In any event, Respondent contends that, as a result, the faculty effectively proposes the distribution of teaching loads.

Under the above facts, its contention is not accurate, because the university-prepared contracts with full-time professors, the only ones included in the unit, dictate that professors shall teach 15 credits. No one had any choice

[18] The faculty member on the committee ruling on granting tenure to Professor Merril Bowman Waller was a member of the board of trustees.

to vary that term. It appears that assignment of courses was made pursuant to the individual professor's expertise and availability, and not faculty decision; that assignment was ultimately, in any event, within the prerogative of the department director,[16] subject to the approval of the academic dean.[17]

Furthermore, although Melendez earlier testified that a professor had a right, on his own, to divide a class into sections once more than 50 students enrolled, I find that such decision had to be made by the director, with the consent of the office of the registrar.[18] Even if this were not so, the division of one section into two, because class size exceeded 50 students is, at best, a ministerial one and requires neither managerial discretion nor managerial expertise.[19] Otherwise, faculty members had no authority to limit class size. The English faculty had recommended that certain courses be limited in size, but its suggestions were not followed.[20]

7. Curriculum

Faculty members prepare and revise courses and recommend new courses and revision of curriculum, which have been approved and implemented. Some of these functions go little beyond the faculty member's decision of what will be the content of the course entrusted to the teacher and the preparation of a course syllabus or outline. However, there is also interaction between professors about what they will teach. That is caused by a number of factors: Certain courses have more than one section and the sections are taught by more than one professor. The tests for the basic English, Spanish, and mathematics courses are jointly prepared by the respective faculty of those courses, although it is unclear who prompted this decision. In any event, because of that decision, professors desired to ensure that the same material was being taught, because it would be unfair to the students to be tested on material that was not covered. Furthermore, if an introductory course in a subject does not cover certain fundamentals, students will not be able to understand other principles in a more advanced course. Accordingly, professors have met to ensure that course contents mesh and that the ultimate result of a department's course contents are sufficient to satisfy a thorough education in a major program.

Syllabi of courses have been prepared collegially, by department; course contents have also been prepared and revised collegially; catalogue descriptions have been written; textbooks have been recommended and those recommendations have been generally followed—all this with the active participation of professors, but also in the presence of coordinators and department directors.[21] The record is not precise in indicating the extent of the department director's participation,[22] except that the syllabus is normally given by the professor to the department director, who would then make recommendations about it. In addition, it appears that curriculum changes must be approved by the academic board, on which the department directors serve.

There have been other areas where, Respondent contends, faculty have been instrumental in making major changes in curriculum. The administration in or about 1978 instituted a study concerning the effective method of competing with other institutions of higher learning in Puerto Rico. During the study, it was revealed that Respondent required its students to successfully complete more credits than other universities. The administration determined to reduce the number of credits in all programs and fields of studies; and, based on that policy decision, it was primarily the professors whose expertise was sought in recommending which courses should be dropped or how course studies should be consolidated to effectuate the reduction of credits. Certain proposals, however, were not fully adopted, such as in the social work program and the elimination of a course on the history of Puerto Rico.

Other faculty recommendations have not been approved. For example, in 1979, changes in the contents of various courses in the education department were ignored. In 1977, Sonia Flores, then dean of the education department, established a committee of professors which recommended methods to improve the academic performance of the department's students. The academic board refused to adopt the recommendations. In 1977 and 1978, another committee was convened to make recommendations regarding admission into the department. They selected students by academic score who should be

[16] Bowman testified that it was Respondent's practice that the dean of the department would assign classes after conferring with each professor. But he also stated that it was the coordinator who gave professors their programs and, if the professor was dissatisfied, he would apply to the department director to change his assignment. Flores stated that one of her functions as dean of the education department was to assign professors course schedules which she prepared. However, Maria del Carmen Curras, as coordinator of the Spanish department, testified at the representation hearing that she prepared the schedule for each semester, based on a course list given by the director and taking into consideration the professor's preference for scheduling and academic load. She would then recommend a schedule to the department director, who would decide whether or not to adopt it. The director would resolve any conflict, if one arose.

[17] In considering whether to grant tenure to Professor Bowman, Domingo, as part of his lengthy recommendation to refuse tenure, cited Bowman's intemperate refusal to teach the classes to which he had been assigned, Bowman stating that: "This is the worst distribution of courses in the world." Domingo stated that he sent Bowman a memorandum advising that the "academic load that had been assigned to him . . . was his responsibility." Domingo also testified that he and Struik cooperated in the assignment of professors to courses of the humanities department and those of CDEOC. Domingo's report on Bowman and his later testimony are hardly consistent with Respondent's contention that professors chose their own classes and schedules.

[18] Del Carmen testified that directors determined how many sections were required for a course.

[19] No one testified as to how the rule was enacted pertaining to classes of 50 students or more. It is clear, however, that the division of a class added another section which would have to be taught and, if it required a professor to teach more than 15 credits, additional wages would have to be paid by Respondent to that professor.

[20] The only time that a class was limited was the language laboratory, which had only 32 cubicles and thus room for only 32 students. But after some period, even the method of assigning students to the laboratory was changed and apparently no limit was placed on the number of students.

[21] Felix Struik, who was formerly a member of the board of trustees, the academic dean, and the director of the humanities department, testified that professors are not required to use the same textbook, even though it had been recommended by the director; and that professors may teach in different ways. I so find.

[22] Domingo recommended, apparently without faculty participation, the elimination of the baccalaureate program in history because there were too few students enrolled.

admitted. As to those whom they rejected, they recommended assistance that could be offered in order to help them to make successful reapplications. The academic board refused to accept the recommendations; and the rejected applicants were admitted into the department, because the University traditionally maintained an "open admissions" policy which would be violated by the imposition of grade qualifications. Similarly, in the English program, faculty recommendations of grade levels for retention and graduation were not implemented.

The faculty played a major role in the development of several programs. In 1975, the United States Congress enacted the Education of the Handicapped Act, 20 U.S.C. Sec. 1401 et seq., requiring that disabled and handicapped children be afforded their public schooling with all other children. As a consequence, education faculty members recommended changes in curriculum to ensure that students who were to enter the teaching profession be familiar with the problems of the handicapped and disabled and have the necessary skills to deal with them. A thorough proposal was prepared calling for the institution of eight or more new courses. However, only two were approved in the form suggested, and another one was approved but modified. Although many new programs had previously been submitted for approval to the university senate, these were not, Melendez explaining merely that "they were courses needed to be completed for the certification of teachers in the special education area."

As far back as 1974, other kinds of faculty proposals met with varying success. A proposal to differentiate between courses of English as a second language from English as a native language was not accepted,[23] but a proposal to revise the English curriculum to four levels was implemented. Another recommendation was to change assignments of students by the registrar's office to the appropriate courses based on their college board examinations to a requirement that students be given an English placement test. The rationale for the recommendation was that the professors were faced with new students who had vast differences of comprehension and knowledge of English. The placement test was proposed so that they could be assigned four courses that would be geared to their knowledge; but what was adopted by the administration 3 years later was permission to place the students into one of only two beginning courses: either prebasic or basic English. The professors were disheartened, because they felt that the test involved much work with minimal results. The test was given only 1 year, and the faculty lost interest. Finally, the department's suggestion of an alternate registration procedure was not implemented.

About 1979, the English faculty, dissatisfied with the curriculum of the basic English course the previous school year, proposed a diagnostic test which was administered in 1980. They also evaluated textbooks for the course and had authority to retain a consultant. Their recommendations were ultimately not implemented.

There appears throughout to be an attempt by faculty members to limit entry into programs to students who by grade-average demonstrated that they could complete adequately their work. Due to the "open admissions" policy, these grade-average recommendations for commencing or continuing their major fields of study do not appear to have been approved generally. However, when they were, Mulling testified that they were avoided by the simple device of permitting students to repeat courses with an easier marking professor or on an individual study basis and take their better grades.[24] The students were not required to attend class. Otherwise, attendance of students was monitored by the registrar's office. Similarly, the faculty recommended grade averages for graduation, but this recommendation was also disregarded. However, faculty recommendations for prerequisites of courses were generally adopted, as were recommendations of the courses needed to be completed for graduation.

In addition, major actions have been taken by the administration, not the faculty, which went to the very heart of the curriculum of the University. Until 1976, new students were admitted directly into one of the four departments. The academic council, with the approval of the president, changed the procedure; and students entering in the 1977–1978 school year were required to take basic courses and, then, in their second year, would apply to the department of their choice. Up to 1979, the professors utilized the standard curve for grading students (i.e., A=90–100). The administration, notwithstanding faculty opposition, directed that professors thereafter use a normal distribution curve, the effect being that a greater percentage of students successfully completed their courses.

8. Library policies

At least according to practice demonstrated to exist in 1975, it appears that unit members recommend that the library purchase various books. No showing was made of the amount of the yearly expenditures for purchase of books and magazines or of the amount specifically recommended by the faculty or of the amount of the total budget of Respondent. It is thus difficult to assess the impact of the faculty's actions in this regard, assuming, arguendo, that recommendations for the purchases of books constitute an indicia of managerial status.[25]

9. Faculty meetings

Three documents dating from 1973, 1974, and 1975 were introduced by Respondent, which does not unfortu-

[23] Mulling worked on this project in close cooperation with Vincent Norelli, the director of Respondent's office of planning and development. He had previously participated in establishing the same program at another university.

[24] Mulling testified that this was not the result of faculty action, a statement which was not rebutted and which I find is truthful. I, therefore, infer that the device was specifically sanctioned by the administration, which appears to be the only other entity which could have effected this technique. Mulling testified that she believed that she spoke with the dean of humanities to protest, but to no avail.

[25] None of the decisions cited by the parties and my research reveal an instance where the Board or a court has relied on the recommendation for the purchase of books to support a finding of managerial status.

nately point out what I am to glean therefrom. Not only are they relatively ancient but also the most that can be said is that Respondent's president controlled and dominated one meeting, instructing the faculty what he wanted done. That faculty members have meetings is almost a truism. That they adopt policies which are binding on Respondent, or effectively recommend the same, is quite another matter. Respondent's submissions on this matter prove nothing.

10. Faculty development and planning

In August 1981, members of the faculty formed an ad hoc committee on the development of the faculty, met twice, and issued a report. The record fails to reveal that the report was adopted, in whole or in part, by Respondent. Respondent contends that the faculty plans the development of the University, but any argument that faculty participation was meaningful was put to rest by Martinez, who, when discussing the planning committee, testified: "The decision was made by the presidency. I imagine it was the president and the vice president because they were the ones who made the important decisions at all times."

11. Supervisory teachers and students

The curriculum of the department of education required that the students practice their skills at elementary and high schools and, at least sometime after 1976, the faculty indicated its difficulty in placing the students in the different schools in Bayamon and the advantage to the University if it would have a school devoted to its students for practice. Subsequently, as noted above, the University purchased Colegio La Milagrosa and Colegio Santa Rita. However, the record is barren of proof that it was the department's recommendation that prompted the University to purchase the schools or another reason.

In any event, in the placement of the students, it was necessary to obtain assistant teachers to directly oversee the practice teaching of education students. This was accomplished by the department director, who contacted the superintendent of schools and then the principals of the schools where the practice was to be conducted. The principals then asked for volunteers. The assistant teachers received originally $50 per semester, an amount which was later increased to $80 on the recommendation of the education department, which found that it was unable to persuade individuals to become assistant teachers at the lesser amount. The increase was approved by academic dean and paid by the University.[26] There is nothing to demonstrate that the faculty either hired the assistant teachers or granted the increase. The recommendation was the result not of managerial decision, but of necessity.

Finally, some students were employed in the physical education department to do various jobs, such as lending equipment, cleaning the office, and delivering letters and messages, for which they were paid. Various professors certified that the students worked the hours that they wrote on timecards. There is no evidence that the professors hired the students or acted as their supervisors. I infer that these jobs were given by the University to needy students as part of a financial aid package, but cannot infer anything else, particularly whether the faculty possessed managerial or supervisory functions.

12. Student discipline

The record reveals that faculty members are members of a student disciplinary committee, along with representatives of the administration and the student body. Through 1977, three faculty members were elected by the faculty, but the record is not wholly clear what proportion of the total committee they represented or under what authority they came to serve. In 1978, new student regulations were issued unilaterally by the administration. All the committee members were appointed, except for the president, who automatically served. Two professors were appointed by the academic dean, two administration representatives were appointed by the president, and one representative of the administration was appointed by the dean for student affairs. There were also vacancies of two representatives of the student council. Thus, of eight members, only two were members of the faculty. In addition, there is no evidence that the committee ever disciplined anyone or did anything other than meet each year to hear the president explain its duties.

13. Budget

The science faculty was asked for lists of materials and equipment which they needed for teaching their courses, but the record does not demonstrate that they did so. The physical education coordinator requested various equipment, such as balls, bats, and bows and arrows, and Melendez testified that she routinely approved the request. On the other hand, her testimony was unclear as to whether the request was made at the first instance by the faculty, or whether the faculty was guided by the finance department's preliminary budget, which set forth amounts recommended for each department. It was nonetheless clear that, if Melendez determined that a request was unreasonable, she had the authority to disapprove it. Similarly, as stated above, the president openly declared that all fiscal matters were within the complete control of him and the board of trustees.

14. Tuitions

The faculty makes no decisions regarding the fees to be charged to students. Respondent's documentary proof shows only that in 1972, the president forwarded to the university senate a proposed letter that he desired to

[26] I note, however, the ambiguous testimony of Melendez, who stated that the assistant teachers were not employees of the education department, but of the Puerto Rico Department of Education. I understand her testimony to be that the assistant teacher's primary employment was as a teacher in the public school system and paid a bonus of $50 or $80 as a supplement for assisting Respondent's students in their teaching practice. I reject her testimony that the faculty had the authority to increase the amount of the bonus. The record shows that the University was new, relatively poor, and struggling, constantly seeking new programs to compete with other institutions in Puerto Rico. I find it improbable that the faculty had any right to incur monetary obligations for Respondent without the consent of the administration, particularly in light of the president's position that he and the board of trustees had control of all fiscal matters.

send to parents of students, explaining the need to increase Respondent's fees for the 1972–1973 academic year. No request for the faculty's approval of the increase was sought, nor does the exhibit reveal that it was given. All that was sought was the senate's views on the contents of the letter and, once again, the record is barren of any response. It cannot be found that unit members have any input in Respondent's decisions to raise its charges to students.

15. Faculty association

It is not clear when the faculty association was formed; the earliest minutes in the record indicate that it was in existence in early 1975. Nor is it clear who formed the association, because in the first paragraph of its regulations there is an indication that someone formed it, but who is unidentified.[27] The objectives of the association are to "[p]rocure the improvement of the associates and defend their professional, teaching and cultural interests [and] [*p*]*romote* and cooperate with *the identification, definition and realization of the philosophy and educational, cultural and social goals of* [*the University*] and of education in Puerto Rico," the italicized portion (emphasis supplied) partially, albeit ambiguously, supporting Respondent's claim that it was managerial in concept.

Brugueras testified that the faculty association consisted of both teaching and administrative personnel and that it "tried to establish a type of regulations for the faculty as such." She recalled that "a series of norms were recommended from within the faculty along the terms of the contracts, general performance of the faculty as such, and in that committee there were administrators, members of the faculty, and it was then that the faculty manual used in the institution was created." This manual was the faculty regulations which, in the past, had been prepared by the academic dean and was approved by the senate and which the president and board of trustees unilaterally changed in 1978.

An examination of the record leads me to conclude that the association was actually formed in the faculty's self-interest, and that its actions, rather than recommendations to the University, were pleas for relief. Thus, it proposed and was granted (mostly at cost only to the faculty, not Respondent) medical, life insurance, and retirement plans. It was interested in obtaining, and was granted, a faculty parking area. It made proposals for payment of salaries and vacation pay and showed interest in establishing a savings and credit cooperative. It was asked to review the faculty evaluations and expressed rather strong disagreement with the concept and asked the academic board: "If the professors are evaluated by their respective deans, we see no reason why the deans should not be evaluated by their professors."

16. Additional alleged indicia of managerial status

There are a number of other faculty functions which, Respondent alleges, evidence managerial status. I have considered the following and find no basis for and no need to comment further on Respondent's contentions that they constitute managerial functions: that faculty members choose their offices and the colleagues with whom they wish to share the offices; that faculty members' aid was enlisted in preparing and running Christmas parties;[28] that a club organized by a faculty member published a newspaper;[29] that faculty members, together with the administration, published a faculty journal, with articles by faculty members and others;[30] and that faculty members participated in a television series which was paid for by the University and which was directed by Martinez.

17. Discussion

In *Yeshiva University*, 444 U.S at 686, the Court stated that the "controlling consideration"

> . . . is that the faculty . . . exercise authority which in any other context unquestionably would be managerial. Their authority in academic matters is absolute. They decide what courses will be offered, when they will be scheduled, and to whom they will be taught. They debate and determine teaching methods, grading, policies, and matriculation standards. They effectively decide which students will be admitted, retained, and graduated. On occasion their views have determined the size of the student body, the tuition to be charged, and the location of a school. When one considers the function of a university, it is difficult to imagine decisions more managerial than these. To the extent the industrial analogy applies, the faculty determines within each school the product to be produced, the terms upon which it will be offered, and the customers to be served.[23]

The closest that the facts in this proceeding approach those of *Yeshiva University* is in the area of course offerings. Unquestionably, the faculty plays a role in what courses will be taught, but their authority is nowhere as absolute as that exercised in *Yeshiva University*. For instance, it was the administration which instructed profes-

[27] The first paragraph of the regulations reads:

> This being the YEAR OF THE FACULTY, as declared by the President of Bayamon Central University and following the recommendations of the Middle States Associations in relation to more Faculty participation in the development and organization, fundamentally academic, of the University, I consider it appropriate to form a Faculty Association to aid in the improvement of the Institution in general and particularly of the Faculty.

[23] The record shows that faculty members . . . also play a predominant role in faculty hiring, tenure, sabbaticals, termination and promotion. . . . These decisions clearly have both managerial and supervisory characteristics. Since we do not reach the question of supervisory status, we need not rely primarily on these features of faculty authority.

[28] Even with respect to such minor functions as running Christmas parties, the president issued directions as to how the party should be organized.

[29] All clubs were required to have constitutions approved by the dean of students; otherwise, they were not permitted to function. Before the newspaper was distributed on campus, it also had to be approved by the dean of students.

[30] The magazine was directed by six administrators and five professors.

sors to reduce the course requirements for degrees in various programs, and it was primarily the administration that devised the plans and policies for the institution of new programs, the faculty merely filling in the details of the programs, some with recommendations for budgets and hiring of personnel.

An overview of the records reveals that many of the actions taken by faculty members were the result of the administration's response to recommendations or criticisms of Middle States so that Respondent could retain its accreditation. In addition, the development of new programs, in particular, was the result of Respondent's desires (1) to continue to attract new students which, of course, is the basis of its business; and (2) to attract Federal support for its programs. That Respondent's administration sets the ultimate policy does not necessarily negate the possibility that the faculty is managerial and require a holding that they are employees, who are, in this instance, professional. However, in weighing the totality of what Respondent's professors do, it is certainly telling that much of their major contribution derives from the implementation of policy set by the president and board of trustees and from merely following orders. Indeed, in one exhibit, a department director bemoaned the fact that she could not retain any professor to prepare a program, because the professors had sufficient classroom work and she could not force them to do other work.

In pursuing the policies of the administration, much of the work of professors could be characterized as professional, rather than managerial. For example, the social work program was based on the standards set forth by the council on social work. The special education project was implemented by the education department because it was required by the new Federal law. The English courses were devised by the English professors because they were the ones who understood English. This is not intended to belittle what was probably the result of some initiative on the part of the professors, but, hopefully, puts into better perspective what they were doing.

In addition, I do not intend to detract from functions of the senate, which was informed of almost everything that occurred at the University and has discussed, voted on, and approved major new academic programs leading to bachelor's degrees and has contributed, through committees, to policies established by the administration. On the other hand, before a new curriculum was proposed to the senate, the president reviewed it; and one of the exhibits reveals an objection made by a faculty member that only those programs which were initiated by the administration appeared to succeed, whereas faculty-initiated curriculum proposals appeared to universally fail. The president did not deny the allegation, but stated that perhaps the reason was that the proposals were not drafted well. Furthermore, the implementation of the programs was normally entrusted to the director of the affected department, in close collaboration with the academic dean.

In sum, it cannot be fairly concluded that faculty control over curriculum was absolute. At best, it was partial and the result of professional knowledge. Other than curriculum, there is little to support Respondent's contention. Unlike *Yeshiva University*, professors do not decide when courses will be scheduled. With the policy of open admissions, and despite faculty recommendations that more capable students be enrolled in their respective programs, it was the administration which decided who shall be taught, and not the faculty. There is no evidence that the faculty decided which students will be admitted, retained, or graduated. The faculty's views have not determined the size of the student body, the tuition to be charged, the location of a school, or anything related to the financial affairs of the University, those being the exclusive domain of Respondent's administration. Unlike the secondary features of faculty authority noted in footnote 23 of *Yeshiva University*, quoted above, the faculty plays no role in hiring, tenure, sabbaticals, termination, and promotion. Finally, even in those areas where the faculty has contributed, recommendations have frequently been disregarded.

The decisions of the Board have rested on a case-by-case analysis of the facts, no two colleges being identical. *Bradford College*, 261 NLRB 565 (1982), comes closest to the facts in this proceeding. Here, like *Bradford*, governance of the Respondent was not democratic, but was a government by the president and the board of trustees. All major changes in curriculum had to be approved by them. Faculty salaries are determined by them. Teaching loads and requirements for teaching were decided by them and the chancellor. Tenure and rank were subject to the whim of the president and his staff. The method of grading was altered over the opposition of faculty. Faculty recommendations of curriculum were accepted or rejected, as the president wished. Faculty regulations were not submitted to, or approved by, the faculty. Faculty recommendations of requirements for admission into departments were rejected. Faculty participation in all meaningful actions was a minority participation, with Respondent's administration being firmly in control.

Loretto Heights College, 264 NLRB 1107 (1982), is also instructive. There, the faculty had more powers than are evidenced here. Nonetheless, the Board found that the professors were not managerial. Among the factors leading to that conclusion were that, as here, (1) the participation of faculty in committee work was merely incidental to or in addition to their primary functions of teaching, research, and writing; (2) most of the actions taken in which faculty members participated were recommendations and advices; (3) no faculty member was authorized to take any action on his own initiative, which was final and binding on Respondent; and (4) whereas in *Yeshiva University*, the administrative staff was small and there was no effective buffer between the faculty and the administration, here there is a chain of authority from department directors, to academic dean, to president, and to board of trustees. Somewhere in this chain are the chancellor and the president's staff. The department directors are administrators, not instructors, and they attend all department meetings and ultimately approve or reject all faculty actions.

By consequence, I conclude that the faculty of Respondent is not managerial.[31]

III. THE SUPERVISORY STATUS OF PROFESSORS

In the representation proceeding, the Regional Director for Region 24 determined that none of the faculty members were supervisors within the meaning of Section 2(1) of the Act. He wrote, at footnote 5:

> The Employer, contrary to Petitioner, alternatively contends that all faculty members of the University are managerial personnel or supervisory and therefore not employees within the meaning of the Act, or, if not found to be managerial employees, that any unit found appropriate herein should exclude, as supervisory, its coordinators.
>
> In contending that no faculty bargaining unit can be appropriate because all faculty members—by virtue of their group participation in the University's Senate Committee—are managerial and/or supervisory and are, thereby, not employees within the meaning of the Act, the Employer relies upon *N.L.R.B. v. Yeshiva University*, 582 F.2d 686 (CA 2, 1978), wherein the Court of Appeals for the Second Circuit reversed the Board Order therein (holding that faculty members are professional employees within the meaning of the Act), and found that all the full-time faculty of Yeshiva University were outside the Act's jurisdiction because they collectively possess certain attributes of supervisors.
>
> While noting that the decision in *Yeshiva University* is currently pending review in the U.S. Supreme Court, the undersigned is bound by Board precedent, absent a contrary determination by the U.S. Supreme Court. Thus, as in *Yeshiva University, supra*, the undisputed evidence reflects that "faculty participation in collegial decision making is on a collective rather than individual basis, is exercised in the faculty's own interest rather than 'in the interest of the employer,' and that final authority rests with the board of trustees." *Id* at 1054. Furthermore, unlike *Yeshiva University* where the faculty committees therein met on a regular and continuing basis, the uncontradicted evidence established that the Academic Senate Committee, the Rank and Tenure Committee and the Planification Committee rarely, if ever, meet as a group, with the last session of the University Senate held in May 1978. In fact, the Employer's witness could neither recall if these latter two committees had met this year nor the extent of faculty participation on said committees. Moreover, the University's President testified, without contradiction, that he had veto power over any programs proposed by the Senate. In view thereof and in accord with the Board's decision in *Yeshiva University, supra*, I find that faculty members are professional employees under the Act. See, *Northeastern University*, 218 NLRB 247; *University of Miami*, 213 NLRB 634.
>
> Contrary to the Petitioner who would include the coordinators in the petitioned-for unit, the Employer would exclude said group as supervisors within the meaning of the Act. The record reveals that the University employs 9 faculty coordinators, 4 in the Humanities Department, 4 in the Science and 1 in the Education Departments, with each coordinator assigned six professors from the full-time, temporary or part-time faculty, to his or her team. The coordinators, who are selected by the concerned department chairman, hold meetings with their team members to transmit information or instructions from the department chairman, gather the students' course selections and submit them to the chairman, help in the preparation for registration of students and prepare class schedules for the professors on their team. In performing this latter duty, which appears to be their most important function, the coordinators prepare such schedules from both a list of approved courses and the teaching schedule drawn by the department director. More importantly, in the event of a scheduling conflict among professors the coordinator refers the matter to the department director for resolution. The coordinators have regular faculty appointments, carry the same workload as other full-time or temporary faculty members, do not receive any extra pay or stipend because their performance is limited to under twenty hours a semester. Unlike department chairmen, whom the parties appear to agree are supervisory personnel, it is undisputed that the coordinators as such have nothing to do with personnel action affecting the faculty members, do not evaluate the performance of their members or, possess any other indicia of supervisory authority as defined in the Act. In these circumstances, I find the coordinators are not supervisors within the meaning of the Act, and, therefore, shall include them in the unit. *Adelphi University*, 195 NLRB 639.

The Board declined to grant review of that decision, and Respondent seeks herein to relitigate that issue. Board law requires that, unless special circumstances are shown, or newly discovered evidence appears, not available at the time of the representation proceeding, there may be no relitigation in a subsequent 8(a)(5) refusal-to-bargain proceeding; but in light of the still unsettled nature of Respondent's claim,[32] I permitted Respondent to introduce whatever additional evidence it believed supported its position.

On my review of the record, I conclude that there were no facts introduced by Respondent which persuade me that the Regional Director's decision was incorrect and, on reconsideration, there is no special circumstance which permits Respondent to renew its previously reject-

[31] However, although Respondent has contended that the faculty as a body is managerial, it has not based its opposition against any particular professor or group of professors. It was its burden to do so, if it desired. *Montefiore Hospital & Medical Center*, 261 NLRB 569, 572 fn. 17 (1982). I am constrained to call the parties' attention to the fact that Veerkamp is a member of Respondent's board of trustees and, under the rationale of this decision, could not be deemed anything but managerial.

[32] *Yeshiva University* did not reach the question of the supervisory status of the university's professors. 444 U.S at 686 fn. 23.

ed contentions or to relitigate that which it could have raised earlier. *Noranda Aluminum*, 268 NLRB No. 223 (Feb. 29, 1984). I thus find no merit in any of Respondent's contentions and find that Respondent's professors are not supervisors within the meaning of Section 2(11) of the Act.

IV. THE UNFAIR LABOR PRACTICES

The unfair labor practices are clear, simple, and not disputed, with the exception of one matter. After the Union was certified, it made numerous requests of Respondent to bargain. Its letters of February 19 and March 26, 1980, went unanswered. Its letters of May 13, June 6, and July 2, 1980, were replied to by Respondent, which stated that it was either studying the matter or could not determine whether or not to bargain with the Union, in view of the Supreme Court's decisions in *Catholic Bishop* and *Yeshiva University*. That Respondent has refused to bargain is implicit in its failure to respond to the Union's letters or its failure to agree to bargain with the Union.

Furthermore, as noted above, without bargaining with and without notice to the Union, Respondent issued a memorandum on May 20, 1980, which provided that, commencing with the summer term 1980 and the academic year 1980–1981, classes would be assigned only to teachers having a master's degree. No such qualification had previously existed. This resulted in the discharge of the following professors, including some who previously been hired to teach in the summer term: Marcos F. Reyes Davila, Hector Aponte Luna, Jose Luis Perez, Pedro Cebollero Perez, and Ramon Antonia Guzman Rivera.

The only discharge which appears to be contested is that of Merril Bowman Waller, who was discharged by the president on June 26, 1980. Earlier that year, on January 31, Bowman was denied tenure by the president, but the basis for his action was unexplained. However, the tenure committee based its recommendation that Bowman not be granted tenure on the following grounds: (1) that Bowman had not obtained his master's degree; (2) that Bowman had served a probationary period of 7 years; (3) that Bowman was only an instructor and had not obtained the rank of assistant professor, a requirement for tenure; (4) that the humanities department and English major already had at least 10 percent of its faculty on tenure; and (5) that the University would not be served well by issuing Bowman tenure, which would permit him to remain for 10 years. As noted above, items (1) and (4) were unilaterally promulgated without bargaining after Respondent was required to bargain. Item (2) was not a basis for the denial of tenure, according to my understanding of the faculty regulations, and the only possibly legitimate grounds were items (3) and (5).

However, none of these grounds, even if they warranted denial of tenure, similarly required dismissal from the University. Although the faculty regulations state that "every member of the Faculty shall serve for a probationary period of not more than seven (7) consecutive years," the president issued an administrative order on December 31, 1978, clarifying that the quoted sentence did "not establish either the choice of granting tenure or dispensing with the services rendered by the professor" but left open the option, inter alia, of denying tenure and issuing another contract. Based on the discharge of other professors solely because they did not have master's degrees in accordance with the unilaterally and illegally imposed new term and condition of employment issued by the president, I conclude that the General Counsel has established a prima facie case that Bowman's discharge was similarly illegally motivated.[33]

The university president did not testify and there is no basis, whatsoever, to conclude that Respondent had a valid reason for discharging Bowman. As noted above, the reasons for denial of tenure are not the equivalent of the justification for discharge. Indeed, two other professors, Brugueras and Joseph Morris, were previously denied tenure but received new contracts of employment. Accordingly, Respondent has not met its burden of proof; and I conclude that Bowman was illegally discharged by reason of Respondent's application of a unilaterally promulgated rule, in violation of Section 8(a)(5) and (1) of the Act. *Wright Line*, 251 NLRB 1083 (1980), enfd. on other grounds 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

In addition, Respondent unilaterally issued a second memorandum on July 11, 1980, that required of teachers not only a master's degree but also 12 credits in the studies of any course to which they would be assigned. Jose Maldonado Beltran and Severino Bermudez Varela were advised by Respondent on August 25, 1980, that they would not be teaching any courses during the academic year because there were no courses available in their areas of expertise, a decision which was based solely on the newly promulgated directive. Both had previously taught the same courses to which they were then being denied assignment. The discharge of and failure to appoint these teachers were clearly the result of newly and unilaterally initiated and imposed conditions of employment, in violation of Section 8(a)(5) and (1) of the Act.

Finally, the Union called a strike on September 3, 1980, because of Respondent's continuing refusal to bargain—an unfair labor practice strike. On November 13, 1980, Respondent received the Union's unconditional offer, dated November 12, 1980, for the strikers to return to work. However, Respondent refused to reinstate any of the following strikers, in violation of Section 8(a)(3) and (1) of the Act: Brunilda Ferrer Silva, Efrain Ayala Medina, Juan Garcia Marchand, Irma Brugueras Laborde, Juanita Guzman Morales, Jose R. Colon Rodriguez, Maria Lopez Pagan, Ricardo Cruz Garcia, Sylvia Mulling, Maria Curras Lorenzo, Hortencia Panetto Ortiz,[34] Marta Ramos Ortiz, Laura Rios Rodriguez,

[33] This conclusion is not affected by the testimony of Bowman that he did, in fact, possess a master's degree and that the university catalogue listed him as having a master's degree from the University of Bridgeport. Respondent's documents denying Bowman tenure find that there was no evidence of such a degree.

[34] Respondent contended that Panetto was sick during the strike but also stipulated that Panetto was on the picket line on more than one occasion. I conclude that she joined the strike.

Evelyn Robles Melendez, and Ernesto Valladares Pombo.

V. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

Respondent's activities set forth in section V, above, occurring in connection with the operations of Respondent described in section II, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States, and tend to lead to labor disputes burdening and obstructing commerce and the free flow thereof.

CONCLUSIONS OF LAW

1. Universidad Central de Bayamon is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Union de Profesores Universitarious (UPU) is a labor organization within the meaning of Section 2(5) of the Act.

3. At all times material herein the Union has been and is the sole and exclusive collective-bargaining representative of all of Respondent's employees in the following unit held appropriate for collective bargaining:

> All full-time teaching personnel employed by Respondent at its Bayamon, Puerto Rico campus, including lecturers, instructors, temporary faculty, auxillary professors, associate professors, professors and athletic instructors/coaches; but, excluding all other employees, all part-time teaching personnel, maintenance personnel, directors, all administrative, office clerical employees, guards and all supervisors as defined in the Act.

5. By refusing since February 19, 1980, to bargain collectively with the Union with regard to wages, hours, and other terms and conditions of employment of the employees in the appropriate unit described above, and by unilaterally, and without bargaining to impasse with the Union, imposing new requirements that teachers have master's degrees and possess 12 credits in the studies of any course to which they would be assigned, Respondent has failed and refused to bargain in good faith in violation of Section 8(a)(5) and (1) of the Act.

5. By discharging Marcos F. Reyes Davila, Hector Aponte Luna, Jose Luis Perez, Pedro Cebollero Perez, Raymon Antonio Guzman Rivera; and Merril Bowman Waller, Jose Maldonado Beltran, and Severineo Bermudez Varela by reason of the application of the newly and unilaterally instituted terms and conditions of employment, Respondent violated Section 8(a)(1) of the Act.

6. Commencing on September 3, 1980, the Union engaged in an unfair labor practice strike against Respondent.

7. On November 12, 1980, the Union unconditionally offered that the strikers would return to work.

8. By refusing to reinstate Brunilda Ferrer Silva, Efrain Ayala Medina, Juan Garcia Marchand, Irma Brugueras Laborde, Juanita Guzman Morales, Jose R. Colon Rodriguez, Maria Lopez Pagan, Ricardo Cruz Garcia, Sylvia Mulling, Maria Curras Lorenzo, Hortencia Panetto Ortiz, Marta Ramos Ortiz, Laura Rios Rodriguez, Evelyn Robles Melendez, and Ernesto Valladares Pombo, Respondent has violated Section 8(a)(3) and (1) of the Act.

9. The above unfair labor practices are unfair labor practices affecting commerce with the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1), (3), and (5) of the Act, I shall recommend that it cease and desist therefrom, post an appropriate notice, and take certain affirmative action designed to effectuate the purposes and policies of the Act, including, on request, to bargain in good faith with the Union, and to rescind the unilateral changes of terms and conditions of employment set forth above.

In order to ensure that the employees in the appropriate unit will be accorded the services of their selected bargaining agent for the period provided by law, I shall recommend that the initial period of certification begin on the date that Respondent commences to bargain in good faith with the Union as the recognized bargaining representative in the appropriate unit. *Mar-Jac Poultry Co.* 136 NLRB 785 (1962); *Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817 (1964); *Burnett Construction Co.*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965).

Additionally, because employees were discharged due to the unilateral institution of new terms and conditions of employment and because other employees engaged in an unfair labor practice strike and were denied reemployment after they unconditionally offered to make themselves available for work, I shall recommend that Respondent be ordered to offer Marcos F. Reyes Davila, Hector Aponte Luna, Jose Luis Perez, Pedro Cebollero Perez, Ramon Antonio Guzman Rivera, Merril Bowman Waller, Jose Maldonado Beltran, Severino Bermudez Varela, Brunilda Ferrer Silva, Efrain Ayala Medina, Juan Garcia Marchand, Irma Brugueras Laborde, Juanita Guzman Morales, Maria Curras Lorenzo, Hortencia Panetto Ortiz, Mara Ramo Ortiz, Laura Rios Rodriguez, Evelyn Robles Melendez, and Ernesto Valladares Pombo immediate and full reinstatement to their former positions or, if such positions no longer exists, to substantially equivalent positions, without prejudice to their seniority or other rights and privilges, dismissing, if necessary, replacement employees, and to make them whole for any loss of earnings they may have suffered by reason of their discharges, or refusals to reinstate, as the case may be, by paying them sums of money equal to that which they normally would have earned absent the discharges and failure to reinstate, less earnings during such period, with interest thereon to be computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and *Florida Steel Corp.*, 231 NLRB 651 (1977).[35]

[35] See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962). Professors are frequently offered the opportunity to teach courses over and above

Continued

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[36]

ORDER

The Respondent, Universidad Central de Bayamon, Puerto Rico, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to recognize and bargain with Union de Profesores Universitarios (UPU) as the exclusive representative of its employees in the following appropriate unit:

> All full-time teaching personnel employed by Respondent at its Bayamon, Puerto Rico campus, including lecturers, instructors, temporary faculty, auxillary professors, associate professors, professors and athletic instructors/coaches; but, excluding all other employees, all part-time teaching personnel, maintenance personnel, directors, all administrative, office clerical employees, guards and all supervisors as defined in the Act.

(b) Refusing to bargain in good faith with the Union by unilaterally instituting changes in qualifications for teaching positions and other changes of terms or conditions of employment, without notifying, consulting, and bargaining with the Union as exclusive representative of its employees in the above appropriate unit.

(c) Failing promptly to reinstate employees on an unconditional offer to return to work in order to discourage them from engaging in concerted and protected activities and in order to discourage their membership in the Union.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the National Labor Relations Act.

2. Take the following affirmative action designed to effectuate the policies of the Act.

(a) On request of the Union, bargain collectively with it as the exclusive representative of all of Respondent's employees in the above appropriate unit and, if an understanding is reached, embody such understanding in a signed agreement.

(b) On request of the Union, rescind the unilateral changes of qualifications for teaching positions, to wit, the requirement that teachers have a master's degree and possess 12 credits in the studies of any course to which they would be assigned.

(c) Offer Marcos F. Reyes Davila, Hector Aponte Luna, Jose Luis Perez, Pedro Cebollero Perez, Ramon Antonio Guzman Rivera, Merril Bowman Waller, Jose Maldonado Beltran, Severino Bermudez Varela, Brunilda Ferrer Silva, Efrain Ayala Medina, Juan Garcia Marchand, Irma Brugueras Laborde, Juanita Guzman Morales, Jose R. Colon Rodriguez, Maria Lopez Pagan, Ricardo Cruz Garcia, Sylvia Mulling, Maria Curras Lorenzo, Hortencia Panetto Ortiz, Marta Ramos Ortiz, Laura Rios Rodriguez, Evelyn Robles Melendez, and Ernesto Valladares Pombo immediate and full reinstatement to their former positions, without prejudice to their seniority and other rights and privileges, dismissing, if necessary, replacement employees, and make them whole for any loss of earnings suffered by reason of the discrimination against them, with interest thereon, to be computed as described in the remedy section of this decision.

(d) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Post at its institution in Bayamon, Puerto Rico, copies of the attached notice marked "Appendix."[37] Copies of the notice, on forms provided by the Regional Director for Region 24, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED for the purpose of determining the duration of the Union's certification as the representative of Respondent's employees in the appropriate unit, the certification period is extended to a date 1 year from the date Respondent commences to bargain in good faith with the Union.

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the 15 credits required in their contract. The backpay liability recommended herein specifically includes backpay for additional courses that the employees may have been offered to teach.

[36] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[37] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE, WILL NOT refuse to recognize and bargain with Union de Profesores Universitarios (UPU) as the exclusive representative of our employees in the following appropriate unit:

> All full-time teaching personnel employed by Respondent at its Bayamon, Puerto Rico campus, in-

cluding lecturers, instructors, temporary faculty, auxillary professors, associate professors, professors and athletic instructors/coaches; but, excluding all other employees, all part-time teaching personnel, maintenance personnel, directors, all administrative, office clerical employees, guards and all supervisors as defined in the Act.

WE WILL NOT refuse to bargain in good faith with the Union by unilaterally instituting changes in qualifications for teaching positions and other changes of terms or conditions of employment, without notifying, consulting, and bargaining with the Union as exclusive representative of our employees in the above appropriate unit.

WE WILL NOT fail promptly to reinstate employees upon an unconditional offer to return to work in order to discourage them from engaging in concerted and protected activities and in order to discourage their membership in the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request of the Union, bargain collectively with it as the exclusive representative of our employees in the above appropriate unit and, if an understanding is reached, embody such understanding in a signed agreement.

WE WILL, on request of the Union, rescind the unilateral changes of qualifications for teaching positions, to wit, the requirement that teachers have a master's degree and possess 12 credits in the studies of any course to which they would be assigned.

WE WILL offer Marcos F. Reyes Davila, Hector Aponte Luna, Jose Luis Perez, Pedro Cebollero Perez, Ramon Antonio Guzman Rivera, Merril Bowman Waller, Jose Maldonado Beltran, Severino Bermudez Varela, Brunilda Ferrer Silva, Efrain Ayala Medina, Juan Garcia Marchand, Irma Brugueras Laborde, Juanita Guzman Morales, Jose R. Colon Rodriguez, Maria Lopez Pagan, Ricardo Cruz Garcia, Sylvia Mulling, Maria Curras Lorenzo, Hortencia Panetto Ortiz, Marta Ramos Ortiz, Laura Rios Rodriguez, Evelyn Robles Melendez, and Ernesto Valladares Pombo immediate and full reinstatement to their former positions, without prejudice to their seniority and other rights and privileges, dismissing, if necessary, replacement employees, and make them whole for any loss of earnings suffered by reason of the discrimination against them.

UNIVERSIDAD CENTRAL DE BAYAMON

John Kirkpatrick and Cheryl Kirkpatrick, a partnership d/b/a Karsh's Bakery *and* Bakery, Confectionary and Tobacco Workers International Union of America, Local No. 85. Case 32–CA–4120

14 December 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS ZIMMERMAN AND HUNTER

On 30 December 1982 Administrative Law Judge Gordon J. Myatt issued the attached decision. The Respondent filed exceptions and a supporting brief, and the Charging Party filed an answering brief. The General Consel and the Charging Party also filed exceptions and supporting briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions[1] to the extent consistent with this Decision and Order, and to adopt the recommended Order as modified.

The judge found that the Respondent violated Section 8(a)(5) of the Act by withdrawing recognition from the Union and failing to bargain with it concerning modification of a collective-bargaining agreement, and by repudiating that agreement, after the Respondent filed a petition in bankruptcy. He further found that the Respondent violated Section 8(a)(3) by constructively discharging five employees who refused to work under the terms thus set by the Respondent.

We have considered the judge's decision in light of the Supreme Court's subsequent decision in *NLRB v. Bildisco & Bildisco*, above, and will modify it accordingly. Briefly, we agree that the Respondent violated Section 8(a)(5) by withdrawing recognition, and that the five employees were unlawfully discharged when they refused to work without representation. Under *Bildisco*, however, the Respondent's other conduct did not violate the Act, and there is no independent make-whole remedy for the 8(a)(5) violation.

In *Bildisco*, the Court held that 8(d) procedures do not apply to an employer's rejection of a collective-bargaining contract in bankruptcy, and that such unilateral rejection does not violate Section 8(a)(5) of the Act. 104 S.Ct. at 1199–1200.[2] It follows that the Respondent's unilateral rejection of its collective-bargaining agreement and its consequent modification of certain terms and conditions of employment were not unfair labor practices. The Respondent may not have acted lawfully but, that is solely a question for the bankruptcy court, not the Board, to decide.[3]

At the same time, the Court in *Bildisco* reaffirmed an employer's general obligation to recognize and bargain with the statutory bargaining agent of its employees. This duty is independent of the rejection or renegotiation of a contract within the framework of a bankruptcy petition. 104 S.Ct. at 1200–1201. We agree with the judge that the Respondent here withdrew recognition from the Union and thereby violated Section 8(a)(5) of the Act.[4]

We further find that the Respondent offered continued employment to the five named employees on the condition that they forgo union representation. Such an offer constitutes a constructive discharge and violates Section 8(a)(3) of the Act. *Advance Electric*, 268 NLRB 1001 (1984). The judge found that the employees declined the Respondent's offer because it was conditioned on nonrepresentation *and* on the abrogated contract. Because the contract abrogation was not an unfair labor practice, neither was it an unlawful condition of the Respondent's offer of employment, and we will modify the judge's conclusions of law and recommended Order to delete any such finding. We still find, however, that the offer was expressly conditioned on a waiver of union representation, and this was unlawful.

The judge credited each employee's testimony that John Kirkpatrick told her that the Respondent would operate "non-union." No exception was taken to this finding and the record supports it. We find inconclusive the record testimony as to what

[1] The Respondent has excepted to the judge's conclusion that its commerce operations meet the Board's $500,000 standard for retail operations; it argues that only its revenues as debtor-in-possession may be considered. We agree with the judge that we may consider the Respondent's revenues before the bankruptcy petition was filed. We note that the Supreme Court has rejected the theory that a bankrupt employer is a "new entity." *NLRB v. Bildisco & Bildisco*, 104 S.Ct. 1188, 1197 (1984). We also agree that actual revenues in the preceding year are relevant despite a later reduction. This principle was affirmed in *Retail/Wholesale Union District 76 (Morgan Shoe)*, 129 NLRB 1339 (1961), on which the Respondent relies. In that case, unlike here, the respondent's actual revenues in the preceding 12-month period did not meet our discretionary jurisdictional standards.

[2] This ruling is unaffected by bankruptcy reform legislation since enacted by Congress.

[3] The Charging Party contends that the Bankruptcy Appeals Panel of the Ninth Circuit has, in fact, reversed the bankruptcy judge's decison to approve this contract rejection. For the reasons already stated, this evidence is now irrelevant and we do not need to consider it.

[4] While the remedy for this violation includes an order that the Respondent bargain with the Union concerning terms and conditions of employment, it does not include any make-whole relief for unilaterally changed contractual conditions, as in *Ogle Protection Service*, 183 NLRB 682 (1970). To do so would of course undermine the rule that rejection of the contract in bankruptcy did not violate the Act.

the five employees "meant" by "non-union." The employees were likely describing what they believed were the characteristics of a "non-union" operation, the phrase they testified that John Kirkpatrick used.[5] We will therefore attribute to that phrase its plain meaning.

There can be no doubt what the Respondent intended by its statements, as it then unlawfully withdrew recognition from the Union. We find this meaning was clearly conveyed to the employees even though they were not told that recognition had been withdrawn, or that they had to waive union representation. While it is true that the record does not allow a precise determination of the employees' motivation in declining the Respondent's offer of employment, the Respondent created this uncertainty by telling the employees it was going to operate "non-union." We will therefore resolve the ambiguity against the Respondent.

The judge's recommended Order required that the five employees be offered reinstatement with backpay through 5 March 1982, the date the Respondent offered to recognize and bargain with the Union. We find, however, that backpay was not tolled on that date because, while the Respondent offered to recognize the Union, it did not communicate that offer to the employees.

There is no record evidence that that offer was communicated. The only pertinent testimony is that of two employees who told Kirkpatrick in March that they could not work in a nonunion shop; there is no indication that Kirkpatrick corrected their misperception of his offer.

The judge's recommended remedy also provided that backpay be at the contractual rates set before the bankruptcy petition was filed. For the reasons already discussed, we hold instead that backpay and other monetary relief must be determined in accordance with whatever contractual arrangements are approved by the bankruptcy court. We will therefore leave the determination of the backpay formula to the compliance proceeding.

CONCLUSIONS OF LAW

1. By refusing on 4 December 1981 to recognize and bargain with the Union, as the exclusive representative of the employees in the unit set forth below, concerning rates of pay, wages, hours, and other terms and conditions of employment, the Respondent engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act. The unit appropriate for purposes of collective bargaining is:

> All full-time and regular part-time journeymen and apprentice bakers, doughnut fryers/icers/glazers, miscellaneous employees, and sales persons, including forepersons, excluding office clerical employees, professional employees, guards and supervisors as defined in the Act.

2. By conditioning continued employment of the unit employees on 4 December 1981 on their forgoing representation by their exclusive collective-bargaining representative, the Respondent constructively discharged those employees and violated Section 8(a)(3) and (1) of the Act. The unit employees are:

Janet Higbee	Pamela Hale
Susan Sadoian	Dollie Phillips
Diane Jones	

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, John Kirkpatrick and Cheryl Kirkpatrick, a partnership d/b/a Karsh's Bakery, Fresno, California, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1(b).

"(b) Discharging employees by conditioning their continued employment on their forgoing representation by their exclusive collective-bargaining representative."

2. Delete paragraph 1(c) and reletter the subsequent paragraph.

3. Substitute the attached notice for that of the administrative law judge.

MEMBER HUNTER, concurring and dissenting.

I agree with my colleagues that, under *NLRB v. Bildisco & Bildisco*,[1] the Respondent did not violate Section 8(a)(5) and (1) of the Act by rejecting its collective-bargaining agreement with the Union on the filing of its petition in bankruptcy on 4 December 1981. I also agree with my colleagues that, notwithstanding the lawful rejection of the collective-bargaining agreement, the Respondent violated

[5] See, e.g., the following testimony of employee Janet Higbee:

Q. Would you state why you decided not to continue working for Karsh's Bakery after December 5?

A. Because he went non-union, primarily.

JUDGE MYATT: What does non-union mean when you say non-union?

THE WITNESS: It means that you work 12 hours a day, you get paid for eight at the minimum, no insurance, no nothing. That's what it means, sir. I know.

[1] 104 S.Ct. 1188 (1984).

Section 8(a)(5) and (1) by withdrawing recognition from the Union.[2] However, contrary to my colleagues, I would find that the Respondent did not violate Section 8(a)(3) and (1) by constructively discharging five employees who refused the Respondent's offer of continued employment after 4 December 1981.

According to the majority, the judge found that the five employees declined the Respondent's offer of continued employment because it was conditioned on a waiver of union representation as well as on the abrogation of the collective-bargaining agreement, whereby they were constructively discharged. In reversing the judge regarding the rejection of the contract, the majority recognizes that it has eliminated one of the two grounds for the judge's finding of constructive discharge, i.e., because it was not unlawful for the Respondent to reject the contract, it was not unlawful to offer continued employment on new terms. The majority continues to find the Respondent's offer unlawful, however, on the ground that it was expressly conditioned on a waiver of union representation, as in *Advance Electric*, 268 NLRB 1001 (1984).

I have several problems with the majority's approach. For one, I do not read the judge's decision as finding, or supporting a finding, that the Respondent expressly conditioned continued employment on a waiver of union representation. For another, I believe that the record conclusively establishes only that the employees terminated their employment because they did not want to work under the new terms, not that they were constructively discharged because they did not want to work without union representation.

As set forth by the judge, the five employees testified that they were informed by the Respondent's owner or manager that the Respondent had filed for reorganization; that it was going nonunion (employees Higbee and Phillips) or that it would operate as a nonunion shop (employees Sadoian, Hale, and Jones); and that their wages would be cut and their contract benefits eliminated. In response to the Respondent's offer to work under these terms, Higbee "declined to work under the new conditions"; Sadoian "could not accept the new terms because she could not work in a nonunion shop"; Jones "declined to accept the Respondent's offer to work under these new terms"; Hale "refused to continue working for the Respondent"; and Phillips "could not work in a non-union shop." The judge noted Higbee's testimony that she would have continued to work for the Respondent if the wages had been high enough to cover individual health insurance and contributions to the union pension fund. He also noted Higbee's testimony, which was similar to Sadoian's, that having to work for lower wages and no contract benefits meant that the Respondent was going nonunion, even though the Respondent never specifically stated that she could no longer be represented by the Union.[3]

In his "Concluding Findings," the judge stated that the Respondent "made it quite clear to these employees that the business was going to be operated henceforth as a non-union establishment." The judge further found that each employee who was offered continued employment on the new terms "declined to do so because they refused to work under 'nonunion' conditions and for the lower pay without any benefits." From this the judge *inferred* that the employees wanted to continue to be represented by the Union as well as to continue to be employed under the terms of the contract. The judge then concluded that "by refusing to work in a non-union shop for less wages and without any of the benefits provided in the collective-bargaining agreement, the five employees were constructively discharged."

In my view, the judge made no specific finding that the Respondent made the waiver of union representation an express condition of continued employment. I also do not believe that the employees' reasons for declining continued employment have been determined with sufficient precision. In this regard, I note that at the time the judge issued his decision the Respondent's offer of new terms was unlawful under pre-*Bildisco* law. Thus, it was not necessary at that time to dissect the employees' reasons as closely as we must do now. Additionally, although the majority finds the employees' testimony as to what they "meant" by "non-union" inconclusive and therefore "attribute[s] to that phrase its plain meaning,"[4] I believe that such testimony affirmatively supports a finding that the employees

[2] This finding is supported by credited evidence that on 5 December 1981 the Respondent's owner Kirkpatrick told the Union's assistant business representative Ghan that he did not think he should even be talking to Ghan, and that Kirkpatrick thereafter did not return Ghan's telephone calls. I further agree that a bargaining order is the appropriate remedy for this violation.

I also agree that the Respondent met the Board's jurisdictional standards for retail operations. As indicated in fn. 1 of the majority's decision, the Respondent's actual revenues in the entire 12-month period beginning 1 July 1981 are relevant despite a reduction in its business beginning December 1981. Moreover, in *Retail/Wholesale Union District 76 (Morgan Shoe)*, 129 NLRB 1339 (1961), the respondent's actual revenues in the preceding 12-month period did not meet the Board's discretionary jurisdictional standards and any projected revenues would have had to account for the closing of one store in addition to the opening of two stores. Here, however, the evidence of actual revenues involved the 15-day period that would complete the year, and the projection made by the judge was in line with the Respondent's reduced operations.

[3] Although not mentioned by the judge, there is similar testimony on the record by the other employees involved herein.

[4] See fn. 5 of the majority's decision.

focused only on the loss of wages and benefits,[5] particularly in the absence of evidence that the five employees knew of the Respondent's withdrawal of recognition from the Union at the time they made their individual decisions to decline the Respondent's offer. I also submit, contrary to the majority, that the meaning of the term "nonunion" is not so plain in the post-*Bildisco* context of bankruptcy cases because the Supreme Court's decision has raised issues concerning post petition bargaining obligations which have yet to be resolved by the Board.

The context of the Respondent's bankruptcy also serves to distinguish this case from *Advance Electric*, relied on by the majority. In that case the Board found that the respondent violated Section 8(a)(3) and (1) by "conditioning the employment of its electricians on their working without union representation *and for wages below those specified in the collective-bargaining agreement* applicable to them, and that those electricians, having chosen to forgo their employment *rather than accept those unlawful conditions*, were thereby constructively and unlawfully discharged." (Emphasis added.)[6] Thus, in *Advance Electric*, the employer's unlawful unilateral changes were a key factor in the Board's decision.

For all of the foregoing reasons, I would find that the preponderance of the evidence fails to establish that the Respondent's offer of continued employment was unlawful or that the employees terminated their employment in consequence of any such unlawful offer. Accordingly, I would dismiss the 8(a)(3) allegation of the complaint.

[5] My colleagues concede that the record does not allow a precise determination of the employees' motivation in declining the Respondent's offer of continued employment. My reading of the employees' testimony persuades me, however, to resolve any ambiguity created by the Respondent's offer against the General Counsel, who had the burden of proving the unlawful condition of employment.

[6] 268 NLRB 1001, 1004 (1984)

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to recognize and negotiate with Bakery, Confectionary and Tobacco Workers International Union of America, Local No. 85 as the exclusive collective-bargaining representative of our employees in the following appropriate unit:

All full-time and regular part-time journeymen and apprentice bakers, doughnut fryers/icers/-glazers, miscellaneous employees, and sales persons, including forepersons, excluding office clerical employees, professional employees, guards and supervisors as defined in the Act.

WE WILL NOT discharge employees by conditioning their continued employment on their forgoing representation by their exclusive collective-bargaining representative.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL recognize and, on request, bargain with the above-named Union, as the exclusive collective-bargaining representative of our employees in the unit described above, with respect to rates of pay, wages, hours, and other terms and conditions of employment.

WE WILL offer Janet Higbee, Susan Sadoian, Diane Jones, Pamela Hale, and Dollie Phillips immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, discharging, if necessary, any employees hired after 4 December 1981, and WE WILL make them whole for any loss of earnings they may have suffered as a result of our discrimination against them, with interest.

JOHN KIRKPATRICK AND CHERYL KIRKPATRICK, A PARTNERSHIP D/B/A KARSH'S BAKERY

DECISION

STATEMENT OF THE CASE

GORDON J. MYATT, Administrative Law Judge. On a charge filed by Bakery, Confectionary and Tobacco Workers International Union of America, Local No. 85 (the Union), against John Kirkpatrick and Cheryl Kirkpatrick, a partneship d/b/a Karsh's Bakery (the Respondent), the Regional Director for Region 32 issued a complaint and notice of hearing on January 12, 1982. The complaint alleged, inter alia, that the Respondent, through its agents and/or supervisors, on various dates commencing December 4, 1981,[1] informed employees that their continued employment depended on their accepting reduced wages and forgoing representation by the Union. Further, that by such conduct, Respondent caused the termination of several of its employees.[2] Fi-

[1] Unless otherwise indicated, all dates refer to the year 1981.

[2] The complaint alleged that because of Respondent's conduct, six named employees terminated their employment with the Respondent. At

Continued

nally, it is alleged that on December 5 the Respondent instituted wage reductions and eliminated employee fringe benefits provided for in the collective-bargaining agreement in effect between it and the Union without first affording the Union an opportunity to negotiate and bargain on these matters. In addition, on the same date, the Respondent withdrew recognition of the Union as the exclusive representative of its employees in a unit appropriate for purposes of collective bargaining. The complaint alleged that by the above conduct the Respondent violated Section 8(a)(1), (3), and (5) of the National Labor Relations Act, 29 U.S.C. § 151 et seq. (the Act). The Respondent filed an answer in which it admitted certain allegations of the complaint, denied others, and specifically denied the commission of any unfair labor practices.

A hearing was held in this matter on June 22, 1982, in Fresno, California. All parties were represented by counsel and afforded full opportunity to examine and cross-examine witnesses and to present relevant and material evidence on the issues involved here. All parties submitted written briefs in support of their positions and they have been duly considered.

On the entire record in this case, including my observation of the demeanor of the witnesses while testifying, I make the following

FINDINGS OF FACT

I. JURISDICTION

The complaint alleges that since about June 25, 1981, the Respondent, as a California partnership, had been engaged in the baking and retail sale of bakery products. Further, since that date the Respondent has averaged monthly gross revenues from the operation of its business in excess of $60,000 and, when such revenues are projected on an annual basis, they exceed $500,000. The Respondent denies these allegations and asserts that due to unique circumstances (more fully set forth below) it does not meet the Board's jurisdictional standards. Thus, the Respondent affirmatively pleads that the complaint should be dismissed because the gross dollar volume does not satisfy the Board's discretionary standards for retail enterprises. For this reason, the matter of jurisdiction becomes a threshold issue which must be decided at this point.

The undisputed facts disclose that John and Cheryl Kirkpatrick, as general partners, began negotiations for the purchase of Karsh's Bakery at some undisclosed time in April 1981. At the time the purchase negotiations were taking place, the employees of then owner Rose Karsh were represented by the Union and covered by a collective-bargaining agreement which, among other things, required the employer to make periodic payments into health and pension funds and to grant vacation pay to the employees. Karsh was delinquent in her contributions to the Funds and had not paid vacation benefits to the employees. As a result, the Union and the Funds instituted an action in the Federal district court to collect the amount in arrears.

Sometime in May, the Kirkpatricks entered into an agreement with Karsh to purchase the business. On July 1, the partnership took over the operational control of the business. However, escrow for the purchase was to close at a subsequent date.[3] Under this arrangement, the Kirkpatricks (primarily through John Kirkpatrick) assumed control of the day-to-day operation of the enterprise. John Kirkpatrick testified that he was "to run the bakery as best as [he] saw fit and that [he] could hire and fire employees." Rita Karsh, daughter of Rose, continued to come to the establishment each day to be available as an adviser or consultant to the Kirkpatricks if needed.[4]

On July 9, after what appears to be tripartite negotiations, the Kirkpatricks entered into an agreement with Rose Karsh and the Union whereby the partnership, as purchasers of the business, agreed to the following: (1) to assume and pay Karsh's delinquent obligations to the Funds and the Union; (2) recognize the Union as the collective-bargaining representative of the employees; and (3) abide by the terms of the existing collective-bargaining agreement. (See G.C. Exh. 3.) Kirkpatrick's assumption of the indebtedness was to be effective as of July 1, or on the date he assumed control of the business.

When the Kirkpatricks took over operational control of the bakery, there were four retail outlets located in shopping malls or in existing retail establishments. These outlets were known as: (1) the main store and production center located in Fulton Mall; (2) Gottschalk's Fashion Fair Store; (3) Gottschalk's Manchester Store; and (4) the Hanoian Store. In early August, the Kirkpatricks expanded the retail operation to include three additional outlets. They were the Foodland Herndon Store, Gottschalk's Downtown Store, and the Boy's Market Store.

On July 25, the Kirkpatricks and the Union entered into a collective-bargaining agreement covering a unit of the employees in various bakery and sales classifications. (See G.C. Exh. 4.) In addition, the unrefuted testimony indicates that sometime in July or August, Kirkpatrick held a meeting with all of the employees and assured them that "things would be just as usual" under his ownership and operation of the business. Further, the unrefuted testimony indicates that, between the date the Kirkpatricks assumed control of the operation of the bakery and the actual close of escrow, John Kirkpatrick met on several occasions with Union Representative Randy Ghan to resolve employee grievances.

On December 4, the Kirkpatricks, as general partners doing business as Karsh's Bakery, filed a petition in bankruptcy under Chapter 11 of the Bankruptcy Code. The partnership was immediately appointed by the Bankruptcy Court as debtors-in-possession and continued to operate the business from that day forward during the pendency of the bankruptcy proceedings. As debtors-in-pos-

the hearing, the name of one of these employees, Claude Williams, was deleted from this allegation of the complaint.

[3] Escrow for the purchase of the bakery did not close until October 15, 1981.

[4] According to the undisputed testimony of John Kirkpatrick, this same arrangement applied to Rose Karsh; however, she never came to the bakery during the transition period because of an injury to her leg or hip.

session, the partnership permanently closed the retail outlets located in the three Gottschalk's stores on December 4.

The parties stipulated to the monthly volume of business grossed by the bakery for the period July 1, 1981, to June 15, 1982. These amounts are as follows:

July 1981	$44,175.55
August 1981	53,778.59
September 1981	51,886.17
October 1981	61,901.38
November 1981	54,658.96
December 1981	31,750.43
January 1982	31,333.32
February 1982	34,295.24
March 1982	34,691.79
April 1982	33,668.77
May 1982	30,498.00
June 1–15, 1982	19,614.00
Total Gross	$496,252.20

[See G.C. Exh. 2.]

It was further stipulated at the hearing that for the period July 1, 1981, to November 30, 1981, the bakery purchased and received goods and services which originated outside the State of California valued in excess of $5,000.[5]

Based on the above facts, the Respondent contends that only the gross revenue earned by the general partnership as debtors-in-possession can be considered in determining whether the gross volume of business satisfies the Board's standards for retail enterprises. In support of this argument the Respondent cites the decision of the United States Court of Appeals for the Second Circuit in *Iron Workers Local 455 v. Kevin Steel Products*, 519 F.2d 698 (1975), and a subsequent decision by the Ninth Circuit in *Local Joint Executive Board v. Hotel Circle*, 613 F.2d 210 (1980).

In *Kevin Steel* the Court was confronted with the conflict between Section 313(1) of the then Bankruptcy Act permitting rejection of executory contracts and Section 8(d) of the National Labor Relations Act prohibiting a "party" from terminating or modifying a collective-bargaining agreement without adhering to the requirements of that section. There, the Court reasoned that a debtor-in-possession is a "new entity" from the pre-bankrupt employer and thus can be permitted to reject the existing collective-bargaining agreement as "burdensome executory contract" without regard to the requirements of Section 8(d) of the National Labor Relations Act. The Ninth Circuit in *Hotel Circle* adopted this reasoning stating it was analogous to the situation of a successor employer who was found not to be bound by the collective-bargaining agreement of its predecessor in the *Burns International Security Services* decision of the United States Supreme Court.[6]

Intriguing as the Respondent's argument may be, I find that it cannot prevail. In each of the cases relied on by the Respondent the courts were confronted with the narrow concern of resolving the conflict between provisions of the Bankruptcy Act and the National Labor Relations Act. Thus, the courts adopted the "new entity" concept solely for the limited purpose of resolving the conflict between these two sections of the statutes and not for all purposes as the Respondent would urge. Indeed, the Second Circuit in a subsequent decision on the same issue stated that the new entity created was a "new juridicial entity" and that it was "for the narrow purpose of resolving otherwise conflicting provisions of the labor and bankruptcy laws." *Teamsters Local 807 v. Bohack Corp.*, 541 F.2d 312 (2d Cir. 1976). Similarly, the Ninth Circuit in *Hotel Circle* stated, "We are convinced that the analogy to successorship [made by the court in *Kevin Steel* and *Bohack*] cases in this *limited* area is valuable." (Emphasis supplied.) 613 F.2d at 214.

Therefore, the argument that the prebankrupt partnership and the partnership as debtor-in-possession are not the same entity is not supported by careful reading of the very cases relied on by the Respondent. There is no conflict here between the National Labor Relations Act and the Bankruptcy Code in determining the gross dollar volume of business of the pre-bankrupt debtor and the debtor-in-possession for purposes of ascertaining whether the Board's jurisdictional standards are met. Indeed, the Board has consistently held that a trustee in bankruptcy or a debtor-in-possession is the alter ego of the bankruptcy employer. *Jersey Juniors*, 230 NLRB 329 (1977); *Stateside Shipyard and Marina*, 178 NLRB 516 (1969). Therefore, I find the gross revenue experience of the Respondent, both as the pre-bankrupt debtor and as the debtor-in-possession is to be considered in ascertaining whether the Board's jurisdictional standards are met, since for this purpose of the Act they are a continuing entity.

The next question to be resolved on the issue of jurisdiction is at what point did the Respondent become the successor employer? The Respondent argues that since escrow did not close until October 15, it did not legally become owner of the business until that date. I find that this argument is also without merit.

The uncontroverted testimony discloses that the Respondent assumed operational control of the bakery on July 1. Kirkpatrick could hire and fire employees and ran the business as he "saw fit." There was no change whatsoever in the employing enterprise and in August, Kirkpatrick increased the number of retail outlets from four to seven. In July, the Respondent not only assumed its predecessor's obligations to the Union for the vacation pay due employees and to the benefit funds for the delinquent contributions, but also executed, in its own name, a collective-bargaining agreement with the Union. It is apparent that as of July 1, the Respondent had taken over all entrepreneurial control of the business enterprise with the attendant risk of loss and opportunity to gain a profit. Therefore, it is evident that during escrow the Respondent operated the bakery for its own financial benefit and not for the financial benefit of its predecessor. *East Beldon Corp.*, 239 NLRB 776 (1978). Accordingly, I

[5] There is no evidence in the record reflecting the gross volume of business earned by the bakery during the ownership of Rose Karsh.

[6] *NLRB v. Burns Security Services*, 406 U.S. 272 (1972).

find the Respondent became the successor employer on July 1, when the Kirkpatricks assumed control of the bakery, rather than on October 15, when escrow for the purchase finally closed.

Under established Board law, two independent jurisdictional tests apply to the situations involving successor employers. The Board treats the successor as it had commenced operation of a new business and determines whether it meets the jurisdictional standard by making a forward projection based on its actual revenue experience. Where the evidence indicates that the business will continue in essentially the same manner as before the change of ownership, the Board has also used the 12-month experience of the predecessor to project what revenues the successor employer will total during its first 12 months of control. *Galaxy Theatre*, 210 NLRB 695 (1974). Nor is the application of these tests mutually exclusive. *Northgate Cinema*, 233 NLRB 586 (1977).

In the instant case, there is no evidence in the record of the 12-month experience of the predecessor. Consequently, it is only the actual experience of the Respondent and its alter ego, the debtor-in-possession, that can be considered and projected forward over a 12-month period.

The stipulation shows that for 11-1/2 months the business enterprise grossed $496,252.20. Even under the reduced operation by the debtor-in-possession the business enterprise averaged $36,339.57 a month for the first 6 months (until the end of May 1982). Thus, it is reasonable to project that the full month's revenue for the month of June 1982 would more than double the half-month total ($19,614) set forth in the stipulation. As this would clearly place the gross revenues above the $500,000 discretionary standard for retail enterprises, I find that the Respondent meets the jurisdictional requirements of the Board. Accordingly, the Respondent's motion to dismiss for lack of jurisdiction is denied and I find that the Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

Bakery, Confectionary and Tobacco Workers International Union of America, Local No. 85 is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

As noted, the Respondent executed a collective-bargaining agreement with the Union on July 25 and filed a petition under Chapter 11 of the bankruptcy code on December 4. Although there are some differences between the testimony of Kirkpatrick and that of the witnesses for the General Counsel, there is no significant dispute over the events which followed the filing of the petition in the bankruptcy court.

Janet Higbee had been employed at the bakery since 1963 as a salesclerk. She was a member of the Union and on December 4 was earning $5.06 an hour working in the main store in Fulton Mall. At the end of her shift on December 4, Higbee spoke to Carl Swatsky, Respondent's manager of operations, and asked for her work schedule for the following day.[7] Swatsky told the employee to go home and that she would be contacted later by Kirkpatrick. When she failed to hear from Kirkpatrick during the course of the evening, Higbee telephoned the store and spoke directly with him. According to Higbee, Kirkpatrick stated he was reorganizing the business and had filed a petition in bankruptcy under Chapter 11. Higbee testified that Kirkpatrick told her he was going nonunion and that her wages would be reduced to $4 an hour with no other benefits.[8] Kirkpatrick then asked the employee to work at the Hanoian outlet under these new terms. Higbee initially agreed to accept Respondent's terms because she was hesitant to become unemployed just before Christmas. After giving the matter additional thought, Higbee decided to call the home of one of the employees who worked at the Hanoian store. This employee told Higbee that she was not going to accept Respondent's offer to work for lower wages with no benefits or a union contract. Higbee then decided she would not work on these terms either. The following morning, Higbee called Swatsky and declined to return to work under the new conditions offered by Respondent. On cross-examination, Higbee stated she would have continued to work for the Respondent if the wages offered had been high enough to enable her to purchase her own health insurance and to make payments into the union pension fund. Higbee also testified on cross-examination that working for less than contract wages without any of the contract benefits and without a contract itself meant to her that the Respondent was going nonunion. She stated this was true even though Kirkpatrick never specifically told her that, if she returned, she could no longer be represented by the Union.

Employee Susan Sadoian had been employed at the bakery as a sales clerk since 1955. She too was a member of the Union and worked at the Hanoian store outlet. On December 4 her hourly rate of pay was $5.05.

Sadoian testified she was called at home by Swatsky on the evening of December 4. Swatsky told the employee that the Respondent had filed for reorganization under Chapter 11 of the Bankruptcy Code and that the business would operate as a nonunion shop. Swatsky also told the employee that there would be no union contract or benefits given to the employees and that the wages would be reduced to $4 an hour. Sadoian asked for time to think about these new terms. She subsequently called Swatsky back and told him that she could not accept the new terms because she could not work in a nonunion shop.[9]

Diane Jones worked at the bakery since 1978 as a salesclerk. She was a member of the Union and was earning $5.02 an hour on December 4. Jones testified

[7] Although Swatsky figured prominently in conversations with several of the employees, he was not called as a witness in this proceeding.

[8] Kirkpatrick testified that he told Higbee he was "rejecting" the union contract. He denied making the statement that the Respondent was going nonunion and testified there was no discussion about the Union continuing to represent the employees.

[9] As with the testimony of Higbee, Sadoian stated that working for lower wages without any benefits or a collective-bargaining agreement meant, as far as she was concerned, that the Respondent was going nonunion.

that on December 4 Swatsky telephoned her at home and informed her that the Respondent would no longer be a union shop and that the wages would be reduced to $4 an hour without any other benefits. Jones declined to accept the Respondent's offer to work under these new terms.

Pamela Hale was a salesclerk at the Hanoian store outlet. She was a union member and was receiving $5.06 an hour on December 4. Hale testified that on December 6 Kirkpatrick called her home and informed her that the Respondent was reorganizing under Chapter 11 of the Bankruptcy Code. According to Hale, Kirkpatrick said the Respondent would not honor the collective-bargaining agreement with the Union and that the wages of the employees would be cut. He told Hale the Respondent was going to be a nonunion shop. Hale then refused to continue working for the Respondent.

Dollie Phillips was also a salesclerk for the Respondent. Like the other employees Phillips was a member of the Union and was earning $5.06 an hour at the time of the filing of the petition in bankruptcy. She testified that on December 4, Cheryl Kirkpatrick told her the Respondent was closing all of the Gottschalk outlets and since the following day was Phillips' day off, the employee should go home and wait for management to contact her. The following day John Kirkpatrick called Phillips. According to Phillips, Kirkpatrick stated the bakery was going nonunion and her wages would be reduced to $4.50 an hour with no other benefits. He stated the Respondent was rejecting the collective-bargaining agreement with the Union.[10] Phillips testified she asked Kirkpatrick for time to consider this new development. Kirkpatrick called Phillips a short while thereafter and asked her to come to work that Saturday. Phillips at this point refused, telling Kirkpatrick that she could not work in a nonunion shop.

Randy Ghan, assistant business representative of the Union servicing the contract at the bakery, testified that he went to the main office of the bakery on December 5 and spoke with Kirkpatrick. He stated Kirkpatrick informed him that a petition had been filed under Chapter 11 of the Bankruptcy Code and the Respondent was rejecting the Union's contract along with its Gottschalk's contract. Ghan told Kirkpatrick that he could not do that and asked where they were to go from there. Kirkpatrick replied that he did not know and that he did not think he should even be talking to the union representative. At this point, according to Ghan, Kirkpatrick walked away. Following this conversation, Ghan stated he made several attempts to contact Kirkpatrick by telephone but was unable to get his calls returned.

Kirkpatrick acknowledged that he spoke with Ghan on December 5 at the bakery. According to Kirkpatrick, Ghan was questioning him about rejecting the collective-bargaining agreement. Kirkpatrick stated he told Ghan he had authority to reject all executory contracts under Chapter 11 of the Bankruptcy Code. The union representative then informed Kirkpatrick that he would be hearing from him. Kirkpatrick stated that he was later informed that Ghan had called him several times but denied receiving any such messages when the calls were allegedly made by Ghan.

Apparently at the time of the filing of the petition in bankruptcy, or shortly thereafter, the Respondent filed a motion with the bankruptcy court for approval to reject a number of executory contracts including the collective-bargaining agreement. A hearing was held on the motion on December 22 and the following day the bankruptcy court issued an order approving the rejecting of the agreement by the debtor-in-possession.[11]

On March 5, 1982, the Respondent, apparently on advice of different counsel, contacted the employees who had refused to work for the lower wages and new terms offered by the Respondent in December. Kirkpatrick offered each of these employees a position with the bakery on the identical terms he initially offered after filing the petition in bankruptcy. Each of the employees refused to accept the offer for substantially the same reason; i.e., they would not work for the lower wages without any benefits and without a union contract.

Kirkpatrick also contacted the union representative on that same date. Ghan testified that Kirkpatrick offered to bargain on any issues that the Union wished to discuss. A meeting was set for some time in May but was canceled because of a scheduling conflict of the Union's attorney. Since that time, there has been no effort by the Union to reschedule another meeting with the Respondent.

Concluding Findings

The General Counsel argues that the filing of the Chapter 11 petition and the appointment of the Respondent as debtor-in-possession did not relieve the debtor from its obligations under the collective-bargaining agreement. Thus, when the debtor-in-possession unilaterally abrogated the provisions of the agreement prior to receiving authorization from the bankruptcy court to reject that executory contract, it did so without complying with the requirements of Section 8(d) and thereby violated Section 8(a)(5) of the Act. In addition, the General Counsel contends that, even after the bankruptcy court's approval of the rejection of the agreement, the debtor-in-possession remained under an obligation to recognize and bargain with the Union, since the employing enterprise continued to operate in the same manner albeit on a reduced scale, with substantially the same employees. In support of these arguments, the General Counsel cites, among other cases, *Burgmeyer Bros.*, 254 NLRB 1027 (1981); *Jersey Juniors*, 230 NLRB 329 (1977); *Iron*

[10] Kirkpatrick testified that he offered Phillips a position as head of the Foodland Herndon outlet at $4.50 an hour. Kirkpatrick said he told the employee that the Respondent was rejecting the union contract. At this point, according to Kirkpatrick, Phillips stated she would not work for those wages and refused his offer.

[11] The Union takes the position in the instant proceeding that the order of the bankruptcy court is not entitled to be honored by the Board. The Union in effect argues that the Court applied an improper standard in determining that the collective-bargaining agreement was burdensome to the debtor's estate and its rejection was necessary to achieve a satisfactory reorganization. I do not consider a proceeding before the Board to be a proper forum to review an order issued by the bankruptcy court. Therefore, the Union's argument in this regard is rejected.

Workers Local 455 v. Kevin Steel Products, 519 F.2d 698 (2d Cir. 1975).

Finally, the General Counsel argues that the five employees who refused to work under the new terms and conditions offered by the debtor-in-possession were constructively discharged in violation of Section 8(a)(1) and (3) of the Act. The General Counsel reasons that by unilaterally reducing wages and eliminating benefits required by the collective-bargaining agreement, as well as the asserted repudiation of the Union as the bargaining representative of the employees, the debtor-in-possession made the terms and conditions of employment so intolerable that the five employees were forced to quit their jobs.

The Respondent's basic argument is much the same as that advanced in support of the jurisdictional issue. The Respondent contends that the debtor-in-possession is a new entity and, as such, is free to reject the existing collective-bargaining agreement much like a successor employer in the circumstances found by the Supreme Court in *NLRB v. Burns Security Services*, 406 U.S. 272 (1972). To sustain this position, the Respondent relies heavily on *Kevin Steel*, supra, and also on *Local Joint Executive Board v. Hotel Circle*, 613 F.2d 210 (9th Cir. 1980). The Respondent also contends that in exercising its right to reject the collective-bargaining agreement, it did not repudiate the Union's status as the bargaining representative of the employees and hence did not deny the employees their statutory right of representation. In this regard, the Respondent asserts that the five employees quit their jobs because they declined to work for the reduced wages and without any benefits, rather than because they understood the Union would no longer be allowed to represent them.

Addressing first the issue of the unilateral changes in the terms of the collective-bargaining agreement, I find that the Respondent has indeed acted in violation of the National Labor Relations Act. The Board has long held that the filing of a petition in bankruptcy and the subsequent appointment of a receiver, a trustee, or a debtor-in-possession does not invalidate the effectiveness of an existing collective-bargaining agreement; nor does it relieve the receiver, trustee, or debtor-in-possession of the obligation to recognize and bargain with the current collective-bargaining representative of the employees of the financially troubled enterprise. *Burgmeyer Bros.*, supra; *Oxford Structures*, 245 NLRB 1180 (1979); *Jersey Juniors*, supra. This principle has likewise received approval in the courts. See *Teamsters Local 807 v. Bohack Corp.*, 541 F.2d 312 (2d Cir. 1976), and *Iron Workers Local 455 v. Kevin Steel Products*, supra.

The *Hotel Circle* case heavily relied on by the Respondent does not necessarily, in my judgment, warrant a contrary conclusion. There, the Ninth Circuit recognized a receiver (or debtor-in-possession) has a "general duty to bargain and otherwise comply with the [Act]," but held that a receiver's duty under 8(d) "is limited by his lack of authority to affirm an executory labor agreement without the permission of the bankruptcy court." *Local Joint Executive Board v. Hotel Circle*, supra, 613 F.2d at 215. The court in *Hotel Circle* was concerned with a receiver who had participated in negotiations for a new collective-bargaining agreement and then conformed to the terms of the agreement negotiated without prior approval of the bankruptcy court. It was not a situation where compliance with the terms of an existing collective-bargaining agreement was involved. Indeed, in *Hotel Circle* the court referred to the *Bohack* case, supra, to note that the "new entity" concept for a receiver or debtor-in-possession is narrowly limited and "cannot be taken literally since one not a party technically cannot affirm or reject an agreement." In a more recent case (involving a lease of the debtor rather than a collective-bargaining agreement), the Ninth Circuit explained the meaning of *Hotel Circle*. See In re *Huntington Ltd.*, 654 F.2d 578 (9th Cir. 1981). There, the court stated what it intended by its holding in *Hotel Circle*. The court said in footnote 14 at 587:

> *Hotel Circle* should be read, however, for the proposition that a receiver's assumption of an executory contract, be it express or implied by conformance to the terms of the contract, is subject to the review of the Bankruptcy Court. See 4A Collier on Bankruptcy ¶70.43 [5]; p. 530 (14th ed. 1978). The receiver's assumption of the contract may be affirmed or denied by the court depending upon the court's judgment of whether such assumption is in the best interest of the debtor's estate.

Turning to the facts in the instant case, it is evident that on December 4, while the debtor-in-possession had applied for approval to reject the collective-bargaining agreement, a hearing was not held on the matter until December 22, and the bankruptcy court did not grant approval until December 23. Since under the Board law the mere filing of a petition in bankruptcy does not invalidate the effectiveness of an existing collective-bargaining agreement, the debtor-in-possession in this case was not free to repudiate the terms of the existing agreement until such action was authorized by the bankruptcy court. Indeed, even under *Hotel Circle* such action would have to require prior approval of the bankruptcy court. Thus, when the debtor here breached the terms of the collective-bargaining agreement by unilaterally reducing wages and eliminating benefits on December 4, it did so without authorization by the bankruptcy court and without complying with the requirements of Section 8(d) of the National Labor Relations Act. This action was taken in derogation of the exclusive collective-bargaining status of the Union and violated Section 8(a)(5) of the Act.

While the court decisions hold that after authorization is granted by the bankruptcy court to reject a collective-bargaining agreement the debtor-in-possession is free to do so, neither the Board cases nor the court decisions hold that the debtor-in-possession was relieved of its obligation to recognize and bargain with the Union as the exclusive representative of the unit employees. *I.S.G. Extrusion Tooling*, 262 NLRB 114 (1982); *Burgmeyer Bros.*, supra; *Oxford Structures*, supra; *Jersey Juniors*, surpa; *Local Joint Executive Board v. Hotel Circle*, supra; *Teamsters Local 807 v. Bohack Corp.*, supra; *Iron Workers Local 455 v. Kevin Steel Products*, supra.

Although the Respondent here contends that it did not tell the employees the Union could no longer represent them, I find the facts belie this claim. Each of the employees who testified stated they were either told by Kirkpatrick or Swatsky that the Respondent was going "non-union" and was rejecting the collective-bargaining agreement. As noted, Swatsky was not called as a witness and I do not credit Kirkpatrick's denial that he told the employees the business was going to operate "non-union." It is apparent from the manner in which Kirkpatrick carefully couched his words when testifying that he was seeking to portray his actions in a lawful mold rather than to give an accurate recital of the statements which were made to the employees. Indeed, on December 5, when Ghan came to the bakery and spoke to Kirkpatrick, Ghan was told not only that the Respondent was rejecting the collective-bargaining agreement, but also that Kirkpatrick felt he should not even be talking to the union representative. In my judgment, this serves to indicate that Kirkpatrick considered the Union to have no further status as bargaining representative of the unit employees.

Thus, I find the debtor-in-possession not only unlawfully rejected the collective-bargaining agreement on December 4, but also unlawfully refused to recognize and bargain with the Union as the exclusive representative of the employees. Nor does the fact that on March 5, 1982, the debtor-in-possession made an offer to bargain with the Union on any issues between them cure the violations which had already taken place. Accordingly, I find that by rejecting the collective-bargaining agreement and unilaterally reducing wages and eliminating contract benefits on December 4, 1981, the debtor-in-possession violated Section 8(a)(5) of the Act. I further find that by refusing to recognize the Union as the exclusive representative of the employees and bargaining with it as such, the debtor-in-possession committed an additional violation of Section 8(a)(5) and in so doing unlawfully deprived the unit employees of their statutory right to be represented by a union of their own choosing in violation of Section 8(a)(1) of the Act.

Turning to the circumstances surrounding the refusal of the five employees to continue to work for the Respondent after December 4, I find that each of these employees was in fact constructively discharged by the Respondent and its debtor-in-possession. As previously noted, Kirkpatrick made it quite clear to these employees that the business was going to be operated henceforth as a nonunion establishment. Not only were the wages of the employees to be reduced if they continued to work in the bakery, but all of the benefits provided in the contract were to be eliminated. Each of the five employees who were offered continued employment on these terms declined to do so because they refused to work under "non-union" conditions and for lower pay without any benefits. The obvious inference to be drawn from their refusal to work on these terms is that the employees wanted to continue to be represented by their union and employed under terms and conditions negotiated by their bargaining representative. Therefore, I find that by refusing to work in a nonunion shop for less wages and without any of the benefits provided in the collective-bargaining agreement, the five employees were constructively discharged by the Respondent on December 4 in violation of Section 8(a)(3) and (1) of the Act. *Western Pacific Roofing Corp.*, 244 NLRB 501 (1979), enfd. sub nom. in pertinent part *Seattle Auto Glass v. NLRB*, 669 F.2d 1332 (9th Cir. 1982).

CONCLUSIONS OF LAW

1. Respondent John Kirkpatrick and Cheryl Kirkpatrick, a partnership d/b/a Karsh's Bakery, and its debtor-in-possession is an employer within the meaning of Section 2(2) of the Act engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Bakery, Confectionary and Tobacco Workers International Union of America, Local No. 85 is a labor organization within the meaning of Section 2(5) of the Act.

3. By refusing on December 4, 1981, to recognize and bargain with the Union, as the exclusive representative of the employees in the unit set forth below, concerning rates of pay, wages, hours, and other terms and conditions of employment, the Respondent violated Section 8(a)(5) of the Act. The unit appropriate for purposes of collective bargaining is:

> All full-time and regular part-time journeyman and apprentice bakers, doughnut fryers/icers/glazers, miscellaneous employees, and sales persons, including forepersons, excluding office clerical employees, professional employees, guards and supervisors as defined in the Act.

4. By unilaterally repudiating the collective-bargaining agreement in effect between it and the Union on December 4, 1981, without first securing approval of the bankruptcy court, and on the same date unilaterally changing the terms and conditions of employment of the unit employees without first notifying and bargaining with the Union, the Respondent violated Section 8(a)(5) of the Act.

5. By conditioning continued employment of the unit employees on December 4, 1981, on lower wages without any of the benefits provided for in the collective-bargaining agreement, the Respondent made the terms and conditions of employment so intolerable that it constructively discharged the following employees in violation of Section 8(a)(3) and (1) of the Act:

Janet Higbee
Susan Sadoian
Diane Jones
Pamela Hale
Dollie Phillips

6. By denying the unit employees representation by their exclusive collective-bargaining representative on December 4, 1981, and thereafter, the Respondent has interfered with the rights guaranteed its employees by statute and violated Section 8(a)(1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found the Respondent has engaged in certain unfair labor practices, it shall be recommended that the Respondent be required to cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

Since the record facts that the bankruptcy court approved the rejection of the collective-bargaining agreement on December 23, 1981, and since case law holds that even court-approved rejection of an existing collective-bargaining agreement does not relieve a debtor-in-possession of the obligation to recognize and bargain with the representative of the unit employees, the vindication of the public policy of the statute must be tailored to the particular facts of the instant case. That the conduct of the Respondent and its debtor-in-possession on December 4, 1981, was unlawful, cannot be gainsaid. However, on March 5, 1982, the Respondent and its debtor-in-possession notified the Union of its willingness to recognize and bargain with the Union on the matters at issues between them. Therefore, at this point, the Respondent was willing to comply with the requirements of the Act with respect to the collective-bargaining representative. For this reason, the Respondent shall be ordered to cease and desist from refusing to recognize and bargain with the Union (which was accomplished on March 5, 1982) and affirmatively ordered to bargain, on request, with the Union regarding wages, rates of pay, hours, and other terms and conditions of employment of the unit employees. In addition, the Respondent shall be ordered to reinstate the five constructively discharged employees to their former or substantially equivalent positions without loss of seniority or other rights and privileges, discharging, if necessary, any employee hired subsequent to December 4, 1982. The Respondent and its debtor-in-possession shall be required to make the reinstated employees whole for any loss of earnings they may have suffered, at the rate set forth in the collective-bargaining agreement, from the date of their unlawful discharge until March 5, 1982, the date of the offer to recognize and bargain with the Union. Backpay shall be computed in the manner set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and interest thereon shall be computed in the manner provided in *Florida Steel Corp.*, 231 NLRB 651 (1977).[12] In addition, the Respondent and its debtor-in-possession shall make the required pension and health fund contributions for the constructively discharged employees from the date of their discharges to March 5, 1982, with interest thereon, if any, to be determined at the compliance stage of this proceeding. See *Merryweather Optical Co.*, 240 NLRB 1213, 1216 fn. 7 (1979).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[13]

ORDER

The Respondent, John Kirkpatrick and Cheryl Kirkpatrick, a Partnership d/b/a Karsh's Bakery, Fresno, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to recognize and bargain with Bakery, Confectionary and Tobacco Workers International Union of America, Local No. 85 as the exclusive collective-bargaining representative of its employees in the following appropriate unit:

> All full-time and regular part-time journeyman and apprentice bakers, doughnut fryers/icers/glazers, miscellaneous employees, and sales persons, including forepersons, excluding office clerical employees, professional employees, guards and supervisors as defined in the Act.

(b) Denying employees in the above-described unit representation by their exclusive collective-bargaining representative.

(c) Unlawfully reducing wages, eliminating contract benefits, and denying union representation to the unit employees in order to make terms and conditions of employment so intolerable that employees quit their jobs.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action designed to effectuate the policies of the Act.

(a) Recognize and, upon request, bargain with the Union as the exclusive collective-bargaining representative of the employees in the above-described unit.

(b) Offer to Janet Higbee, Susan Sadoian, Diane Jones, Pamela Hale, and Dollie Phillips immediate and full reinstatement to their former jobs or, if those positions no longer exist, to substantially equivalent positions without prejudice to their seniority or other rights and privileges, discharging, if necessary, any employees hired subsequent to December 4, 1982. In addition, make the above-named employees whole for for any loss of earnings or benefits they may have suffered in the manner set forth in the section of this decision entitled "The Remedy."

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its main facility and all outlets located in Fresno, California, copies of the attached notice marked "Appendix."[14] Copies of the notice, on forms provided by the Regional Director for Region 32, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon re-

[12] See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962).

[13] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[14] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

ceipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

Plasterers Local Union No. 346 of the Operative Plasterers' & Cement Masons' International Association of the United States and Canada, AFL–CIO *and* A. G. Brawner Plastering, Inc.
Cases 21–CB–8274 and 21–CB–8357

14 December 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS ZIMMERMAN AND HUNTER

On 27 September 1983 Administrative Law Judge William L. Schmidt issued the attached decision. The Respondent and the Employer filed exceptions and supporting briefs, and the Respondent filed an answering brief to the Employer's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions[1] and to adopt the recommended Order as modified.

The Employer has excepted to the judge's finding that the Respondent did not violate Section 8(b)(3) by refusing to provide the Employer with certain information concerning the health and welfare trust and the pension trust. We find merit to the Employer's exceptions, and for the reasons below we find that the Respondent violated Section 8(b)(3) by refusing to provide information which it admittedly possessed concerning the trusts.

The Respondent and the Employer were parties to the Plastering Industry Short Form Agreement which bound the Employer to the terms of the contract between the Respondent and the Associated Plastering and Lathing Contractors of San Diego. The Plastering Industry Short Form Agreement provided that the Employer was bound to the terms and conditions of each of the trust agreements referred to in the Respondent's contract with the Associated Plastering and Lathing Contractors of San Diego, including the health and welfare trust and the pension trust. The Plastering Industry Short Form Agreement also required the Employer to designate and appoint the employers mentioned in the trust agreements as attorney-in-fact for the selection, removal, and substitution of trustees. The trust agreements themselves are not in evidence but the record discloses that the trusts are jointly administered and that an entity known as Allied Trust serves as the administrator.

The most recent agreement between the Respondent and the Employer was scheduled to expire on 3 August 1982,[2] and we agree with the judge that the Employer's notice of 23 April was sufficient to prevent the automatic renewal of that agreement. The parties met on 28 June for their initial bargaining session, and on 20 July the Employer forwarded a written information request to the Respondent. The Employer's request stated, inter alia:

> 4) Please provide us immediately with details regarding the health and welfare plan provided through the jointly administered trust applicable to your union as follows:
>
> A) A detailed analysis of coverage, benefits and cost as projected for the next contract period;
>
> B) All actuarial statements or reports involving this trust fund or any of its subsidiaries; and,
>
> C) All financial reports, audited or unaudited, for this trust fund, including any subsidiary, for the period beginning January 1, 1977.
>
> 5) With regard to the jointly administered pension plan, please provide us immediately with the following details:
>
> A) Any actuarial studies or reports which have been completed with regard to the fund, or any of its subsidiaries;
>
> B) All financial reports and income statements, audited or unaudited, for this trust fund, including any subsidiary thereof, for the period beginning January 1, 1977;
>
> C) A description of the present unfunded liability of said plan;
>
> D) With regard to employer contributions to the pension fund for the five-year period ending with the most recent plan year's expiration,
>
> i) the amount of total employer contributions;
>
> ii) The amount of contributions made by our company;
>
> iii) The pension fund's unfunded liability as of the end of the most recent plan year;
>
> E) A projection of the unfunded liability for the next three years; and,
>
> F) A full description of the present and projected benefits to employees participating in

[1] No exceptions were filed to the judge's finding that the Respondent violated Sec. 8(b)(3) by refusing the Employer's request to provide certain information on the operation of its hiring hall. We agree with the judge's findings, but in doing so we find it unnecessary to consider his additional statement that the Respondent has no duty to expend its resources to conduct a survey of the hiring hall registrants in order to compile additional information which the Employer has requested.

[2] Unless otherwise specified, all dates herein refer to 1982.

> said plan, and costs to employees contributing to said plan for the next three years.

The Employer subsequently reiterated its request on 17 November and on 14 February 1983 but the Respondent consistently declined to provide the information.

The record establishes that Allied Trust maintains all of the records concerning the trusts sought by the Employer in its information request. However, the Respondent's financial secretary and business agent McHenry admitted at the hearing that the Respondent also possesses much of the information contained in the request. McHenry testified that the Respondent possesses actuarial statements and financial reports in connection with both the health and welfare trust and the pension trust. He further testified that the Respondent possessed records of employer contributions to the trust funds from the preceding 5 years. The record is silent as to whether the Respondent possesses the remaining information requested concerning the trusts.

The judge found that the Respondent had no obligation to furnish the requested information. We conclude that the Respondent violated Section 8(b)(3) by failing to submit the information which it admittedly possessed, but that it did not act unlawfully in connection with information not in its possession.

After the judge's decision, the Board issued *Food & Commercial Workers Local 1439 (Layman's Market)*, 268 NLRB 780 (1984). In that case the Board observed that in *NLRB v. Amax Coal Co.*, 453 U.S. 322 (1981), the Supreme Court held that trustees of jointly administered trust funds are not agents of their respective parties. The Board concluded that *Amax* required a modification of *Hospital Employees (Sinai Hospital of Baltimore)*, 248 NLRB 631 (1980). In *Sinai* a union representative was also a trustee of a health and welfare trust fund, and the Board found that the representative, as a trustee, violated Section 8(b)(3) by intentionally preventing the employer's access to the requested information. The Board in *Sinai* also found that in so doing the union representative violated his "affirmative obligation to make a reasonable effort to obtain the information, or to investigate reasonable alternative means for obtaining it, or to truthfully explain or document the reasons for its unavailability."[3] In *Layman's* the Board concluded that in light of the Supreme Court's decision in *Amax*, the decision in *Sinai* continues to be valid "only where a collective-bargaining representative demonstrates that it is in de facto control of a nominally independent trust fund."[4]

Therefore, the threshold question under *Layman's* is whether a union has de facto control of a trust fund. A finding that a union exercises such control will trigger an analysis of whether it met its "affirmative obligation," but where a union does not exercise such control an affirmative obligation will not arise in most circumstances.

There is no evidence that the Respondent was in de facto control of the trust funds involved in this case. Consequently, with respect to the information which presumably it did not possess, we find that the Respondent did not have an affirmative obligation to make a reasonable attempt to obtain the information, to investigate reasonable alternative means for obtaining it, or to explain its unavailability. Whether the Respondent had such an affirmative obligation, however, is a relevant inquiry only with respect to the information which it did not possess. Clearly a party can never have an obligation to attempt to obtain information which is already in its possession. Therefore, to find that the Respondent has no affirmative obligation to seek information does not resolve the question of whether it was obligated to furnish the information which it admittedly had. The latter issue did not arise in *Layman's* because the union did not have the specific information requested. We thus conclude that *Layman's* is not controlling with respect to the information in the Respondent's possession.[5]

Applying our usual principles, we conclude that the Respondent unlawfully refused to furnish the information which it possessed. We note that a labor organization's duty to furnish information is parallel to that of an employer.[6] The information is unquestionably relevant to collective bargaining, and there is no evidence that it is confidential or otherwise privileged, or that its production would

[3] 268 NLRB 780, 781 (1984), quoting 248 NLRB at 633.

[4] 268 NLRB 781 (1984).

[5] The Board in *Layman's* also overruled *Teamsters Local 959 (Frontier Transportation Co.)*, 244 NLRB 19 (1979). In *Frontier Transportation Co.*, union officers were also trustees of the trust funds and in their capacity as trustees they either possessed or had access to trust fund information. The Board found in those circumstances that the union violated Sec. 8(b)(3) by refusing an employer's information request. In view of the overruling of that case in *Layman's*, the Board will no longer find an 8(b)(3) violation where a union official, in his role as a trustee, has possession of or access to information, unless the union is in de facto control of the fund. However, our finding here is consistent with the overruling of *Frontier Transportation Co.* We note particularly that McHenry was the Respondent's only officer, and that there is no evidence that he was a trustee of the funds. He possessed the information simply in his capacity as a union officer and not as a trustee.

[6] *Graphic Communications Local 13 (Oakland Press)*, 233 NLRB 994, 996 (1977); *Machinists Lodge 78 (Square D Co.)*, 224 NLRB 111 (1976). An employer has a duty to furnish relevant information to enable a labor organization to carry out its duties as a bargaining representative. *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967); *NLRB v. Truitt Mfg. Co.*, 351 NLRB 149 (1956).

be unduly burdensome.[7] We are aware that in some circumstances, such as where the information is easily accessible or readily available to a party making an information request, the Board has not required the party to whom the request is made to provide the information.[8] We find, however, that the record does not establish how readily available the information was to the Employer from the trust funds or from any other source. We emphasize that the record contains only limited evidence concerning the operation of the trusts and the availability of the information from Allied Trust, the trust administrator. The Plastering Industry Short Form Agreement binds the Employer to the terms and conditions of the trust agreements, but the trust agreements themselves are not in evidence. The record does not disclose what procedure the Employer would have to utilize to obtain the information from the trust administrator. It is therefore not clear whether the information would be readily available to the Employer on request, or whether the Employer would confront restrictions or delays in obtaining the information.[9] What the record does establish clearly is that the Respondent possessed much of the information and refused the Employer's request to furnish it. In these circumstances we see no reason to require the Employer to use an alternative procedure, and we find that the Respondent violated Section 8(b)(3) by failing to furnish the information.

AMENDED CONCLUSIONS OF LAW

Substitute the following for paragraph 8:

"8. On July 20, and November 17, 1982, and on February 14, 1983, the Employer requested that the Respondent provide it with the names, classifications, and years of construction industry experience of all registrants on the hiring hall lists maintained by the Respondent. The Employer also requested on the above dates that the Respondent provide it with actuarial statements and financial reports in connection with both the health and welfare trust and the pension trust, and that the Respondent provide it with records of employer contributions for the preceding 5 years to the health and welfare and pension trust funds."

AMENDED REMEDY

Having concluded that the Respondent violated Section 8(b)(3) by refusing to provide certain information admittedly in its possession in connection with the health and welfare and pension trusts, we shall modify the judge's recommended Order to require the Respondent to cease and desist therefrom and to furnish the information in its possession.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Plasterers Local Union No. 346 of the Operative Plasterers' & Cement Masons' International Association of the United States and Canada, AFL–CIO, its officers, agents, and representatives, shall take the action set forth in the Order as modified.

1. Insert the following as paragraph 1(d) and reletter the subsequent paragraphs.

"(d) Refusing to furnish A. G. Brawner Plastering, Inc. with actuarial statements and financial reports in its possession in connection with both the health and welfare trust and the pension trust, and refusing to furnish A. G. Brawner Plastering, Inc. with records in its possession of employer contributions for the preceding 5 years to the health and welfare trust fund and the pension trust fund."

2. Insert the following as paragraph 2(d) and reletter the subsequent paragraphs.

"(d) Furnish A. G. Brawner Plastering, Inc. with the information specified in paragraph 1(d), above, without further delay."

3. Substitute the attached notice for that of the administrative law judge.

APPENDIX B

NOTICE TO EMPLOYEES AND MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain collectively with A. G. Brawner Plastering, Inc. by failing and refusing to honor and abide by the termination provisions of the short-form agreement we entered into with A. G. Brawner Plastering, Inc. on 3 August 1976.

WE WILL NOT refuse to bargain collectively, on request, with A. G. Brawner Plastering, Inc. for a new collective-bargaining agreement.

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[7] *Tom's Ford*, 253 NLRB 888, 894 (1980).

[8] See, e.g., *LaGuardia Hospital*, 260 NLRB 1455, 1462 (1982). See also *Tom's Ford*, supra at 895. In this connection the Board has frequently noted that absent special circumstances, a party is not relieved of its obligation to furnish relevant information simply because the information may be available to the requesting party from another source. See *Borden, Inc.*, 235 NLRB 982, 983 (1978); *Kroger Co.*, 226 NLRB 512, 513 (1976).

[9] We do not find that these issues are resolved by the conclusional testimony of the Respondent's business agent McHenry that the requested information was "available" to the Employer through the trust administrator. That testimony does not establish whether the Employer would confront obstacles in obtaining the information.

WE WILL NOT refuse to furnish A. G. Brawner Plastering, Inc. with the names, classifications, and information in our possession concerning the years of construction industry experience of the registrants on our hiring hall lists.

WE WILL NOT refuse to furnish A. G. Brawner Plastering, Inc. with actuarial statements and financial reports in our possession in connection with both the health and welfare trust and the pension trust, and *we will not* refuse to furnish A. G. Brawner Plastering, Inc. with records in our possession of employer contributions for the preceding 5 years to the health and welfare trust fund and the pension trust fund.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL bargain collectively with A. G. Brawner Plastering, Inc. by honoring and abiding by the letter dated 23 April 1982 terminating the short-form agreement in effect between A. G. Brawner Plastering, Inc. and us.

WE WILL bargain, upon request, with A. G. Brawner Plastering, Inc. for a new collective-bargaining agreement.

WE WILL furnish A. G. Brawner Plastering, Inc. with the names, classifications, and information in our possession concerning the years of construction industry experience of all registrants on our hiring hall list without delay.

WE WILL furnish A. G. Brawner Plastering, Inc. with actuarial statements and financial reports in our possession in connection with both the health and welfare trust and the pension trust, and WE WILL furnish A. G. Brawner Plastering, Inc. with records in our possession of employer contributions for the preceding 5 years to the health and welfare trust fund and the pension trust fund.

PLASTERERS LOCAL UNION 346 OF THE OPERATIVE PLASTERERS' CEMENT MASONS' INTERNATIONAL ASSOCIATION OF THE UNITED STATES AND CANADA, AFL–CIO

DECISION

STATEMENT OF THE CASE

WILLIAM L. SCHMIDT, Administrative Law Judge. This matter was heard by me on May 5, 1983, at San Diego, California. The charge in Case 21–CB–8274, filed on behalf of A. G. Brawner Plastering, Inc. (Brawner) on December 12, 1982, alleged that Plasterers Local Union No. 346 of the Operative Plasterers' & Cement Masons' International Association of the United States and Canada, AFL–CIO (Respondent or Plasterers Local 346), violated Section 8(b)(3) of the National Labor Relations Act (Act), by refusing to bargain collectively in good faith with Brawner in the past 6 months. The charge in Case 21–CB–8357, filed on behalf of Brawner on March 11, 1983, alleges that Respondent violated Section 8(b)(3) of the Act by refusing to bargain collectively in good faith with Brawner since February 28, 1983. On March 30, 1983, the Regional Director for Region 21 of the National Labor Relations Board (Board or NLRB) ordered the two cases consolidated and issued a consolidated amended complaint (complaint) on behalf of the General Counsel of the Board. The complaint alleges that the Respondent violated Section 8(b)(3) of the Act by refusing since July 20, 1982, to furnish Brawner with cetian specified information alleged to be necessary and relevant to Brawner's efforts to prepare for collective bargaining with the Respondent and by refusing to meet and bargain with Brawner as requested in writing on February 14, 1983. The Respondent filed a timely answer denying that it engaged in the unlawful conduct alleged in the complaint.

On the entire record, including my observation of the witnesses who appeared before me at the hearing, and my careful consideration of posthearing briefs filed by the General Counsel and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

Brawner, a California corporation, is a plastering contractor in San Diego County, California. During its fiscal year from May 31, 1981, to May 31, 1982, Brawner performed services valued in excess of $50,000 for C. A. Larsen Construction Company of San Diego. During the same period, C. A. Larsen Construction Company purchased and received goods and materials valued in excess of $50,000 directly from suppliers located outside the State of California. On the basis of the foregoing, I find that Brawner meets the Board's indirect outflow standard for exercising jurisdiction and that Brawner is an employer within the meaning of Section 2(2) of the Act, engaged in commerce, or an industry affecting commerce, within the meaning of Section 2(6) and (7) of the Act. I further find that it would effectuate the purposes of the Act for the Board to assert jurisdiction with respect to this dispute.

II. LABOR ORGANIZATION

Respondent has been a labor organization within the meaning of Section 2(5) of the Act at all times relevant to this case.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Pleadings*

The complaint alleges that the Respondent violated Section 8(b)(3) of the Act by a February 28, 1983 written refusal to meet and bargain with Brawner concerning a successor collective-bargaining agreement. The complaint also alleges that the Respondent violated Section

8(b)(3) by refusing since July 20, 1982, to furnish information requested by Brawner which was necessary and relevant for it to prepare for collective bargaining with the Respondent. As described in the complaint, the data sought by Brawner was:

> . . . information relating to Respondent's hiring hall, details regarding the health and welfare plan provided through the jointly administered trust applicable to Respondent, information regarding the jointly administered pension plan applicable to Respondent, and the names and titles of those persons on the Respondent's negotiating committee.

The answer to the complaint denies that the Respondent engaged in any unfair labor practices. More particularly, the answer denies that Brawner requested the necessary and relevant information on the dates alleged, and that it had refused to supply any such information. Although the answer admits that Brawner requested bargaining for a successor agreement by its February 14, 1983 letter, the answer denies that the Respondent refused that request. The answer alleges two affirmative defenses. First, Respondent asserted that the information requested by Brawner is "more readily available" from other sources. Secondly, it is alleged that at all relevant times there was a collective-bargaining agreement in effect between Brawner and the Respondent which had not been timely terminated.

B. *The Evidence*

On August 3, 1976, Brawner executed the Plastering Industry Short Form Agreement (short form agreement) with the Respondent where it agreed to be bound by terms of the collective-bargaining agreement in effect between the Respondent and the Associated Plastering and Lathing Contractors of San Diego (Association) which contained the terms and conditions of employment for journeymen and apprentice plasterers, including working foremen, employed by the Association members.[1] The short form agreement provided that it was to become effective "on the date hereto" and was to remain in effect for a period of 3 years and "from year to year thereafter, unless either party has given sixty (60) days' written notice prior to the anniversary date to the other party of intention to terminate." No date is specified as an opening date for giving a timely termination notice. It is undisputed that the agreement between Brawner and the Respondent renewed itself through the 1981 calendar year.

The short form agreement also provided that the employer signatory agreed to be bound by each of the trust fund trust agreements referred to in the Association agreement and designated the employers mentioned in the trust agreements as its attorney in fact for the selection and removal of trustees. The Association agreement contains provisions requiring employers bound thereto to make contributions to a health and welfare trust and to a pension trust.

By letter dated April 23, 1982, Brawner's counsel, Michael Merrill, notified the Respondent that Brawner desired to terminate its current agreement and to negotiate a new agreement. Specifically, the first paragraph of Merrill's April 23 letter to the Respondent stated:

> In accordance with the termination provisions of the current collective bargaining agreement with your union which terminates by its terms on June 30, 1982, we wish to terminate said agreement on behalf of [Brawner] or any person or firm which may be considered to be an employer bound by a collective bargaining agreement affecting the foregoing named persons or entities.

The letter went on to (1) revoke authority of any association to bargain on Brawner's behalf; (2) request separate bargaining for a new collective-bargaining agreement; (3) suggest that an initial bargaining session be held during the week of May 17; (4) solicit written proposals from the Respondent prior to the date of the first meeting; and (5) request a copy of any collective-bargaining agreement and trust agreements which the Respondent claimed were in effect between it and Brawner for Merrill's review prior to the first bargaining session.

The tenor of Merrill's letter in general and his reference to the fact that the agreement terminated "by its terms on June 30, 1982," in particular, makes it evident that Merrill believed Brawner was directly bound to the Association agreement as an Association member. Thus, the Association agreement then in effect was for a term beginning on June 16, 1979, and continuing through June 30, 1982. Eventually, when Merrill and Robert J. McHenry, the Respondent's financial secretary, met for their initial bargaining session on June 28, 1982, McHenry provided Merrill with a copy of the original short form agreement executed by Brawner in 1976 and asserted that the Respondent's agreement with Brawner continued through August 3.[2] Recognizing that the termination date gave the parties additional time in which to hold further bargaining sessions, Merrill explored the Respondent's position with respect to certain concessions Brawner desired and concluded that more productive negotiations would occur after the Respondent had concluded its negotiations with the Association which, McHenry assured Merrill, were progressing satisfactorily at that time.[3] The June 28 meeting concluded with it being "loosely decided" that the parties would meet again after the Association agreement had been concluded and its terms had been forwarded to Merrill. According to Merrill, McHenry bluntly told him during the course of the June 28 meeting that it was not "feasible" for the Respondent to "give a different contract to a

[1] Laborers' Union Local 89 was also a party to the Association agreement as it contained terms and conditions of employment for plaster tenderers who are represented by that Union. However, Local 89 is not involved in these proceedings.

[2] A representative for Laborers Union Local 89 also attended the first bargaining session but was not called as a witness in this proceeding.

[3] More specifically, Merrilll asked if the Respondent would be willing to consider a commercial-residential wage differential and concessions on a "couple of other compensation items" not specified in this record. Merrill testified that he was given a negative response on all items.

given contractor, no matter what his financial circumstances might be."

Merrill claimed that nothing was said during the June 28 meeting which indicated that the Respondent believed Merrill's April 23 letter to be premature with respect to forestalling further automatic renewal of Brawner's agreement with the Respondent or that the letter was otherwise defective for that purpose. Attorney Prochazka testified that he told Merrill at a representation case hearing in May 1982 that the Respondent felt the Brawner termination notice was untimely. McHenry claimed that he expressed doubt concerning the effectiveness of the April 23 letter because it had been submitted more than 90 days prior to the August 3 termination date and following the meeting he checked further. McHenry claims that he ascertained that it was the Respondent's policy to treat termination notices received more than 90 days prior to the termination date as premature, and that he telephoned Merrill within a day or two after the June 28 meeting to advise him that the April 23 termination letter had been sent too soon. Merrill emphatically denied that McHenry made any claim at the June 28 meeting that the short form agreement had already renewed itself. On the contrary, Merrill testified that McHenry explicitly stated that the Brawner agreement would terminate on August 3. Merrill was not recalled as a witness to rebut Prochazka's testimony.

On July 20, Merrill wrote to McHenry confirming several preliminary understandings reached concerning the framework for their negotiations including the fact that Brawner's agreement with the Respondent did not expire until August 3. In addition, Merrill requested that he be furnished with a copy of the Respondent's agreement with the Association if it had been concluded together with some indication of those provisions which were susceptible to a different result in the negotiations between the Respondent and Brawner. Finally, Merrill enclosed a listing of information which Brawner wanted in order to conduct an "evaluation of your negotiation proposals." The request for information enclosed in Merrill's July 20 letter is attached as "Appendix A." The Respondent did not answer Merrill's July 20 letter nor furnish the material requested.

On September 15, 1982, the parties to the Association negotiations executed a new agreement effective by its terms for plasterer employees from July 7, 1982, through July 31, 1983. There is no evidence that Brawner was furnished with a copy of the new agreement.

By letter dated November 17, 1982, attorney Mark T. Bennett, an associate in Merrill's office, wrote to remind the Respondent that there had been no response to Merrill's letter of July 20. Bennett's letter requested that the Respondent supply the information requested in Merrill's letter "by no later than December 1, 1982," because Brawner was "anxious to continue negotiations for a successor collective bargaining agreement."

On January 11, 1983, McHenry finally responded in writing to the information requests of Merrill and Bennett. McHenry enclosed a copy of the 1982–1983 Association agreement and informed Merrill that, although it was the Respondent's desire to adhere to a uniform standard agreement, all portions of the Agreement were "open for negotiation." McHenry's letter also asserted that items 1, 2, and 3 of the information request were unnecessary, burdensome, and overly broad "particularly in light of the fact that our proposal says that, if we are not able to provide you with competent, skilled journeymen, you may hire from any source."

By letter dated February 14, 1983, Bennett renewed Brawner's demand for the requested information and suggested a further bargaining session (the second in 10 months) at the Merrill law offices on February 23, or at some alternate date if that date were not satisfactory. The Respondent replied to Bennett's February 14 letter on February 28. In his February 28 letter, McHenry stated that "we will be happy to meet with you to discuss [Brawner]" but continued by saying that it was the Respondent's position that Brawner's "letter to withdraw from [Respondent] was not untimely." McHenry asserted that he had so informed Brawner by telephone and in the June 28 meeting. As a consequence, McHenry stated that it was the Respondent's position that Brawner was bound by the 1982–1983 Association agreement.

Alex (Sonny) Brawner confirmed that McHenry had telephoned him concerning the timeliness of the termination notice on a day in 1983 which he could not recall. According to Alex Brawner, McHenry told him, in so many words, "Sonny, why don't you come back down and sign up? Your termination was not timely and . . . your contract is still in existence." According to Alex Brawner, McHenry claimed that Brawner's "termination was given too far in advance." Alex Brawner was unimpressed with McHenry's assertion. He told McHenry, "Giving your termination too far in advance is like having too much penis. You can't have too much." The conversation was concluded without Alex Brawner's concession that he was still bound to the 1982–1983 Association agreement.

In connection with Brawner's July 20 information request, the Respondent elicited testimony from Alex Brawner that in the past he had hired employees from a variety of sources. Alex Brawner had no positive recollection of any plasterer referred to his company by the Respondent. However, in certain instances, the employees Brawner hired were cleared through the Respondent's referral system after they were hired. In the past year, Brawner employed individuals he had known for a number of years, individuals who were referred to him by other employees, individuals with whom he had become acquainted as their instructor at the local apprenticeship school and his sons. Alex Brawner has been active in the industry for a number of years in the San Diego area. Brawner and McHenry are acquainted personally.

According to McHenry, the Respondent does not segregate the registrants on the hiring hall list by particular classifications because they are all journeymen. The registrants are required to inform the Respondent of the number of years of construction industry experience they have but the Respondent does not solicit information as to whether the registrant has had experience as a foreman or general foreman. Similarly, in order for McHenry to know the number of registrants who were

working on any given day, it would be necessary for him to, in effect, poll the area contractors. McHenry claimed that he had never encountered a situation where a registrant had been referred to a contractor and was refused employment. Additionally, McHenry asserted that the Respondent does not maintain such records containing that information.

An entity known as Allied Trust (Allied) serves as the administrator for the health and welfare trust as well as the pension trust. Allied maintains all of the records which Brawner requested concerning those trusts. At the time of the hearing, McHenry was the only official employed by the Respondent. The other officers apparently are employed at other endeavors. The Respondent does maintain a negotiating committee which is selected each year.

C. *Additional Findings and Conclusions*

1. As to the refusal to meet and bargain

The Respondent defends its admitted refusal to meet and bargain a new agreement by claiming in effect that Brawner's April 23, 1982 termination notice was not timely to forestall the automatic renewal of the short form agreement on August 3, 1982. As a consequence, the Respondent claims it had no legal obligation to meet and bargain pursuant to Brawner's February 14, 1983 request. The heart of the Respondent's case is that Brawner's termination notice was given too soon. Respondent argues that there is a 30-day period between 90 and 60 days before the agreement's anniversary for exchanging termination notices under the agreement. The Respondent contends that the honoring of notices only if given in this 30-day period has been the "long established practice" of the Respondent and that it is also Board policy as reflected in *Leonard Wholesale Meats*, 136 NLRB 1000 (1962).

The Respondent's proffered defense of its refusal to meet and bargain for a new agreement pursuant to the February 14, 1983 request lacks merit. The agreement reflects no provision whatsoever concerning the maximum time preceeding the agreement's anniversary which narrows the period for timely termination notices. Because such a limitation is not explicitly set forth in the parties agreement or otherwise clearly inferrable from other specific terms of the agreement, and as a limited notice period severely restricts an important substantive right of the parties, it would not appear that the Board is not at liberty by decisional law to engraft a limited notice period on the parties' agreement. See *H. K. Porter Co. v. NLRB*, 397 U.S. 99 (1970). Even assuming that the Respondent had been successful in its attempt to prove that it was a long-established practice to honor only those termination notices which were given in the limited 30-day period, such a practice would be of no consequence here in view of its acknowledgement that Brawner had no way of knowing of such a practice. In the absence of a mutual intent to be bound by the claimed practice it would be highly inappropriate to take legal cognizance of such a practice.

Likewise, *Leonard Wholesale Meats* is inapposite to the situation found here. The holding in that case serves to notify the public of the time period prior to the expiration of a collective-bargaining agreement when the Board will entertain a petition for a representation election and, as such, it involves policy considerations which are completely distinguishable from those involved here. Accordingly, I find that Brawner's April 23, 1982 notice to the Respondent conformed to the requirements in the short form agreements and was sufficient to forestall renewal of the short form agreement. *Construction Teamsters Trust v. Con Form Construction Corp.*, 657 F.2d 1101 (9th Cir. 1981). The Respondent's refusal to give effect to the April 23 termination notice and to thereafter meet and bargain with Brawner as requested violated Section 8(b)(3) of the Act, as alleged. *Carpenters Local 743*, 261 NLRB 425 (1982).

2. The alleged refusal to furnish information

The issue pertaining to the allegation that the Respondent unlawfully refused to furnish information to Brawner is considerably more troublesome. Citing two cases which hold that hiring hall information is the type of relevant information a labor organization must furnish to an employer and his belief that, as the Respondent wanted to negotiate its standard agreement containing both an exclusive hiring hall and trust funds for which information was sought, the General Counsel claims that it was unlawful for the Respondent to refuse to furnish the requested information.[4] The General Counsel also makes the unsupportable claim that McHenry admitted that "most, if not all, of the information requested by Brawner was in the possession of (the Respondent) and readily retrievable." The General Counsel does not address other obvious questions raised on the face of the request, namely, whether or not the Respondent is obliged to furnish Brawner information about the trust funds where, as here, the funds are jointly administered and whether or not the Respondent is obliged to furnish information about the amount of Brawner's *own* contributions to the funds at all.

The Union's position with respect to the information request is elusive. McHenry's January 11 letter claimed that the first three items of the informantion request were "unnecessary, burdensome and overly broad"; its answer asserted that the information was available elsewhere; the tenor of the testimony it elicited at the hearing was that certain of the information was unavailable and that, in any event, Brawner did not use the hiring hall; and, finally, in its brief the Respondent claims that Brawner has no need for the hiring hall information and, accordingly, the request was intended as a harassing tactic. Respondent's brief makes no argument at all concerning the requested trust fund information.

The principles governing the duty to furnish information are, for the most part, well settled. The Supreme Court has held that an employer has the duty to furnish a labor organization relevant information necessary for it

[4] The cases cited were: *Asbestos Workers Local 80 (West Virginia Insulators Assn.)*, 248 NLRB 143 (1980); *Graphic Communications Local 13 (Oakland Press Co.)*, 233 NLRB 944 (1977). The complaint does not allege that the Respondent was legally obliged to furnish *all* of the information sought in the July 20 request.

to carry out its duties as a bargaining representative. *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967); *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1956). For decisional purposes, the Board has assumed that a labor organization has a duty to furnish informationn which is parallel to that of an employer. *Machinists Lodge 78 (Square D Co.)*, 224 NLRB 111 (1976). Board cases repeatedly cite and rely on the language of Judge Forman in *Curtiss-Wright Corp. v. NLRB*, 347 F.2d 61, 68–69 (3d Cir. 1965) that:

> [W]age and related information pertaining to employees in the bargaining unit is presumptively relevant, for, as such data concerns the core of the employer-employee relationship, a union is not required to show the precise relevance of it, unless effective employer rebuttal comes forth . . .

See, e.g., *Washington Post Co.*, 237 NLRB 1493, 1495 (1978); *A. S. Abell Co.*, 230 NLRB 1112, 1113 (1977); *Northwest Publications*, 211 NLRB 464, 465 fn. 4 (1974). Implicit in the Board and court action in imposing a duty on one party in the bargaining process to furnish information to the other party is the fact that the information sought is "reasonably available only from (that party's) records." *Whitin Machine Works*, 108 NLRB 1537, 1538, enfd. 217 F.2d 593 (4th Cir. 1954). Where the information sought is equally accessible to the parties from outside sources, there is no obligation for one or other of the parties to serve as a messenger for purposes of obtaining and furnishing relevant information. *NLRB v. Milgo Industrial*, 567 F.2d 540 (2d Cir. 1977). Finally, the duty to furnish information carries with it the concomitant duty to furnish the information promptly or to advise the requested party of the necessity for any delay. *NLRB v. Feed & Supply Center*, 294 F.2d 650 (9th Cir. 1961).

It is concluded that as a general proposition, information maintained by a labor organization concerning the operation of a hiring hall is presumptively relevant for purposes of collective bargaining or contract administration where, as here, the employer is contractually obliged to look initially to the hiring hall for its unit employees. *Asbestos Workers* supra; *Oakland Press*, supra. Therefore, to the extent that the Respondent's record contains the information requested in the first three items of Brawner's request, I find that the Respondent was legally obliged to furnish such information without delay. McHenry's uncontradicted testimony establishes that the Respondent did not maintain records dealing with the registrant's experience as general foreman or foreman, that Respondent does not maintain a running record of the employees who are actually employed, and that it does not seek or maintain information concerning employee terminations or failure to obtain employment. To the extent that the Respondent does not maintain the information about its registrants, it has no duty to expend its limited resources to survey the registrants in order to compile information for Brawner. However, as the Respondent regularly maintains records showing the names, classifications, and the years of construction experience of the hiring hall registrants, it was obliged to furnish such information to Brawner. Although it may well have been true that Brawner did not adhere to the letter or the spirit of its agreement with the Respondent concerning the use of the hiring hall, Brawner's failure in that regard does not excuse the Respondent's inaction here. Indeed, it may very well have been Brawner's intent to attempt to secure relief from the strict contractual requirements concerning the hiring hall by demonstrating that employees readily available to it were, in general, more experienced than the hiring hall registrants. Although it is true the negotiations between Brawner and the Respondent had not gotten off the ground, the evidence adduced by the Respondent here falls far short of demonstrating that Brawner's request was made in bad faith or for harassment purposes. Accordingly, to the extent that the Respondent failed to timely furnish information from its regularly maintained records concerning the names, classifications, and experience of its hiring hall registrants, I find that the Respondent violated Section 8(b)(3) of the Act.

Items 4 and 5 of Brawner's July 20 request concern information about the jointly administered trusts through which unit employees are provided a health and welfare plan and a pension plan. The information is clearly relevant. However, I find that the General Counsel has failed to establish that the Respondent was obliged to obtain and furnish the detailed information requested by Brawner. As Brawner's request indicates, the trusts are jointly administered. Brawner's short form agreement designates the employer representatives mentioned in the trust as its attorney in fact for the selection of the employer trustees. There is no evidence Brawner made the slightest attempt to obtain the requested information through its appointed trust representatives or the trust administrator, or that the information was not available through its appointed representative. From all that appears in this record, Brawner's access to the information sought in items 4 and 5 of its request was equal to, or greater than, the Respondent's.

In cases where the Board had imposed a duty on a labor organization to furnish such information, it is clear that the employer's inability to obtain reasonable access to the requested trust fund information was an important element of proof. *Hospital Employees*, 248 NLRB 631 (1980); *Teamsters Local 959*, 244 NLRB 19 (1979). However, in the absence of evidence to the contrary, it is reasonable to infer that where the trusts are jointly administered, trust information is available to both sides from the same source and that before one party or the other can be legally compelled to furnish the trust information, it must be demonstrated that the requesting party has at least made an attempt to obtain trust information from its own trustee. Accordingly, I find that the General Counsel has failed to establish that the Respondent was obliged to furnish the information requested by Brawner in items 4 and 5 of the request because it was not established that the information was reasonably available to Brawner only from Respondent's records. *Whitin Machine Works*, supra. This is especially true with respect to item 5(D)(ii).

The General Counsel also alleged that the Respondent violated Section 8(b)(3) of the Act by failing to furnish Brawner with the "names and titles" of those persons on the Respondent's negotiating committee pursuant to the July 20 request. At the outset, it should be clearly understood that the issue raised by the Respondent's failure to furnish this information is not the presence or absence of gentlemenly manners; the issue is whether the Respondent violated the Federal labor laws by failing to furnish this information. Under the *Curtiss–Wright* standard, such information is not presumptively relevant and, hence, the General Counsel was obliged to demonstrate its relevance. *Press Democrat Publishing Co. v. NLRB*, 629 F.2d 1320 (9th Cir. 1980); *San Diego Newspaper Guild v. NLRB*, 548 F.2d 863 (9th Cir. 1977). This is especially true when one considers the fact that Merrill's July 20 letter purports to confirm the framework agreed on for furture negotiations at the June 28 negotiating meeting. At the June 28 negotiating sessions, McHenry, the Respondent's only full-time official, appeared on behalf of the Respondent and gave no indication whatsoever that he lacked authority to act on behalf of the Respondent in concluding any understanding. Alex Brawner was thoroughly familiar with McHenry's role. In these circumstances, it is fair to assume that the Respondent would have been bound by McHenry's actions and ageements and that Brawner understood as much. Hence, as the precise relevance of the names and titles of the Respondent's negotiating committee was left tc conjecture, I find that the General Counsel has failed to show the relevance of such information and, therefore, that it has not been established that the Respondent violated Section 8(b)(3) of the Act, as alleged in this respect.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES ON COMMERCE

The activities of the Respondent set forth above, occurring in connection with Brawner's operations, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

CONCLUSIONS OF LAW

1. Brawner is an employer within the meaning of Section 2(2) of the Act, engaged in commerce or an industry affecting commerce within the meaning of Section 2(6) and (7) of the Act.

2. Respondent is a labor organization within the meaning of Section 2(5) of the Act.

3. At all relevant times the Respondent has been the exclusive collective-bargaining representative of the journeymen and apprentice plasterers, including all working plasterer foremen, employed by Brawner, an appropriate unit of employees for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. On August 3, 1976, the Respondent and Brawner entered into a short form agreement which, by its terms, adopted the applicable terms and conditions of employment contained in the Association's collective-bargaining agreement as the terms and conditions of employment for the employees in the unit described in paragraph 3, above.

5. By its terms, the short form agreement in effect between Brawner and the Respondent was effective for a term of 3 years from the data of its execution and from year to year thereafter unless a notice of termination was provided by one of the parties at least 60 days prior to the anniversary date of the short form agreement.

6. By letter dated April 23, 1982, Brawner notified the Respondent that it desired to terminate the short form agreement and that it desired to negotiate the terms and conditions of a new collective-bargaining agreement for those employees in the unit described in paragraph 3, above.

7. At all material times, the Respondent has refused to recognize Brawner's April 23, 1982 termination notice as being a timely notice under the agreement for the purposes of forestalling the renewal of the short form agreement on August 3, 1982, and since February 28, 1983, has refused to meet and bargain with Brawner concerning the terms of a collective-bargaining agreement to succeed the short form agreement for that reason.

8. On July 20 and November 17, 1982, Brawner requested that the Respondent provide it with certain information the Respondent possessed which is necessary and relevant for the purposes of collective bargaining, namely, the names, classifications and the information it had concerning the years of construction industry experience of all registrants on the hiring hall lists maintained by the Respondent.

9. Following receipt of Brawner's request specified in paragraph 8, above, the Respondent has failed and refused to furnish said information to Brawner.

10. By the conduct specified in paragraphs 7 and 9, above, the Respondent has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(b)(3) of the Act.

11. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

12. The Respondent did not engage in the other unfair labor practices alleged in the complaint dated March 30, 1983.

THE REMEDY

Having concluded that the Respondent has engaged in the unfair labor practices described above, it is recommended that the Respondent be ordered to cease and desist therefrom. It is also recommended that the Respondent be ordered to give effect to Brawner's timely termination notice of April 23, 1982, to notify Brawner that it will meet and bargain at reasonable times and places in conformance with Section 8(d) of the Act and then do so on Brawner's request, and to furnish Brawner with the names, classifications, and information it has concerning the construction industry experience of the registrants on its hiring hall list without further delay. Finally, it is recommended that the Respondent be ordered to post the notice attached as Appendix B at its offices and meeting halls and that it furnish the Regional Direc-

tor for Region 21 with signed copies of said notice for posting by Brawner if it so desires.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[5]

ORDER

The Respondent, Plasterers Local Union No. 346 of the Operative Plasterers' & Cement Masons' International Association of the United States and Canada, AFL–CIO, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Refusing to bargain collectively with A. G. Brawner Plastering, Inc., by failing and refusing to honor Brawner's April 23, 1982 letter as a timely termination notice under the short form agreement.

(b) Refusing to bargain collectively, on request, with A. G. Brawner Plastering, Inc., for a new collective-bargaining agreement.

(c) Refusing to furnish A. G. Brawner Plastering, Inc., with the names, classifications, and information in its possession concerning the years of construction industry experience of the registrants on the Respondent's hiring hall lists.

(d) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Honor and abide by the termination provision of its short form agreement entered into with A. G. Brawner Plastering, Inc.

(b) On the request of A. G. Brawner Plastering, Inc., bargain for a new collective-bargaining agreement.

(c) Furnish A. G. Brawner Plastering, Inc., with the information specified in paragraph 1(c), above, without further delay.

(d) Post at Respondent's business offices and meeting halls, copies of the attached notice marked "Appendix B."[6] Copies of the notice, on forms provided by the Regional Director for Region 21, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Sign and return to the Regional Director for Region 21 sufficient copies of the attached notice marked "Appendix B" for posting by A. G. Brawner Plastering, Inc., if willing, in conspicuous places, including all places where notices to employees are customarily posted.

(f) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that those allegations in the complaint dated March 30, 1983, which have not been proven or otherwise sustained be dismissed.

APPENDIX A

INFORMATION REQUESTED FROM PLASTERERS' LOCAL NO. 346 BY A.G. BRAWNER PLASTERING, INC.

1) State the numbers of persons registered for employment with your hiring hall, indicating their classification (foreman, journeyman, apprentice, etc.) and a general allocation as to the years of construction industry experience in your craft or trade held by such persons. State the numbers of persons having experience in the last three years as general foreman or foreman.

2) Advise us of the number of persons presently employed, describing them with reference to the categories stated in request number one above. Please advise us of the number of persons (by category) who are registered for employment with your union's hiring hall, and who are available for employment.

3) State the names, addreses and employment category of all persons represented by your union who have had employment refused or terminated because of lack of qualifications or cause other than lack of work, and state:

A) the name, address and telephone number of the employer or employers refusing or terminating employment;

B) the date(s) of such termination(s);

C) the stated reasons given by (1) the employer and (2) the employee for the refusal or termination of employment.

4) Please provide us immediately with details regarding the health and welfare plan provided through the jointly administered trust applicable to your union as follows:

A) A detailed analysis of coverage, benefits and cost as projected for the next contract period;

B) All actuarial statements or reports involving this trust fund or any of its subsidiaries; and,

C) All financial reports, audited or unaudited, for this trust fund, including any subsidiary, for the period beginning January 1, 1977.

5) With regard to the jointly administered pension plan, please provide us immediately with the following details:

A) Any actuarial studies or reports which have been completed with regard to the fund, or any of its subsidiaries;

B) All financial reports and income statements, audited or unaudited, for this trust fund, including any subsidiary thereof, for the period beginning January 1, 1977;

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[5] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[6] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

C) A description of the present unfunded liability of said plan;

D) With regard to employer contributions to the pension fund for the five-year period ending with the most recent plan year's expiration,

i) the amount of total employer contributions;
ii) the amount of contributions made by our company;
iii) the pension fund's unfunded liability as of the end of the most recent plan year;

E) A projection of the unfunded liability for the next three years; and,

F) A full description of the present and projected benefits to employees participating in said plan, and costs to employers contributing to said plan for the next three years.

6) Please provide us with the names and titles of all elected officers and business representatives of your union and provide a brief description of the duties of each such person. State the office or location at which each such person is generally located; and if any particular geographic territory or type of construction operation or jobsite is the primary responsibility of any such persons, identify the person and his or her particular area of primary responsibility.

7) State the name, address and union affiliation (if any) of your negotiating representative or committee, indicating titles where applicable. If any person is an employee and/or officer of some labor organization, indicate his/her title and the name and address of such labor organization.

8) Provide a copy of the constitution of any international organization with which your union is affiliated, and a copy of any constitution and/or by-laws of your union and any of its constituent local unions having jurisdiction over San Diego and Imperial Counties.

Stone's Express, Inc. *and* Hotel Employees and Restaurant Employees Union, Local 5, AFL–CIO,[1] Petitioner. Case 37–RC–2704

14 December 1984

DECISION AND ORDER DIRECTING HEARING

BY CHAIRMAN DOTSON AND MEMBERS ZIMMERMAN AND HUNTER

The National Labor Relations Board, by a three-member panel, has considered objections to an election held 19 November 1982 and the Regional Director's report recommending disposition of them. The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 12 for the Petitioner, none for the Intervenor, 4 against the participating labor organizations, with 6 challenged ballots, an insufficient number to affect the results.

On 26 November 1982 the Employer filed timely objections to the election. An investigation of the objections was conducted and thereafter on 23 December 1982 the Regional Director issued and served on the parties his Report on Objections in which he recommended that the Employer's objections be overruled in their entirety.

Thereafter on 5 January 1983 the Employer filed timely exceptions to the Regional Director's report, contending that a hearing should be held to resolve the factual issues raised by the three objections. On 13 January 1983 the Petitioner filed an answering brief to the Employer's exceptions.

The Board has reviewed the record in light of the exceptions and briefs and hereby adopts the Regional Director's findings and recommendations except as modified herein.

The Board has indicated two situations where supervisory participation in union organizing campaigns may be objectionable.[2] The first is where employees may be led to believe that the supervisor was acting on behalf of the employer and that the employer favors the union. Here, it is clear that former supervisor Simbahon strongly favored the Petitioner. According to the employee affiant, Simbahon indicated to him after the employees began to discuss unionization that "It's good you guys are going Union." The affiant further indicated that he knew Simbahon was "pushing for the Union" and that Simbahon "was very close to most of the employees and it was common knowledge that he was supporting the Union." Notwithstanding these comments, our dissenting colleague finds no cause for concern in Simbahon's conduct because he characterizes Simbahon's statement in support of the Union merely as his personal opinion and he finds no evidence that Simbahon was speaking on behalf of the Employer. However, he has missed the focus of *Stevenson Equipment*, supra, in so concluding. As the Board noted in *Stevenson Equipment* "if supervisors actively encourage employees to vote for the Union, *and the employer takes no stance to the contrary*, the supervisory conduct might well imply to the employees that the employer favors the Union."[3] The Board in *Stevenson* further noted that "[a]ny such impression will be dissipated . . . if, in one way or another, the employer's antagonism to the Union is brought to the attention of the employees."[4] The problem in this case, however, is that the Regional Director has supplied no details on the Employer's position on unionization. In the face of Simbahon's strong support of the Petitioner, such evidence is crucial to the Board's disposition of the objection.

A second concern of the Board in analyzing whether supervisory participation in union organizing is objectionable is the posssibility that such conduct would coerce an employee into supporting the union out of a fear of future retaliation by a union-oriented supervisor. The Board's decision in *Sheraton Motor Inn*[5] is instructive in this regard. There the Board found objectionable the strong prounion activities of a "major" supervisor. The Board did not analyze that supervisor's particular comments to determine whether they were themselves coercive. Rather, the Board stated that:

> While the record does not show Gibbons [the supervisor] gave any indication to employees that he would use his authority as supervisor to punish those who failed to support the Union, we believe, given Gibbons' considerable supervisory authority and his active and outspoken support of the Union throughout the organizational campaign, that there is a reasonable "possibility that [his] conduct could coerce an employee into supporting the union."[6]

Given the Board's approach in *Sheraton*, there are at least three issues in the instant case which have yet to be addressed fully and which will not be resolved absent a hearing. First, there is the question whether Simbahon was a "major" supervisor like Gibbons in *Sheraton*. The affiant describes him as

[1] Hawaii Teamsters and Allied Workers Local 996 is an Intervenor herein.

[2] See *Stevenson Equipment Co.*, 174 NLRB 865 (1969); *Turner's Express*, 189 NLRB 106 (1971).

[3] 174 NLRB at 866 (emphasis added).

[4] Ibid.

[5] 194 NLRB 733 (1971).

[6] Id. at 734.

"Manager" but the Regional Director did not elaborate on his status. Another question concerns the real extent of his campaign activities. The affiant states Simbahon was "pushing for the Union" and was "supporting the Union." The Regional Director did not pursue the matter further to determine the extent of Simbahon's organizing efforts. And lastly the question arises as to whether Simbahon was working at the Employer at the time of the election. Although Simbahon is referred to by the parties as a "former" manager it is not clear whether he was working at the Employer when the election was held. This fact would certainly be relevant in determining whether his conduct ultimately was sufficient to set aside the election.[7]

In sum, the Employer's Objection 1 concerning Simbahon's actions raises substantial material factual issues which have not yet been resolved and a hearing is necessary.[8]

ORDER

It is ordered that the above-entitled matter is referred to the Regional Director for Region 20 for the purpose of conducting a hearing on the Employer's Objection 1 in accordance with the terms of this decision and that said Regional Director is authorized to issue notice of hearing.

IT IS FURTHER ORDERED that the hearing officer designated for the purpose of conducting the hearing pursuant to this Order shall prepare and cause to be served on the parties a report containing resolutions of credibility of witnesses, findings of fact, and recommendations to the Board as to the disposition of said objection. Within 10 days from the date of issuance of said report, either party may file with the Board in Washington, D.C., eight copies of exceptions thereto. Immediately upon the filing of such exceptions, the parties filing the same shall serve a copy thereof on the other party, and shall file a copy with the Regional Director. If no exceptions are filed thereto, the Board will adopt the recommendations of the hearing officer.

[7] See *Stevenson Equipment*, supra, *Sheraton Motor Inn*, supra.

[8] In spite of Simbahon's comments, our dissenting colleague also contends that his remarks showed no preference for either union in this two-union case. The remarks themselves belie the contention that Simbahon was not pushing a particular union. Further, we note that the Regional Director indicated that Simbahon spoke to the affiant sometime between mid-August and mid-September. The election was not conducted until November and the Employer states that Intervenor had not yet formally moved to intervene when the remark was made. Clearly, the import of the affiant is that Simbahon favored a particular union and it seems reasonable to conclude that the union was the Petitioner. At the very least, a material issue of fact exists on this issue which, taken in conjunction with the balance of the case, is further reason for a hearing.

We adopt the Regional Director's findings and recommendations with respect to Objection 2. We also adopt the Regional Director's recommendation to overrule Objection 3 since it appears that the conduct discussed in this objection was prepetition conduct. See *Ideal Electric & Mfg. Co.*, 134 NLRB 1275 (1961).

MEMBER ZIMMERMAN, dissenting in part.

Contrary to the majority, I find no sufficient basis for directing a hearing on the Employer's Objection 1 which alleges impermissible supervisory sponsorship and electioneering by former manager, Al Simbahon.

I note at the outset that mere supervisory participation in a union's organizational campaign does not necessarily warrant setting aside an election.[1] The Board has found that such participation can constitute grounds for setting aside an election where: (1) employees may be led to believe that the employer favors the union; and (2) employees may be coerced into supporting the union out of fear of future retaliation by a union-oriented supervisor. The evidence produced by the Employer does not show that either situation exists in this case.

In support of its allegation of impermissible supervisory participation, the Employer produced an affidavit of a single employee who states that sometime after the employees began to discuss the union, Simbahon came up to him after lunch in back of the office, at a time when no one else was present, and said, "It's good you guys are going union." The employee states, "I know [Simbahon] was pushing for the Union," he was "very close" to most of the employees, and it was common knowledge that he supported the Union.

Assuming the truth of these assertions, the Employer has not made out a prima facie case.[2] Nothing in the employee affidavit suggests that Simbahon misled employees into believing that the Employer was in favor of the Union. Simbahon's statement to the employee witness does not indicate he was speaking on behalf of the Employer. At the most it amounted to nothing more than his personal approval of the employees' "going union." Such evidence, which is all that the Employer—the moving party—has offered, is not sufficient to show Simbahon's conduct had a tendency to interfere with the employees' free choice in the election.[3]

Similarly, this evidence fails to indicate that the employees had reason to believe that Simbahon would engage in reprisals against them in the event

[1] *Turner's Express*, 189 NLRB 106 (1971); *Stevenson Equipment Co.*, 174 NLRB 865 (1969).

[2] Since the Employer has not presented a prima facie showing of substantial and material issues which would warrant setting aside the election, it is not entitled to an evidentiary hearing. E.g., *Modesto Brothers*, 255 NLRB 828, 829 (1981).

[3] Since it cannot be found on the evidence presented that Simbahon's conduct could have led employees to believe that the Employer favored unionization, it is immaterial to resolving the merits of Objection 1 whether the Employer in fact conducted an antiunion campaign capable of dissipating an impression that the Employer favored unionization. *Admiral Petroleum Corp.*, 240 NLRB 894, 895 (1979).

they rejected the Union.[4] Surely Simbahon's statement was not inherently threatening. And there is no evidence that Simbahon did anything to indicate that he would use whatever authority he possessed to punish those who did not join the Union. Even assuming that Simbahon was a "major" supervisor, the degree of his supervisory authority cannot, standing alone, render his conduct objectionable.[5] Accordingly, I find Simbahon's conduct did not interfere with the employees' free choice in the election.[6]

Based on the foregoing, I would adopt the Regional Director's recommendation to overrule the Employer's objection without a hearing, and, as the tally of ballots shows that the Petitioner has received a majority of the valid votes cast, I would certify the Petitioner as the employees' representative.

[4] It is significant to note that Simbahon is a former manager of the Respondent. As the record now stands, it is not clear when Simbahon left the Respondent's employ in relation to the alleged objectionable remark or the election. Clearly, however, if Simbahon was terminated before the election, there would be no basis to find this conduct objectionable, as offending supervisors, once no longer employed, are incapable of exerting any coercion. See *El Caballo*, 251 NLRB 46 (1980).

[5] *Admiral Petroleum Corp.*, supra at 897 (1979).

[6] The Regional Director found, and I agree, that Simbahon's statement showed no preference for either union in this two-union case.

Windsor Industries, Inc. *and* **National Organization of Industrial Trade Unions.** Cases 29–CA–7943 and 29–CA–8108

14 December 1984

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS ZIMMERMAN AND HUNTER

On 15 December 1982 the National Labor Relations Board issued a Decision and Order in this proceeding,[1] adopting an administrative law judge's findings that the Respondent violated Section 8(a)(1) of the Act by soliciting grievances from its employees and promising to remedy them in order to induce employees to refrain from supporting the National Organization of Industrial Trade Unions (the Union) and violated Section 8(a)(1) and (3) by laying off employees Joseph Benzola and Jack Roberts in order to discourage membership in the Union. The Board also adopted the judge's findings that the Respondent's unfair labor practices were sufficiently widespread and serious to warrant issuance of a bargaining order under *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969), and that the Respondent's refusal to recognize and bargain with the Union violated Section 8(a)(1) and (5).[2] The Board ordered the Respondent to cease and desist from the conduct found unlawful and to take certain affirmative action, including bargaining with the Union on request as the exclusive bargaining representative of its employees. Thereafter, the Board filed an application for enforcement with the United States Court of Appeals for the Second Circuit.

On 13 March 1984 a panel of the court of appeals enforced the Board's Order to the extent that the Board found the Respondent had violated Section 8(a)(1) and (3). The court declined, however, to enforce that portion of the Order requiring the Respondent to bargain with the Union and remanded this proceeding to the Board for additional findings concerning the propriety of a bargaining order. The court found that events occurring after the unfair labor practices were committed were relevant to the issuance of a bargaining order. Thus, the court directed the Board to consider lapse of time, employee turnover, and other factors and to apply the law of the circuit that the existence of "hallmark" violations alone does not necessarily warrant issuance of a bargaining order.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Applying the principles in the court's remand as the law of this case, we find for the following reasons that a bargaining order is not warranted.

As found in our original decision the Union commenced organizational activities among the Respondent's 15 unit employees on 7 April 1980.[3] On 10 April the Union demanded recognition. At the employees' request the Respondent held a meeting on company premises the following day where employees' benefits and grievances were discussed. At this meeting the Respondent agreed to "look into" employees' stated concerns and thereafter at the request of an employee posted a list of holidays already enjoyed by employees.[4] On 15 April the Respondent laid off employees Benzola and Roberts because of their activities on behalf of the Union. On 29 May the Respondent offered Benzola reinstatement and on 4 June the Respondent offered Roberts reinstatement. Roberts accepted the reinstatement offer. Benzola did not respond.

At the time of the unfair labor practices in April 1980 the Respondent employed 15 bargaining unit employees. When our original decision issued in the proceeding in December 1982 the Respondent employed 13 unit employees. Only 5 of those 13 employees had been employed at the time of the unfair labor practices in April 1980. Of those five employees only two had signed union authorization cards. Two more years have now elapsed since our original decision in this proceeding.

Substantially similar circumstances were present in *NLRB v. Knogo Corp.*, 727 F.2d 55 (2d Cir. 1984), in which the Second Circuit denied enforcement of a bargaining order. There, 60 percent of the current unit employees were not employed at the time the violations were committed. Here, approximately 60 percent of the unit as it existed when our original decision issued were not employed at the time the violations were committed. There almost two-thirds of the old employees had not signed cards. Here, precisely 60 percent of the employees employed in April 1980 who were still employed in December 1982 had not signed cards. There, the court noted a substantial lapse of time cast doubt on whether employee preference once expressed through authorization cards still reflected

[1] 265 NLRB 1009.

[2] Former Chairman Van de Water and Member Hunter declined to join that portion of the Board's Order directing the Respondent to bargain with the Union.

Chairman Dotson did not participate in the original decision and expresses no view regarding the Board's findings therein.

[3] All dates are in 1980 unless noted otherwise.

[4] The list included no additional holidays that were not already enjoyed.

majority support for the union. Here, a similar substantial lapse of time occurred.

In addition to such substantial employee turnover and passage of time in the instant proceeding, we also find that certain other factors now militate against issuance of a bargaining order. Thus, although the discriminatory layoff of employees Benzola and Roberts were hallmark violations of the Act, the Respondent offered reinstatement to both these employees several weeks later and, indeed, Roberts accepted the Respondent's offer. Further, notwithstanding its solicitation of grievances and implied promise to remedy grievances, the Respondent did not implement any actual changes in response to the grievances solicited.[5] Nor did the Respondent otherwise engage in acts of reprisal or coercion independently violative of Section 8(a)(1).

Taken together with the substantial employee turnover and passage of time, we find that the Respondent's unfair labor practices in April 1980 did not have the tendency to undermine majority strength and impede the election processes as to make a fair election unlikely years later. *NLRB v. Gissel Packing Co.*, supra.[6] We shall therefore deny the request for a bargaining order and shall dismiss the complaint insofar as it alleges that the Respondent violated Section 8(a)(5) and (1) of the Act.

[5] As noted, the Respondent merely posted a list of holidays already enjoyed by employees.

ORDER

The complaint is dismissed insofar as it alleges that the Respondent, Windsor Industries, Inc., Melville, New York, refused to bargain with National Organization of Industrial Trade Unions in violation of Section 8(a)(5) and (1) of the Act.

IT IS FURTHER ORDERED that the request for a bargaining order is denied.

[6] As directed by the court of appeals, in reaching our decision we have carefully considered the court's opinions in *NLRB v. General Stencils*, 438 F.2d 894 (2d Cir. 1971); *J. J. Newberry Co. v. NLRB*, 645 F.2d 148 (2d Cir. 1981); *NLRB v. Pace Oldsmobile*, 681 F.2d 99 (2d Cir. 1982); and *NLRB v. Marion Rohr Corp.*, 714 F.2d 228 (2d Cir. 1983). We conclude that a bargaining order is not warranted in this proceeding under the holdings of those cases. See also *NLRB v. Knogo Corp.*, supra.

International Association of Machinists and Aerospace Workers, AFL–CIO and International Association of Machinists and Aerospace Workers, AFL–CIO, Local Lodge No. 1271 *and* Bolton-Emerson, Inc. Case 1–CB–5899

14 December 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS ZIMMERMAN AND HUNTER

Upon a charge filed 23 December 1983 and an amended charge filed 23 January 1984 the General Counsel of the National Labor Relations Board by the Regional Director for Region 1 issued a complaint and notice of hearing on 2 February 1984. The complaint alleges that the International Association of Machinists and Aerospace Workers, AFL–CIO (Respondent International), violated Section 8(b)(1)(A) of the Act by maintaining in its constitution article L, section 3, which restricts the rights of members to resign during a strike or within 14 days preceding its commencement.

The complaint further alleges that the International Association of Machinists and Aerospace Workers, AFL–CIO, Local Lodge No. 1271 (Respondent Local), violated Section 8(b)(1)(A) when pursuant to article L, section 3 it fined four employees who after tendering resignations from membership in Respondent Local resumed working for the Charging Party.

On 4, 13, and 18 June 1984 the General Counsel, the Respondents, and the Charging Party entered into a stipulation of facts and motion to transfer proceeding to the Board. The parties agree that the stipulation, together with the charge, complaint, and the answer to the complaint, constitute the entire record in the case. The parties waived a hearing and the issuance of a decision by an administrative law judge and submitted the case directly to the Board for findings of facts, conclusions of law, and issuance of an order.

On 28 September 1984, the Board issued an order granting the motion, approving the stipulation, and transferring the proceeding to the Board. Thereafter, the parties filed briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

On the entire record and the briefs, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

The Employer is a Massachusetts corporation engaged in the manufacture and nonretail sale and distribution of industrial knives and related products. Annually, the Employer, in the course and conduct of its operations, purchases and receives at its Lawrence, Massachusetts facility products, goods, and materials valued in excess of $50,000 directly from points outside the Commonwealth of Massachusetts. Additionally, the Employer, in the course and conduct of its operations, annually sells and ships from its Lawrence facility products, goods, and materials valued at over $50,000 directly to points outside the Commonwealth of Massachusetts. We find that the Employer is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act. We further find that Respondents are labor organizations within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *The Stipulated Facts*

Respondent Local is the recognized exclusive collective-bargaining representative of the Charging Party's production and maintenance employees, including drivers at the Lawrence, Massachusetts facility. On 28 February 1983 the collective-bargaining agreement covering these employees expired. Commencing on 1 March 1983 certain of the bargaining unit employees, including Victor Delisle, Gilbert Olivera, Manuel Silveria, and Frank Mack, went out on an economic strike which lasted through 19 April 1983. On 11 April 1983, Delisle and Olivera submitted their resignations from membership in Respondent Local and thereafter crossed Respondent Local's picket line to resume working for the Charging Party. On 17 April 1983 Silveria submitted his resignation from membership in Respondent Local, and on 18 April 1983 he crossed the picket line and returned to work. Mack tendered his resignation from membership in Respondent Local on 18 April 1983. He then crossed the picket line and resumed working for the Charging Party.

Article L, section 3 of the constitution of Respondent International provides in relevant part:

> Improper Conduct of a Member: . . .
>
> Accepting employment in any capacity in an establishment where a strike or lockout exists as recognized under this Constitution, without permission. Resignation shall not relieve a member of his obligation to refrain from accepting employment at the establishment for the duration of the strike or lockout if the resignation occurs during the period of the strike or lockout or within 14 days preceding its commencement. Where observance of a pri-

> mary picket line is required, any resignation tendered during the period that the picket line is maintained, or within 14 days preceding its establishment, shall not become effective as a resignation during the period the picket line is maintained, nor shall it relieve a member of his or her obligation to observe the primary picket line for its duration.

About 8 December 1983 Respondent Local, in furtherance of this provision, filed charges against employees Delisle, Olivera, Silveria, and Mack. About 17 December 1983 Respondent Local imposed court-collectible fines on Delisle, Olivera, Silveria, and Mack. The parties stipulated that Respondent Local engaged in the conduct described above because these four employees crossed a legally established picket line.

B. *Contentions of the Parties*

Citing *Engineers & Scientists Guild (Lockheed-California)*, 268 NLRB 311 (1983), and *Machinists Local 1414 (Neufeld Porsche-Audi)*, 270 NLRB 1330 (1984), the General Counsel contends that the constitutional provision restricting resignations is unlawful and that the mere maintenance by a union of a constitutional provision which is unenforceable in its restriction of the right of members to resign during the pendency of a strike is coercive and violates Section 8(b)(1)(A). Accordingly, the General Counsel maintains that Respondent Local and Respondent International have violated Section 8(b)(1)(A) by promulgating and maintaining the restriction on resignation and Respondent Local has violated Section 8(b)(1)(A) by imposing fines on Delisle, Mack, Olivera, and Silveria for crossing the picket line and returning to work after resigning their membership in Respondent Local.

The Charging Party argues that the Respondents violated Section 8(b)(1)(A) by imposing fines on employees who returned to work after resigning their union membership. The Charging Party urges that the Board order Respondent Local to rescind the fines and Respondent International to expunge article L, section 3 from its constitution.

In its brief, the Union simply states:

> [F]or the reasons set forth in *Machinists Local 1327*, 263 NLRB 984, enf. denied, *Machinists Lodge 1327, International Association of Machinists and Aerospace Workers v. NLRB (Dalmo Victor II)*, 725 F.2d 1212 (9th Cir. 1984), pet. for rehg. den. (July 10, 1984), the International Association of Machinists and Aerospace Workers, AFL–CIO, and the International Association of Machinists and Aerospace Workers, AFL–CIO, Local Lodge 1271, urge the Board to find that the Union has not violated Section 8(b)(1)(a) [sic] of the Act, and to dismiss the Complaint in its entirety.

C. *Analysis and Findings*

Unions may not, pursuant to their constitutional provision prohibiting resignations during a strike or within 14 days preceding its commencement, lawfully impose fines on members who resigned and returned to work during the course of a strike. In urging the Board to dismiss the complaint, the Respondents rely on *Machinists Local 1327 (Dalmo Victor)*, 263 NLRB 984 (1982). In that case the Board found invalid the same IAM constitutional restriction on a member's right to resign at issue here. The plurality opinion held that a union could lawfully restrict a member's right to resign for 30 days after the tender of the resignation. The concurring opinion held that any restriction imposed on a member's right to resign is invalid.

In a subsequent case, *Neufeld Porsche-Audi*, supra, the Board adopted the view of the *Dalmo Victor* concurrence and overruled that case and its progeny. For the reasons set forth in *Neufeld Porsche-Audi*, we find here that by restricting members' right to resign and by fining and filing charges against four employees who crossed Respondent Local's picket line after resigning, the Respondents violated Section 8(b)(1)(A) of the Act.[1] Further, in accord with *Neufeld Porsche-Audi* we shall require that the Respondents cease and desist from maintaining the restriction on resignation and expunge the provision from their governing documents.[2]

CONCLUSIONS OF LAW

1. The Charging Party is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Respondents are labor organizations within the meaning of Section 2(5) of the Act.

3. By maintaining in their governing documents article L, section 3 prohibiting resignations during a strike or within 14 days preceding its commencement; and by filing charges and fining employees who after submitting resignations from membership in the International Association of Machinists and Aerospace Workers, AFL–CIO, Local Lodge No. 1271 resumed working for the Charging Party, the Respondents have engaged in unfair labor practices within the meaning of Section 8(b)(1)(A) and Section 2(6) and (7) of the Act.

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[1] Member Zimmerman finds the violations for the reasons set forth in his concurring opinion in *Neufeld Porsche-Audi*.

[2] See also *Engineers & Scientists Guild (Lockheed-California)*, 268 NLRB 311 (1983).

REMEDY

Having found that the Respondents have violated Section 8(b)(1)(A) of the Act, we shall order them to cease and desist therefrom and take certain affirmative action designed to effectuate the purposes of the Act. We shall order the Respondents to remove from their governing documents the portion of article L, section 3 of the constitution of the International Association of Machinists and Aerospace Workers set forth above,[3] rescind any fines levied against those employees who resigned their membership and subsequently resumed working for the Charging Party, refund any moneys these employees may have paid as a result of the fines imposed against them, with interest computed in the manner prescribed in *Florida Steel Corp.*, 231 NLRB 651 (1977), and cease any prosecution of these employees.

ORDER

The National Labor Relations Board orders that

A. Respondent International Association of Machinists and Aerospace Workers, AFL–CIO, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Maintaining in its constitution article L, section 3 to the extent it provides:

> Improper Conduct of a Member: . . .
>
> Accepting employment in any capacity in an establishment where a strike or lockout exists as recognized under this Constitution, without permission. Resignation shall not relieve a member of his obligation to refrain from accepting employment at the establishment for the duration of the strike or lockout if the resignation occurs during the period of the strike or lockout or within 14 days preceding its commencement. Where observance of a primary picket line is required, any resignation tendered during the period that the picket line is maintained, or within 14 days preceding its establishment, shall not become effective as a resignation during the period the picket line is maintained, nor shall it relieve a member of his or her obligation to observe the primary picket line for its duration.

(b) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action which is designed to effectuate the purposes of the Act.

(a) Remove from its constitution the portion of article L, section 3 set forth above.

(b) Post at its business office copies of the attached notice marked "Appendix A."[4] Copies of the notice, on forms provided by the Regional Director for Region 1, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

B. Respondent International Association of Machinists and Aerospace Workers, AFL–CIO, Local Lodge No. 1271, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Maintaining in its governing documents article L, section 3 of the constitution of the International Association of Machinists and Aerospace Workers to the extent it provides:

> Improper Conduct of a Member: . . .
>
> Accepting employment in any capacity in an establishment where a strike or lockout exists as recognized under this Constitution, without permission. Resignation shall not relieve a member of his obligation to refrain from accepting employment at the establishment for the duration of the strike or lockout if the resignation occurs during the period of the strike or lockout or within 14 days preceding its commencement. Where observance of a primary picket line is required, any resignation tendered during the period that the picket line is maintained, or within 14 days preceding its establishment, shall not become effective as a resignation during the period the picket line is maintained, nor shall it relieve a member of his or her obligation to observe the primary picket line for its duration.

[3] Although the complaint in this case does not specifically allege the maintenance of the provision by Respondent Local in its governing documents as being unlawful, the absence of such an allegation has no bearing on the Board's discretion to fashion appropriate remedies for the violations found. *Neufeld Porsche-Audi*, supra. We will therefore order Respondent Local to cease and desist from maintaining the provision in its governing documents and to expunge the provision therefrom.

[4] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(b) Restraining and coercing employees who have resigned from and are no longer members of the Respondent in the exercise of the rights guaranteed them by Section 7 of the Act by imposing fines on such employees because of their postresignation conduct in working at Bolton-Emerson, Inc. during the strike which commenced on 1 March 1983.

(c) Prosecuting any former members for their postresignation crossing of Local Lodge No. 1271's picket line during the strike at Bolton-Emerson which commenced on 1 March 1983.

(d) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action designed to effectuate the policies of the Act.

(a) Remove from its governing documents the portion of article L, section 3 of the constitution of the International Association of Machinists and Aerospace Workers set forth above.

(b) Vacate, rescind, and expunge from its records all charges and rescind any and all fines levied against Victor Delisle, Gilbert Olivera, Manuel Silveria, and Frank Mack, who submitted resignations of their membership in Local Lodge No. 1271 during the strike against Bolton-Emerson, Inc., which began on 1 March 1983 and concluded on 19 April 1983, and crossed Local Lodge No. 1271's picket line to return to work for Bolton-Emerson, Inc.

(c) Notify each of the above-named employees in writing that the charges and fines have been vacated, expunged, or rescinded, and that it will take no action to collect the fines.

(d) Refund to each of the above-named employees all moneys they may have paid to it as a result of the fines, plus interest in accordance with the Board's established policies.

(e) Post at its business office copies of the attached notice marked "Appendix B."[5] Copies of the notice, on forms provided by the Regional Director for Region 1, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(f) Mail to the Regional Director signed copies of the notice for posting by Bolton-Emerson, Inc., if the Company is willing, in places where notices to employees are customarily posted. Copies of the notices, furnished by the Regional Director after being duly signed by the Respondent's authorized representative, shall be returned forthwith to the Regional Director.

(g) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

APPENDIX A

NOTICE TO MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT maintain in our constitution article L, section 3 to the extent it provides:

> Improper Conduct of a Member: . . .
>
> Accepting employment in any capacity in an establishment where a strike or lockout exists as recognized under this Constitution, without permission. Resignation shall not relieve a member of his obligation to refrain from accepting employment at the establishment for the duration of the strike or lockout if the resignation occurs during the period of the strike or lockout or within 14 days preceding its commencement. Where observance of a primary picket line is required, any resignation tendered during the period that the picket line is maintained, or within 14 days preceding its establishment, shall not become effective as a resignation during the period the picket line is maintained, nor shall it relieve a member of his or her obligation to observe the primary picket line for its duration.

WE WILL NOT in any like or related manner restrain or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL remove from our constitution the portion of article L, section 3 set forth above.

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL–CIO

[5] See fn. 4, supra.

APPENDIX B

NOTICE TO EMPLOYEES AND MEMBERS POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT maintain in our governing documents article L, section 3 of the constitution of the International Association of Machinists and Aerospace Workers to the extent it provides:

> Improper Conduct of a Member: . . .
>
> Accepting employment in any capacity in an establishment where a strike or lockout exists as recognized under this Constitution, without permission. Resignation shall not relieve a member of his obligation to refrain from accepting employment at the establishment for the duration of the strike or lockout if the resignation occurs during the period of the strike or lockout or within 14 days preceding its commencement. Where observance of a primary picket line is required, any resignation tendered during the period that the picket line is maintained, or within 14 days preceding its establishment, shall not become effective as a resignation during the period the picket line is maintained, nor shall it relieve a member of his or her obligation to observe the primary picket line for its duration.

WE WILL NOT restrain or coerce employees who have resigned from the Union and who, in the exercise of the rights guaranteed them by Section 7 of the National Labor Relations Act, worked after their resignation at Bolton-Emerson, Inc. during the strike which began on 1 March 1983 by imposing fines on them for working during the strike.

WE WILL NOT prosecute any former members for their postresignation crossing of Local 1271's picket line during the strike at Bolton-Emerson which commenced on 1 March 1983.

WE WILL NOT in any like or related manner restrain or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL remove from our governing documents the portion of article L, section 3 of the constitution of the International Association of Machinists and Aerospace Workers set forth above.

WE WILL rescind the fines levied against Victor Delisle, Gilbert Olivera, Manuel Silveria, and Frank Mack because they worked at Bolton-Emerson, Inc. after their resignation from the Union during the strike which began 1 March 1983 and refund any moneys they may have paid as a result of such fines, plus interest, in accordance with the policy established by the Board.

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL–CIO, LOCAL LODGE NO. 1271

United Services of America International Labor Union *and* Lincoln Contracting & Equipment Co., Inc. and United Mine Workers of America, District 28 and United Mine Workers of America, Local 6843. Case 6–CD–797

14 December 1984

DECISION AND DETERMINATION OF DISPUTE

BY CHAIRMAN DOTSON AND MEMBERS ZIMMERMAN AND HUNTER

The charge in this Section 10(k) proceeding was filed 21 May 1984 by the Employer, Lincoln Contracting & Equipment Co., Inc. (the Employer), alleging that the Respondent, United Services of America International Labor Union (USA), violated Section 8(b)(4)(D) of the National Labor Relations Act by engaging in proscribed activity with an object of forcing the Employer to assign certain work to employees it represents rather than to employees represented by United Mine Workers of America, Local 6843 (UMWA). The hearing was held 7 June 1984 before Hearing Officer Kim Siegert.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board affirms the hearing officer's rulings, finding them free from prejudicial error. On the entire record, the Board makes the following findings.

I. JURISDICTION

The Employer, a Pennsylvania corporation, is a coal mine construction company with an office and place of business in Boswell, Pennsylvania, where it annually receives supplies and materials valued in excess of $50,000 directly from points outside the Commonwealth of Pennsylvania. The parties stipulate, and we find, that the Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that USA and UMWA are labor organizations within the meaning of Section 2(5) of the Act.

II. THE DISPUTE

A. *Background and Facts of Dispute*

The Employer is engaged in the business of coal construction and fabrication. It is currently performing field construction work at the Consolidated Coal Company Robena Mine located outside Carmichaels, Pennsylvania. The work includes renovating, repairing, and updating existing structures.

On 6 April 1984 the Employer and USA entered into a contract that specifically covers all field construction work performed for the Consolidated Coal Company at the Robena Mine. The Employer is also a member of the Association of Bituminous Contractors (ABC) and is signatory to the National Coal Mine Construction Agreement of 1981 (ABC contract) entered into with UMWA. Article I of the ABC contract "covers all work related to the development, expansion or alteration of coal mines . . . and all other such coal-related work that is performed at or on coal lands by the members of the association for coal mine operators which require such construction work to be performed under the jurisdiction of the United Mine Workers of America."

In mid-April the Employer assigned the disputed work to employees represented by USA. Thereafter, UMWA filed a grievance claiming the Employer violated article I of the ABC contract. On being informed of the grievance, USA responded by advising the Employer that it would picket if the work was assigned to employees represented by another union. Employees represented by USA have continued performing the disputed work.

B. *Work in Dispute*

The disputed work involves the renovating, repairing and updating of existing structures at the Consolidated Coal Company Robena Mine. The work is currently being performed by 10 employees represented by USA.

C. *Contentions of the Parties*

The Employer and USA contend that the disputed work has properly been assigned to the employees represented by USA on the basis of their contract of 6 April 1984, the Employer's assignment and past practice, area practice, and efficiency and economy of operations. The Employer also argues that it is not obligated to assign the disputed work to UMWA-represented employees since Consolidated did not specify that the work be given to employees represented by that organization.

UMWA contends that the ABC contract has jurisdiction over the disputed work and that the work should be assigned to employees represented by UMWA. UMWA further claims that article I of the ABC contract does not create a contract whose jurisdiction is based solely on the coal mine operator's specific request that work be performed by employees represented by UMWA.

D. *Applicability of the Statute*

On 6 May 1984 UMWA filed a grievance against the Employer with respect to the assignment of the disputed work. The Employer informed USA of the grievance and requested its position on the

matter. USA responded by claiming the disputed work and threatened to picket the Employer if the disputed work were assigned to another union.

The parties stipulated that there is no agreed-on method for voluntary adjustment of the dispute.

We find reasonable cause to believe that a violation of Section 8(b)(4)(D) has occurred and that there exists no agreed-on method for voluntary adjustment of the dispute within the meaning of Section 10(k) of the Act. Accordingly, we find that the dispute is properly before the Board for determination.

E. *Merits of the Dispute*

Section 10(k) requires the Board to make an affirmative award of disputed work after considering various factors. *NLRB v. Electrical Workers IBEW Local 1212 (Columbia Broadcasting)*, 364 U.S. 573 (1961). The Board has held that its determination in a jurisdictional dispute is an act of judgment based on common sense and experience, reached by balancing the factors involved in a particular case. *Machinists Lodge 1743 (J. A. Jones Construction)*, 135 NLRB 1402 (1962).

The following factors are relevant in making the determination of this dispute.

1. Certifications and collective-bargaining agreements

There are no orders or certifications of the Board awarding jurisdiction of the disputed work to employees represented by USA or UMWA.

The Employer's president and vice president testified that the contract between the Employer and USA specifically covers all field construction work of the Employer at the Consolidated Coal Company Robena Mine.

As described above, the Employer is signatory to the 1981 ABC contract negotiated between ABC and UMWA. Article I of the ABC contract also covers the disputed work. However, it has been the Employer's and area practice to interpret article I to cover projects only where the coal mine operator requires that the work be performed under UMWA jurisdiction. In this case Consolidated did not request that the disputed work be performed under UMWA jurisdiction. Thus, it appears that the ABC contract is not applicable to the Robena Mine[1] but the USA agreement explicitly covers the work in dispute.[2] Accordingly, we find that the collective-bargaining agreements favor assigning the work to employees represented by USA.

2. Employer assignment, company past practice, and area practice

The Employer assigned the disputed work to employees represented by USA.

The Employer's president and vice president testified that the Employer's consistent practice has been to apply the ABC contract only where the coal company requires that the work be performed under UMWA jurisdiction. When the coal company does not make a specific request, the Employer is free to assign the work to employees represented by unions other than UMWA. The record also discloses that the area practice is consistent with the Employer's assignment. Accordingly, these factors favor an award to the employees represented by USA.

3. Relative skills

Both groups of employees appear equally skilled in performing the disputed work. Therefore, this factor favors neither group.

4. Economy and efficiency of operations

According to the Employer's president and vice president, there are several reasons continued performance of the disputed work by the employees represented by USA is more economical and efficient. The USA contract permits the use of working foremen and provides for an 8-hour workday as opposed to a 7-1/2-hour workday under the ABC contract. The USA contract also allows for greater flexibility in scheduling makeup work on Saturdays, utilizing employees in needed classifications, and hiring needed employees. Finally, employees represented by USA provide continuity since they have been performing the disputed work since mid-April. Accordingly, we find that this factor favors an award of the disputed work to employees represented by USA.

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[1] See *Mine Workers (Elk Run Coal)*, 251 NLRB 1267 (1980); *Mine Workers (Codell Construction)*, 235 NLRB 1134 (1978). See also *United Services Union (Mountaineer Resources)*, 273 NLRB 1167 (1984); and *United Services Union (Mountaineer Resources)*, 273 NLRB 1172 (1984).

[2] We reject UMWA's contention that the Roberts and Schaeffer arbitration decision is controlling on the interpretation of art. I. There the employer, a signatory to the ABC contract, contracted with a coal mine operator to perform construction work and then subcontracted the work to a nonsignatory subcontractor. The employer argued that it was not bound to the ABC agreement since the mine operator did not request that jurisdiction for the work be given to the UMWA. In finding, inter alia, that the employer has no authority under the ABC contract to subcontract out the work, the arbitrator relied primarily on the fact that the employer was signatory to only one contract. He distinguished *Elk Run* in which the employer was signatory to two contracts and emphasized that there was no evidence that Roberts and Schaeffer was a multiunion signator. Here the Employer is signatory to two contracts. Therefore, as the facts in the instant case differ significantly from the Roberts and Schaeffer arbitration decision, we find it is not controlling.

Conclusions

After considering all the relevant factors, we conclude that employees represented by USA are entitled to perform the work in dispute. We reach this conclusion relying on the collective-bargaining agreements, Employer assignment and past practice, area practice, and economy and efficiency of operation. In making this determination, we are awarding the work to employees represented by USA, not to that Union or its members. The determination is limited to the controversy that gave rise to this proceeding.

DETERMINATION OF DISPUTE

The National Labor Relations Board makes the following Determination of Dispute.

Employees represented by United Services of America International Labor Union are entitled to perform all field construction work at the Consolidated Coal Company Robena Mine, Carmichaels, Pennsylvania.

United Services of America Interntional Labor Union[1] *and* Mountaineer Resources, Inc.,[2] Industrial Resources, Inc., Industrial Contracting, Inc., and Salem Construction, Inc., all wholly owned subsidiaries of Salem Corporation

Gunther-Nash Mining Construction Company[3] *and* United Mine Workers of America, District 28 and United Mine Workers of America, Local 6843.[4] Cases 5–CD–278 and 5–CD–279

14 December 1984

DECISION AND DETERMINATION OF DISPUTE

BY CHAIRMAN DOTSON AND MEMBERS ZIMMERMAN AND HUNTER

This is a consolidated proceeding under Section 10(k) of the National Labor Relations Act, following charges filed by Gunther (Case 5–CD–279) and Mountaineer (Case 5–CD–278) alleging that USA violated Section 8(b)(4)(D) of the Act by engaging in proscribed activity with an object of forcing or requiring these Companies to assign certain work to its members rather than to employees represented by UMWA.

Pursuant to notice, a hearing was held before Hearing Officer Mark M. Carissimi on 4 June 1984. All parties appeared and were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to adduce evidence bearing on the issues. Thereafter, Gunther and Mountaineer filed a joint brief and the UMWA filed a brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board affirms the hearing officer's rulings, finding them free from prejudicial error. On the entire record, the Board makes the following findings.

Case 5–CD–279

I. JURISDICTION

Gunther, a Missouri corporation, is engaged in the mining construction business in various States of the United States. During the past year, a representative period, Gunther purchased and received materials and supplies valued in excess of $50,000 directly from points outside the State of Missouri. We find that Gunther is engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that USA and UMWA are labor organizations within the meaning of Section 2(5) of the Act.

II. THE DISPUTE

A. *Background and Facts of Dispute*

About September 1983 Consolidated Coal Company (Consolidation) invited bids for the job of constructing the ventilation shaft at its Buchanan Number One Mine in Virginia. Gunther indicated to Consolidation that it intended to assign the work on that project to employees represented by USA. Gunther's bid was accepted on that basis without any objection from Consolidation. Gunther entered into a collective-bargaining agreement with USA for a 3-year term effective 19 September 1983 specifically covering all field construction work at the ventilation shaft, which commenced with employees represented by USA.

Gunther is a member of the Association of Bituminous Contractors (ABC) and as such is also a signatory of the National Coal Mine Construction Agreement between ABC and UMWA.[5] Article I, which is entitled "Enabling Clause," provides in pertinent part that the contract "covers all work related to the development, expansion or alteration of coal mines . . . that is performed at or on coal lands by the members of the Association for coal mine operators which require such construction work to be performed under the jurisdiction of the [UMWA]."

On 4 May 1984 some UMWA members sent Gunther's President Robert McCoy an ABC-UMWA grievance form wherein it claimed that Gunther violated article I and "other relevant [but unspecified] portions" of the ABC contract in "contracting or subcontracting of work involved in construction of the [ventilation] shaft at . . . Consolidation['s] . . . Buchanan Mine." Gunther on 11 May 1984 notified USA President Charles R. Rush of the grievance and inquired as to USA's position concerning UMWA's claim that the work in question should be done "under [the latter's] jurisdiction." In response, Rush stated that the "work is under the USA contract with [Gunther] . . . [and] that any attempt to defeat [USA's] jurisdiction . . . will no doubt result in the establishment of a picket line." McCoy testified that he took Rush's reply to be a threat by USA to picket if Gunther assigned the work at the ventilation shaft to employees represented by another union.

[1] The name of this organization (USA) has been corrected to reflect the record.

[2] Mountaineer.

[3] Gunther.

[4] UMWA.

[5] This ABC contract provides for a term extending from 25 June 1981 to 30 September 1984, and effective thereafter in the absence of 60 days' notice by either party.

B. *Work in Dispute*

The work in dispute involves all field construction work regarding the ventilation shaft for Consolidation's Buchanan Number One Mine.

C. *Contentions of the Parties*

Gunther asserts that it has already assigned the work in dispute to employees represented by USA and prefers to continue that assignment. It further asserts that its assignment of the work to these employees is appropriate in view of its collective-bargaining agreement with USA and its practice and that of other companies in the area in not having such construction work done "under [UMWA] jurisdiction" when not "required" to do so by the coal mining company for which the work is to be performed.

UMWA contends that under article I of the ABC contract as interpreted in a recent arbitration decision involving another construction company[6] the disputed work should be assigned to employees it represents. It also contends that Gunther has no past practice of performing work under USA jurisdiction and that no evidence was presented as to area practice concerning the utilization of USA-represented employees. The UMWA further contends that an award of the work to its members would promote efficiency and economy of operations in view of their relative skills and greater experience in performing construction work for coal mine operators.

D. *Applicability of the Statute*

Before the Board may proceed with a determination of the dispute pursuant to Section 10(k) of the Act, it must be satisfied that there is reasonable cause to believe that (1) Section 8(b)(4)(D) has been violated and (2) that the parties have not agreed on a method for the voluntary adjustment of the dispute.

As to (1), it is clear that USA categorically stated that any attempt to "defeat" its jurisdiction by assigning the work to UMWA-represented employees would result in its establishment of a picket line. As to (2), the parties stipulated that there is no agreed-on method for the adjustment of this dispute.

On the basis of the entire record, we conclude that there is reasonable cause to believe that a violation of Section 8(b)(4)(D) has occurred and that there exists no agreed-on method for the voluntary adjustment of the dispute within the meaning of Section 10(k) of the Act. Accordingly, we find that this dispute is properly before the Board for determination.

E. *Merits of the Dispute*

Section 10(k) of the Act requires the Board to make an affirmative award of disputed work after considering various factors. *NLRB v. Electrical Workers IBEW Local 1212 (Columbia Broadcasting)*, 364 U.S. 573 (1961). The Board has held that its determination in a jurisdictional dispute is an act of judgment based on common sense and experience, reached by balancing the factors involved in a particular case. *Machinists Lodge 1743 (J. A. Jones Construction)*, 135 NLRB 1402 (1962).

The following factors are relevant in making the determination of the dispute.

1. Certification and collective-bargaining agreements

Neither of the Unions involved herein has been certified by the Board as the collective-bargaining representative for a unit of Gunther's employees. Therefore, certification is not a factor in this case.

As indicated above, Gunther made the following argument in support of its assignment to USA-represented employees: Under the terms of article I of the ABC contract, it is under no obligation to have the construction work on the ventilation shaft performed under "UMWA jurisdiction" unless it is required to do so by Consolidation, the coal mine operator herein. As Consolidation accepted Gunther's bid without objecting to the latter's announced intention to use USA-represented employees on that project, it was free to enter into a contract with USA which provided that the work in question be done "under [USA's] jurisdiction."

As already noted, the UMWA asserts that the assignment should go to employees represented by it on the basis of an arbitration decision which held that disputed construction work should be "under UMWA jurisdiction."

We find that Gunther's interpretation of article I of the ABC contract is consonant with its terms and consistent with the interpretation given identical contract language in earlier Board cases involving employer signatories of the ABC contract.[7] In addition, the UMWA has implicitly recognized that the ABC contract permits use of non-UMWA-represented employees when, as here, the coal mine operator does not require the work to be done by UMWA-represented employees, for it has attempted in these circumstances to gain jurisdiction

[6] Opinion and award in the Matter of *Roberts & Schaeffer Company*, and *United Mine Workers of America, District 4, Local Union 1846* (Apr. 6, 1984).

[7] *Mine Workers (Elk Run Coal)*, 251 NLRB 1267 (1980); and *Mine Workers (Codell Construction Co.)*, 235 NLRB 1134 (1978).

through execution of special project agreements. Accordingly, we do not find that article I of the ABC contract obligated Gunther to perform the disputed work "under UMWA jurisdiction."[8]

2. Employer assignment, past practice, and area practice

Gunther has applied the ABC contract and assigned work to UMWA-represented employees only where the coal company has required that this be done. The record shows that, in the absence of such a requirement, Gunther, as in the instant case and on a Beckley, West Virginia project for another coal company, Cannelton Industries, assigned work in 1983 and 1984 to USA-represented employees. In addition, other companies in the area here followed the same practice.[9]

The record herein shows that Gunther is satisfied with the results of its assignment to USA-represented employees and prefers to continue to have them perform the disputed work.

In view of the foregoing, we find that area practice and Gunther's preference for the USA-represented employees clearly weigh in favor of continuing to assign the work in dispute to those employees.

3. Relative skills

Gunther's president testified that the USA-represented employees, one-fourth of whom had previously been represented by the UMWA, have demonstrated the skills necessary to perform the disputed work and were doing "a good job." He further testified that the majority of the UMWA-represented employees who have worked for Gunther in the past are qualified to perform construction work on coal mine projects.

As it appears that the employees represented by each labor organization possess the requisite skills to perform the work, we find this factor to be inconclusive.

4. Economy and efficiency of operation

Foremen, who are classified as pushers, are permitted to perform bargaining unit work under the USA contract but are prohibited from doing so by the ABC contract. The USA contract provides for an 8-hour day at straight-time rates while the ABC contract provides for a 7-1/2-hour workday and a half hour paid lunch period. The record also shows that the USA-represented employees were already performing the disputed work and, as indicated above, were doing a good job when the UMWA members filed their grievance.

In view of the foregoing, we find that the factors of economy and efficiency favor the continuation of the assignment to the USA-represented employees.

Conclusion

On the record as a whole, and after full consideration of all relevant factors involved, we conclude that employees who are represented by USA are entitled to perform the work in dispute. We reach this conclusion relying on the collective-bargaining agreements, economy and efficiency of operation, the prevailing area practice, and Gunther's preference to assign the work to USA-represented employees whenever it is not required by the coal mine operator to have the work done by UMWA-represented employees. In making this determination, we are awarding the work in question to employees who are represented by USA, but not to that Union or its members.

Case 5–CD–278

I. JURISDICTION

Mountaineer, a Pennsylvania corporation whose principal place of business is in West Virginia, performs, inter alia, field construction work at coal mine sites. During the 12-month period preceding the hearing, it received gross revenues in excess of $500,000. During the same period, Mountaineer purchased and received goods and material valued in excess of $50,000 directly from points outside the State of West Virginia for use at its West Virginia and Virginia jobsites.[10] The parties stipulate, and we find, that Mountaineer is engaged in commerce within the meaning of Section 2(6) and (7) of the Act. As already found in the *Gunther* case, USA and UMWA are labor organizations within the meaning of Section 2(5) of the Act.

II. THE DISPUTE

A. *Background and Facts of Dispute*

Mountaineer, which has been in business since 1978, is a wholly owned subsidiary of Salem Corporation as are Industrial Contracting of Fairmont, Inc. (Industrial) and Salem Construction Company, Inc., which also perform construction work at coal mine sites. Mountaineer and Salem Construction Company are not ABC members and have never

[8] For the reasons set forth in *United Services Union (Lincoln Contracting)*, 273 NLRB 1164 (1984), we reject UMWA's contention that the arbitration decision on which it relies is controlling as to a contrary interpretation of art. I of the ABC contract.

[9] See the *Mountaineer* case in this consolidated proceeding, as well as the decisions in *Lincoln Contracting*, supra, and another companion case, *United Services Union (Mountaineer Resources)*, 273 NLRB 1172 (1984).

[10] These figures are taken from the record in the companion cases, 273 NLRB 1172, involving the same Company.

been signatories to the ABC contract or any other agreement with the UMWA. However, Industrial is a signatory to the ABC contract.

Whenever a coal company invokes article I of the ABC contract to require that work on a construction project at its mine be done "under UMWA jurisdiction," it has been the practice that only Industrial makes bids on that work. However, when a coal company has not called for the use of UMWA-represented employees, Mountaineer then makes the bid for that work.[11] Thus, when Consolidation did not require that UMWA-represented employees be used on a project for the construction of a coal preparation facility at the Buchanan Number One Mine and in fact stated its desire for the most competitive bid, that of Mountaineer was accepted by Consolidation. Accordingly, in April 1984 Mountaineer entered into a 3-year contract with USA to have the employees represented by that organization perform the work in question.

On 4 May 1984 some members of the UMWA sent Don Hoylman in his capacity as president of Industrial an ABC-UMWA grievance form wherein they claimed that Industrial violated article I and "other relevant [but unspecified] portions" of the ABC contract by "contracting or subcontracting of work involved in construction of the preparation facility at the Buchanan Mine." Mountaineer thereupon notified USA President Rush of the grievance, and the latter reiterated the response made in the *Gunther* case, namely, that it would "no doubt" engage in picketing if any attempt were made to "defeat" its jurisdiction.

B. *Work in Dispute*

The work in dispute involves all field construction with respect to a preparation plant at Consolidation's Buchanan Number One Mine.

C. *Contentions of the Parties*

Mountaineer makes the following argument in support of its position.

It has already assigned the disputed work to employees represented by USA and prefers to continue to do so. It is not and never has been a signatory to the ABC contract or any other collective-bargaining agreement with the UMWA and hence there is no basis for attributing to Mountaineer the ABC contract merely because Industrial, its sister company, is a signatory to that contract. A second reason for not applying that contract to Mountaineer is that its employees and those of Industrial constitute separate bargaining units.[12] In any event, the ABC contract does not apply to work on the preparation plant because Consolidation has not required that it be done with UMWA-represented employees.

Mountaineer also relies on its collective-bargaining agreement with USA, area practice, relative skills, and economy and efficiency of operation as factors favoring the assignment to USA-represented employees.

The UMWA asserts that Mountaineer and Industrial are sister companies which have the same officers and engage in the same type of construction work performed by employees who enjoy the same health and insurance benefits. It therefore contends that Mountaineer and Industrial constitute a single employer and that consequently the former is bound by the ABC contract to which the latter is a party.[13]

The UMWA also states that Mountaineer's contract with USA provides that the latter initially determines the skills of the employees it refers to that Company and for that reason there is no assurance that they can perform the work to which they are assigned.

D. *Applicability of the Statute*

Before the Board may proceed with a determination of the dispute pursuant to Section 10(k) of the Act, it must be satisfied that there is reasonable cause to believe that Section 8(b)(4)(D) has been violated and that the parties have not agreed on a method for voluntary adjustment of the dispute.

For the reasons set forth in the *Gunther* case, we find that the dispute is properly before the Board for determination.

E. *Merits of the Dispute*

As indicated above, Section 10(k) of the Act requires the Board to make an affirmative award of disputed work after taking into account the evidence supporting the claims of the parties and balancing all relevant factors.

The following factors are relevant in making the determination of the dispute before us.

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[11] As indicated in the companion case involving Mountaineer, Salem Construction Company restricts itself to bids for construction work which is to be performed by AFL–CIO-represented employees.

[12] In this connection, Mountaineer cites *Peter Kiewit Sons' Co.*, 231 NLRB 76 (1977), in which the Board found that the employees of two sister companies, one union and the other nonunion, constituted separate bargaining units, and for that reason refused to impose on the latter the collective-bargaining agreement of the former.

[13] In this connection, UMWA reiterates the interpretation of the ABC contract set forth in support of its claim against Gunther.

1. Certification and collective-bargaining agreements

As already stated in the *Gunther* case, certification is not a factor in this case because neither of the Unions involved herein have been certified by the Board as the collective-bargaining representative for a unit of Mountaineer's employees.

Mountaineer contends, and we agree, that as a nonmember of ABC and a nonsignatory of the ABC contract it is free to perform construction work at coal mine sites with non-UMWA represented employees. We also agree with its contention that it is an entity separate from Industrial and that consequently the latter's membership in ABC does not oblige Mountaineer to be governed by the ABC contract. However, assuming, as the UMWA contends, that Mountaineer and Industrial constitute one employer, we have already found in the *Gunther* case and the other two companion cases issued today that a single employer which uses UMWA-represented employees when so required by the coal mine operator may also properly rely on USA-represented employees in the absence of such a requirement.

2. Employer assignments, past practice, and area practice

As indicated above, it has been and continues to be Mountaineer's preference and practice to restrict itself to construction work for only those coal companies which do not require the use of UMWA-represented employees. This practice is also followed by Mountaineer's competitors.

In view of the foregoing, we find that area practice and Mountaineer's preference for the use of USA-represented employees clearly weigh in favor of continuing to assign the disputed work to those employees.

3. Relative skills

Mountaineer's president Don Hoylman testified that the USA-represented employees have demonstrated the skills necessary to perform the disputed work. Mountaineer's project manager Vernon Toothman also testified that those employees have done a "pretty good" job. However, Hoylman conceded that the work could be performed by the UMWA-represented employees utilized by Industrial.

As it appears that the employees represented by each labor organization possess the requisite skills to perform the work in dispute, we find this factor to be inconclusive.

4. Economy and efficiency of operations

For the reasons stated in the *Gunther* case, we find that economy and efficiency of operation with USA-represented employees favor the continuation of the assignment to them. An additional factor in favor of that assignment is that Mountaineer has greater flexibility in hiring because it is not limited to a panel of UMWA-represented employees and is free to select from the employees referred by USA only those individuals who are deemed by Mountaineer's supervisors to be best qualified.

Conclusion

On the record as a whole, and after full consideration of all relevant factors involved, we conclude that employees who are represented by USA are entitled to perform the work in dispute. We reach this conclusion relying on the non-ABC membership of Mountaineer, the fact that it is not a signatory of the ABC contract, the absence of any requirement by Consolidation that it utilize UMWA-represented employees, Mountaineer's collective-bargaining contract with USA, economy and efficiency of operating with USA-represented employees, its preference for those employees, and area practice in that regard.

In making this determination, we are awarding the disputed work to employees who are represented by USA, but not to that Union or its members.

Cases 5–CD–279 and 5–CD–278

DETERMINATION OF DISPUTE

The National Labor Relations Board makes the following Determination of Dispute.

Employees of Gunther-Nash Mining Construction Company represented by United Services of America International Labor Union are entitled to perform the job of constructing the ventilation shaft at Consolidation Coal Company's Buchanan Number One Mine in Virginia.

Employees of Mountaineer Resources, Inc. represented by United Services of America International Labor Union are entitled to perform the work of constructing a preparation plant at Consolidation Coal Company's Buchanan Number One Mine in Virginia.

United Services of America International Labor Union[1] *and* Mountaineer Resources, Inc.[2] and United Mine Workers of America.[3] Case 6–CD–800

14 December 1984

DECISION AND DETERMINATION OF DISPUTE

BY CHAIRMAN DOTSON AND MEMBERS ZIMMERMAN AND HUNTER

This is a proceeding under Section 10(k) of the National Labor Relations Act, following a charge filed by Mountaineer alleging the USA had violated Section 8(b)(4)(D) of the Act by engaging in proscribed activity with an object of forcing or requiring Mountaineer to assign certain work to its members rather than to employees represented by UMWA.

Pursuant to notice, a hearing was held before Hearing Officer Sandra Beck Levine on 6 July 1984. All parties appeared and were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to adduce evidence bearing on the issues. Thereafter, Mountaineer and UMWA filed briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board affirms the hearing officer's rulings, finding them free from prejudicial error. On the entire record, the Board makes the following findings.

I. JURISDICTION

Mountaineer, a Pennsylvania corporation whose principal place of business is in West Virginia, is engaged in the construction of material handling and processing facilities for coal mine operators and companies in other industries. During the 12-month period preceding the hearing, it had gross revenues in excess of $500,000. During the same period, Mountaineer purchased and received goods and materials valued in excess of $50,000 directly from points outside the State of West Virginia for use at its West Virginia and Virginia jobsites. We find that Mountaineer is engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that USA and UMWA are labor organizations within the meaning of Section 2(5) of the Act.

[1] USA.
[2] Mountaineer.
[3] UMWA.

II. THE DISPUTE

A. *Background and Facts of Dispute*

Mountaineer, which has been in business since 1978, is a wholly owned subsidiary of Salem Corporation as are Industrial Contracting of Fairmont, Inc. (Industrial) and Salem Construction Company, Inc. (Salem Construction), which also perform construction work at coal mine sites. Industrial is a member of the Association of Bituminous Contractors (ABC) and as such is also a signatory of the National Coal Mine Construction Agreement between ABC and UMWA.[4] Mountaineer and Salem Construction are not ABC members and have not been signatories to the ABC contract or any other agreement with the UMWA. When a coal company invokes article I of the ABC contract to require that the work at its mine be done "under UMWA jurisdiction," it has been the practice to have only Industrial make bids for that work.[5] However, when a coal company does not require the use of UMWA-represented employees, Mountaineer then makes the bid. Thus, when Consolidated Coal Company (Consolidation) invited Mountaineer to make bids for certain construction work at its Humphrey and Loveridge, West Virginia mines in the most "economical" way and stated that it would award the contracts therefor "on basis of price, delivery, and quality," it did not object to Mountaineer's plan to use USA-represented employees. Accordingly, on Consolidation's acceptance of its bids, Mountaineer on 14 May 1984 entered into 3-year contracts with USA to have the employees represented by that organization perform installation work for a coal preparation plant at each location. On 7 June 1984 about 3 weeks after Mountaineer began construction work at the Loveridge preparation plant with USA-represented employees, UMWA filed a class grievance against Industrial stating that it violated the ABC contract by contracting out work to Mountaineer, "a non-[UMWA] company to circumvent [the ABC contract]." Mountaineer and Industrial thereupon notified USA President Charles R. Rush of the grievance and the latter promptly replied that any attempt to defeat USA jurisdiction will "no doubt" result in the establishment of a picket line by USA.

On 13 June 1984 a little more than a week after Mountaineer began construction work at the Hum-

[4] Art. I, which is entitled "Enabling Clause," provides in pertinent part that the contract "covers all work related to the development, expansion or alteration of coal mines . . . that is performed at or on coal lands by the members of the Association for coal mine operators which require such construction work to be performed under the jurisdiction of the [UMWA]."

[5] Salem Construction restricts itself to bids for construction work which is to be performed by AFL–CIO-represented employees.

phrey preparation plant with the USA-represented employees, UMWA filed a similar class action against Industrial, and USA President Rush again responded by stating it would "no doubt" picket to "retain its jurisdiction."

B. *Work in Dispute*

The work in dispute involves the installation of new coal preparation and material handling equipment at Consolidation's preparation plants in Loveridge and Humphrey, West Virginia.

C. *The Contentions of the Parties*

Mountaineer reiterates the following contentions which it made in a companion case involving that Company.[6]

It has already assigned the work in question to employees represented by USA and prefers to continue to do so. It is not and never has been a signatory to the ABC contract or any other collective-bargaining agreement with the UMWA and hence there is no basis for attributing the ABC contract to Mountaineer merely because Industrial, its sister company, is a signatory to that contract. Another reason for not applying that contract is that its employees and those of Industrial constitute separate bargaining units.[7] In any event, the ABC contract does not apply to the work at the Loveridge and Humphrey coal preparation plants because Consolidation has not required that it be done with USA-represented employees.

Mountaineer also relies on its collective-bargaining agreements with USA, its practice, area practice, relative skills, and economy and efficiency of operation as factors favoring the assignment to USA-represented employees.

The UMWA also repeats the argument it made in the companion case. The UMWA asserts that Mountaineer and Industrial are sister companies which have the same officers and engage in the same type of construction work performed by employees who enjoy the same health and insurance benefits and that consequently the former is bound by the ABC contract to which the latter is a party.

UMWA also asserts that, when Industrial performs work under the ABC contract, the panel of UMWA-represented employees is drawn from workers who have already performed coal lands construction for Industrial and, if an employee attempts to perform work for which he does not have the requisite ability, the construction company has the right to return him to his former job or to the panel. The UMWA contrasts that situation with Mountaineer's contract with USA under which the latter initially determines the skills of the individual it sends to the jobsite. However, the UMWA concedes that Mountaineer has authority to return the employee to USA if it determines that he is "incompetent" to perform the work.

D. *Applicability of the Statute*

Before the Board may proceed with a determination of the dispute pursuant to Section 10(k) of the Act, it must be satisfied that there is reasonable cause to believe that (1) Section 8(b)(4)(D) has been violated and (2) that the parties have not agreed on a method for the voluntary adjustment of the dispute.

As to (1), it is clear that USA categorically stated that any attempt to "defeat" USA jurisdiction by assigning the work to UMWA-represented employees would result in USA's establishment of a picket line. As to (2), the parties stipulated that there is no agreed-on method for voluntary adjustment of this dispute.

On the basis of the entire record, we conclude that there is reasonable cause to believe that a violation of Section 8(b)(4)(D) has occurred[8] and that there exists no agreed-on method for voluntary adjustment of the dispute within the meaning of Section 10(k) of the Act. Accordingly, we find that this dispute is properly before the Board for determination.

E. *Merits of the Dispute*

Section 10(k) of the Act requires the Board to make an affirmative award of disputed work after considering various factors. *NLRB v. Electrical Workers IBEW Local 1212 (Columbia Broadcasting)*, 364 U.S. 573 (1961). The Board has held that its determination in a jurisdictional dispute is an act of judgment based on common sense and experience, reached by balancing the factors involved in a particular case. *Machinists Lodge 1743 (J. A. Jones Construction)*, 135 NLRB 1402 (1962).

The following factors are relevant in making the determination of the dispute.

1. Certification and collective-bargaining agreements

Neither of the Unions included herein have been certified by the Board as the collective-bargaining

[6] 273 NLRB 1167 (1984).

[7] Neither the bargaining unit employees at the Loveridge project nor the bargaining unit employees at the Humphrey project have worked for Industrial.

[8] Although Mountaineer's president testified that the work at the Loveridge project would be completed within a few days of the hearing, the dispute as to that work is not moot absent evidence that it will not arise again if Mountaineer later performs similar work. See *Boston Building Trades Council (Methuen Construction)*, 269 NLRB 479 (1984).

representative for a unit of Mountaineer's employees. Certification is not a factor in this case.

Mountaineer contends, and we agree, that as a nonmember of ABC and a nonsignatory of the ABC contract it is free to perform construction work at coal mine sites with non-UMWA represented employees. We also agree with its contention that as an entity separate from Industrial the latter's membership in ABC does not oblige Mountaineer to be governed by the ABC contract. However, assuming, as the UMWA contends, that Mountaineer and Industrial constitute one employer, in the companion cases issued today[9] we refuse to find that article I of the ABC contract obligated signatory employers to use UMWA-represented employees in the absence of a requirement by the coal companies that such employees be used. As Consolidation interposed no objection to Mountaineer's plan to utilize USA-represented employees and made it clear that it awarded contracts for the Loveridge and Humphrey projects on the basis of "price, delivery and quality," we find that Consolidation did not require that the work be performed "under UMWA jurisdiction" and that Mountaineer was therefore free to utilize employees represented by USA.

2. Employer assignment, past practice, and area practice

As indicated above, it has been and continues to be Mountaineer's preference and practice to restrict itself to construction work for only those coal companies which do not require the use of UMWA-represented employees. This practice is also followed by Mountaineer's competitors.

In view of the foregoing, we find that area practice and Mountaineer's preference for the use of USA-represented employees clearly weigh in favor of Mountaineer continuing to assign the disputed work to those employees.

3. Relative skills

Mountaineer's president Don Hoylman testified that the USA-represented employees at the Loveridge and Humphrey projects have demonstrated the skills necessary to perform the work and that they have done an outstanding job, as a result of which he anticipated that the work would be done ahead of schedule and "under budget." Hoylman also stated that if the UMWA-represented employees were not subject to the terms of the ABC agreement they were competent to perform the work in question.

As it appears that the employees represented by each labor organization possess the requisite skills to perform the work in question, we find this factor to be inconclusive.

4. Economy and efficiency of operation

As indicated above, Mountaineer's president testified that the USA-represented employees were doing an outstanding job as a consequence of which the work would be completed ahead of schedule and under budget. He also testified as follows. The USA contracts provide Mountaineer with greater leeway than the ABC contract with respect to moving employees from one classification to another. In contrast to the ABC contract which limits employees to a panel of UMWA-represented employees, Mountaineer is free under the terms of the USA contracts to select from those referred by USA only those individuals who are deemed by Mountaineer to be best qualified. The USA contracts promote efficiency because they, unlike the ABC contract, permit foremen (who are classified as pushers) to perform bargaining unit work and help employees. The USA contracts are economically beneficial in that they provide for an 8-hour workday at straight time while the ABC contract provides for a 7-1/2-hour workday and a half hour paid lunch period. In sum, application of the terms of the ABC contract would make Mountaineer noncompetitive.

In view of the foregoing, we find that the factors of economy and efficiency favor the continuation of the assignment at the Loveridge and Humphrey projects to the USA-represented employees.

Conclusion

On the record as a whole, and after full consideration of all relevant factors involved, we conclude that employees who are represented by USA are entitled to perform the work in dispute. We reach this conclusion relying on the non-ABC membership of Mountaineer, the fact that it is not a signatory of the ABC contract, the absence of any requirement by Consolidation that it utilize UMWA-represented employees, Mountaineer's collective-bargaining contracts with USA, economy and efficiency of operating with USA-represented employees, its preference for such employees, and area practice in that regard. In making this determination, we are awarding the disputed work to employees who are represented by USA, but not to that Union or its members.

DETERMINATION OF DISPUTE

The National Labor Relations Board makes the following Determination of Dispute:

[9] *United Services Union (Mountaineer Resources)*, 273 NLRB 1167 (1984); *United Services Union (Lincoln Contracting)*, 273 NLRB 1164 (1984).

Employees of Mountaineer Resources, Inc. who are currently represented by United Services of America, International Labor Union are entitled to perform the installation of new coal preparation and material handling equipment at Consolidated Coal Company's preparation plants in Loveridge and Humphrey, West Virginia.

SunarHauserman *and* UBC, Southern Council of Industrial Workers, United Brotherhood of Carpenters and Joiners of America, AFL–CIO, Local No. 2982, Union-Petitioner. Case 26–UC–104

14 December 1984

DECISION ON REVIEW AND UNIT CLARIFICATION

BY CHAIRMAN DOTSON AND MEMBERS ZIMMERMAN AND HUNTER

On 6 February 1984 the Regional Director for Region 26 issued his decision and order dismissing the Union's petition for unit clarification. The Regional Director found the petition inappropriate because it attempted to clarify the contractually agreed-upon bargaining unit during the term of the parties' collective-bargaining agreement. Thereafter, in accordance with Section 102.67 of the Board's Rules and Regulations, the Union filed a timely request for review alleging that the Regional Director made inadequate and erroneous findings of fact.

By telegraphic order dated 24 May 1984 the Board granted the Union's request for review, reinstated the petition and remanded the case to the Regional Director for a hearing and an appropriate decision. On 6 July 1984 the hearing officer issued a report setting forth the issues and facts. On 11 July 1984 the Acting Regional Director issued an order transferring the case to the Board.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the entire record in this case and makes the following findings.

The Employer manufactures modular office furniture. The Union was certified in 1965 and represents the following unit of employees:

> All production and maintenance employees at the Employer's Marked Tree, Arkansas, plant, excluding office clerical employees, professional employees, guards and supervisors as defined in the Act.

The Employer and the Union are parties to a collective-bargaining agreement effective 14 November 1983 through 15 November 1986. The parties' previous contract was negotiated in late 1980 and was in effect from 1980 to 1983. The petition urges that the job classifications of inventory cycle counter, quality control technician, receiving clerk, and dock auditor are properly included in the unit. For the reasons discussed below we find that the inventory cycle counter, quality control technician and receiving clerk have been historically excluded from the unit and that the position of dock auditor is appropriately included in the unit.

The classifications covered by the petition are salaried positions which participate in programs and receive benefits different from those of the hourly unit employees. These benefits include different systems of performance review, education reimbursement, medical insurance, life insurance, vacation scheduling, and pension benefits. Unlike the unit employees, the disputed classifications do not punch a timeclock.

The position of inventory cycle counter was created 5 September 1977. The position was originally entitled production and inventory control coordinator and was necessitated by expansion and the institution of a new inventory system. The counter's duties include daily monitoring of inventory, counting parts in work areas and checking them against a ledger balance, and overseeing the inventory control system. Although the position involves a substantial amount of time working on the factory floor it also entails a significant amount of paperwork. For the first 3 years of the position's existence, the counter had a desk in the main clerical office, an area separate and enclosed from the plant floor. When the main clerical office became overcrowded, the counters were moved to an enclosed cubicle in the plant area.

The position of quality control technician was created in October 1979. The position was necessitated by an increase in inventory and a need to assure that all materials complied with specifications. The position evolved from the unit classification of inspector, which primarily involved the visual checking of goods from a specific department. The technician position is more complex in that it requires the use of sensitive equipment, the ability to read blueprints, and the ability to conduct chemical paint analysis. The technician's duties include checking the material acceptability of parts, sampling, and assuring compliance with blueprints. Technicians perform a significant amount of clerical work and are situated in cubicles in the plant area.

The position of receiving clerk, originally entitled receiving and supply clerk, has been in existence since at least October 1977. The receiving clerk checks and identifies incoming materials and directs them throughout the plant. The position involves a substantial amount of paperwork including maintenance of purchase orders, logs, financial data, inspection sheets, and invoices.

The position of dock auditor was created 2 March 1981. The position was necessitated by frequent mistakes in outgoing shipments. The dock auditor's duties consist of checking the merchan-

dise being shipped against a packing list. The dock auditor works primarily in the loading dock area and works closely with unit employees in the shipping crew. The dock auditor and the shipping crew are commonly supervised. The position involves minimal clerical work. Before the dock auditor's position was established, a crew leader or unit employee performed this function. Following the creation of the dock auditor's position the number of shipping errors decreased and the need for a full-time dock auditor diminished. Since October 1983 the position has been vacant.[1] The auditor's functions are currently performed by unit employees or the crew leader, much the same as preceded the creation of the dock auditor position.

The Union contends that it reserved the right to file a unit clarification petition concerning the disputed classifications after the parties reached impasse during the 1983 contract negotiations. It further asserts that the duties of the disputed classifications were performed in the past by bargaining-unit employees and that these duties are plant clerical in nature, similar to those of unit members. The Employer contends that most of the disputed positions existed before the 1980 and 1983 contract negotiations and that they do not share a community of interest with bargaining-unit employees.

We find that the position of inventory cycle counter, quality control technician, and receiving clerk have historically been excluded from the unit. The evidence shows that these positions were in existence at the time of the parties' 1980 and 1983 contract negotiations. The record does not indicate that the Union sought to include these positions in the unit.[2] The contractual unit reached by the parties did not include the above-mentioned classifications. Furthermore, the evidence does not show that the duties of these positions have changed. Based on the foregoing evidence, we agree with the Regional Director that clarification of the unit with respect to these classifications is inappropriate.

Contrary to the Regional Director, we find that the dock auditor has not historically been excluded from the unit and that it is appropriate to clarify the unit so as to include that classification. The dock auditor position was created in March 1981. The Union's first opportunity to include this position in the unit was during the parties' 1983 contract negotiations. The Union unsuccessfully attempted to include the dock auditor. Upon reaching impasse, however, the Union informed the Employer that it would pursue the disputed classifications, including dock auditor, by way of a unit clarification petition. The Union did not abandon its proposal to include the dock auditor in exchange for a concession during bargaining. Thus, the Union did not acquiesce in the exclusion of the dock auditor from the unit.

We further find that the dock auditor shares a community of interest with unit employees. The dock auditor works in close contact with the shipping crew in the loading area and performs functions closely related to those of the unit employees. The dock auditor and unit employees are commonly supervised and the dock auditor's duties are performed by unit employees when the former is absent.

Accordingly, as we find the position of dock auditor has not historically been excluded from the unit and shares a community of interest with unit employees, we shall clarify the unit to include it. The petition is otherwise dismissed.

ORDER

The unit of production and maintenance employees represented by UBC, Southern Council of Industrial Workers, United Brotherhood of Carpenters and Joiners of America, AFL–CIO, Local No. 2982, at SunarHauserman is clarified to include the classification dock auditor.

[1] The Employer's plant manager and assistant manager testified that the dock auditor position has not been eliminated, that the auditor's job description remains on file, and that the position would be filled if the number of shipping errors increased to previous levels.

[2] At the time the quality control technician position was created the Union filed a grievance alleging that the Employer was removing work from the bargaining unit. The parties resolved the grievance by returning four employees to their hourly positions and keeping two as technicians.

Production Workers Union of Chicago and Vicinity, Local 707; The National Production Workers Union *and* Checker Taxi Company, Inc. *and* Yellow Cab Company, Inc. Cases 13–CC–1159 and 13–CC–1160

14 December 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS ZIMMERMAN AND HUNTER

On 9 March 1981 Administrative Law Judge Stanley N. Ohlbaum issued the attached decision. The General Counsel and the Charging Parties[1] filed exceptions and supporting briefs, and the Respondents filed an answering brief and motion to strike the Charging Parties' briefs.[2]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and recommendations only to the extent consistent with this Decision and Order.

The pertinent facts are not in dispute. The two Charging Parties, Checker Taxi Company (Checker) and Yellow Cab Company (Yellow), own between them 3666 of the 4600 taxicabs franchised in Chicago. As franchise holders they may lease out their cabs but the lessees ("leased cab drivers" or "LCDs") may not, under a city of Chicago ordinance, sublease the cabs or permit them to be driven by other drivers.

Six of Yellow's seven garages house only LCD cabs. The remaining garage houses cabs operated by "commission drivers," who are drivers employed by Yellow. Similarly, Checker maintains five garages all with cabs operated exclusively by LCDs with the exception of one garage with cabs operated both by LCDs and commissioned drivers. At the time of the hearing, only 340 of Yellow's 2166 cabs and 200 of Checker's 1500 cabs were operated by commissioned drivers. LCDs lease their cabs for periods ranging from half of a day to 1 week. Generally, they lease the cabs on a daily basis.

No clerical personnel at the Yellow and Checker garages are unionized but the service and maintenance employees and commissioned drivers are represented by the Seafarers Union Local 777.[3] The LCDs are alleged and admitted to be independent contractors.[4]

Sometime in 1980, the LCDs became increasingly dissatisfied with the terms of their leases and began to band together to deal collectively with the Charging Parties under the leadership of an LCD, the Reverend Joseph McAfee. In early July 1980, McAfee consulted with officials of Respondent Unions. By the end of July, McAfee had enlisted about 1200 of the approximately 3126 Yellow and Checker LCDs in his collective effort and had formed the so-called "Leased Taxicab Drivers Division" within Respondent Unions. For a time the division had a separate office. Initiation fees and dues collected from the LCDs were used for office rent and maintenance, and for organizational expenditures.

By letters dated 8 August 1980 Respondent Unions requested on behalf of "the overwhelming majority of the drivers who are leasing cabs from your company" that the Charging Parties, respectively, meet with the Unions "for the purpose of reaching an agreement setting forth uniform conditions regarding the leasing of the cabs." The Charging Parties refused to recognize, meet, or bargain with the Unions and have continued to refuse to meet with the Unions up to the time of the hearing.

On 12 August 1980 the Respondent Unions and the LCDs started picketing and handbilling several of the garages of the Charging Parties.[5] The picket signs read variously: "Please do not lease a cab until an agreement is signed regarding your working conditions"; "On Strike Production Workers Union Local 707";[6] "Lease Cabs on Strike Production Workers Union Local 707"; and "Lease Cab 707 Drivers 707 on Strike Yellow & Checker Taxi Cab Company." The picketing activity was effective in reducing the number of cabs leased by the LCDs from the Charging Parties.

At the inception of the picketing, a picket line went up at the one Yellow garage housing vehicles operated only by its commissioned drivers. As soon as a Seafarers official arrived and complained, the

[1] The Charging Parties have requested oral argument. This request is denied as the record, the exceptions, and the briefs adequately present the issue and the positions of the parties.

[2] The Respondents have moved to strike the briefs of the Charging Parties as failing to comply with Board Rules and Regulations. This motion of the Respondents is denied as lacking in merit.

[3] The parties stipulated that the Respondents do not seek to represent any employees represented by the Seafarers.

[4] The United States Court of Appeals for the District of Columbia found these LCDs to be independent contractors in *Seafarers Local 777 v. NLRB*, 603 F.2d 862 (D.C. Cir. 1979). The General Counsel has stated correctly that for purposes of the instant case, the court's decision is the law of the case and therefore controlling on the independent contractor status of the LCDs. The parties stipulated that the nature of the Charging Parties' operations has not changed since the court of appeals' decision.

[5] The Respondents' counsel stated on the record, "We started picketing . . ." and "We agree we picketed."

[6] This sign was not authorized by the Respondents and its use was discontinued within a day or less after it was first displayed.

pickets left. The picketing at that garage lasted at most for 30 minutes. Other than this one incident, the picketing was confined to garages out of which LCDs operated and was soley directed at the Charging Parties and their potential LCDs. Apparently, however, during the picketing some of the Charging Parties' suppliers refused to make deliveries. There is no evidence that members of the public who use taxicabs patronize the garages directly or that any individuals declined to use taxicabs during the picketing.

There is evidence that considerable violence, not shown to have been directly linked to the Respondents or the picketing, occurred during the Respondents' efforts to obtain recognition as representative of the LCDs. On 9 September 1980 the Board's Regional Director in Chicago sought a temporary injunction under Section 10(l) of the Act in the United States District Court for the Northern District of Illinois, Eastern Division, pending disposition of this proceeding. The Regional Director's petition was denied by the court on 11 December 1980. The Charging Parties also unsuccessfully sought an injunction in the Circuit Court of Cook County against the Respondents and all the LCDs involved in the collective activity. The Illinois Court of Appeals affirmed the Circuit Court's ruling that there was, inter alia, no illegal purpose to the picketing and no nexus shown between the alleged violence and the Respondents.

Relying in part on the absence of any conventional "labor dispute," the administrative law judge concluded, inter alia, that subject matter jurisdiction could not properly be asserted here and, accordingly, that the Respondents have not violated Section 8(b)(4)(i) and (ii)(B) of the Act. We cannot agree with the judge that the Board lacks subject matter jurisdiction here or that the Respondents did not violate Section 8(b)(4) of the Act.

With regard to the lack of a conventional labor dispute as defined in Section 2(9) of the Act, there is some conflict in the circuit courts regarding the import of that fact on Board jurisdiction. As noted by the judge, the Fourth Circuit has found that a conventional labor dispute is a prerequisite to Board jurisdiction.[7] In contrast, the Circuit Court for the District of Columbia held in *Maritime Union (Delta Steamship) v. NLRB*,[8] and later in *Monarch Long Beach Corp.*,[9] that Section 2(9) of the Act does not define the Board's jurisdiction and, since the term "labor dispute" does not appear in Section 8(b)(4), that section's operation is not limited by the definition of "labor dispute" in Section 2(9). This dispute appears to have been laid to rest by the Supreme Court recently in *Longshoremen ILA v. Allied International*,[10] in which the union argued that the boycott in question was not a "labor dispute" but rather a political dispute with a foreign nation. The Supreme Court rejected the union's argument stating that neither the plain language of Section 8(b)(4) nor the legislative history confined the scope of that section to "labor" as opposed to "political" disputes. The Court added that Section 8(b)(4) was deliberately "drafted broadly" and that "[d]espite criticism from President Truman as well as from some legislators that the secondary boycott provision was too sweeping, the Congress refused to narrow its scope. Recognizing that '[i]llegal boycotts take many forms' . . . Congress intended its prohibition to reach broadly."[11] In this light, we find that, contrary to the judge, the Board does have subject matter jurisdiction in this case.

The judge further concluded that the activities of the Unions here were not those of a "labor organization qua labor organization and as such they should not be treated as labor organizations for purposes of Section 8(b)(4)." This hypothesis is not supported by case precedent. In their answer, the Respondents admit that they are labor organizations within the meaning of the Act, thus avowing that they exist at least in part for the purposes set forth in Section 2(5) of the Act. And, as such, it has long been established that the Respondents are subject to the proscriptions of Section 8(b)(4) whether or not their activities concern statutory employees.[12] Accordingly, the fact that the Respondent Unions' ultimate objective was improved leases for a group of independent contractors rather than more customary union objectives cannot shield the Unions if their conduct is otherwise unlawful in nature.

The question remains then whether the Respondents' conduct, when subjected to the scrutiny of Section 8(b)(4), was violative of that section of the Act. Concededly, the usual example cited in the legislative history of conduct addressed by Section 8(b)(4) involves a labor dispute in which the union's activity is directed toward a neutral employer in order to pressure another employer whose employees the union seeks to represent or benefit. This is clearly not the factual situation presented to us here. However, "the mere fact that the

[7] *NLRB v. Longshoremen's ILA*, 332 F.2d 992 (4th Cir. 1964).
[8] 346 F.2d 411 (D.C. Cir. 1965).
[9] *Teamsters Local 812 v. NLRB*, 657 F.2d 1252 (D.C. Cir. 1980).
[10] 456 U.S. 212 (1982).
[11] Id. at 225
[12] See, e.g., *Masters, Mates & Pilots Local 47 (Chicago Calumet Stevedoring)*, 144 NLRB 1172 (1963); *Electrical Workers IBEW (McCormick & Sons)*, 150 NLRB 363 (1964), enfd. 350 F.2d 791 (D.C. Cir. 1965); and *Machinists (Lufthansa German Airlines)*, 197 NLRB 232 (1972).

language of this Section comprehends the familiar patterns of a secondary boycott in the customary sense does not inexorably dictate the conclusion that it excludes all variations from those patterns."[13] Moreover, although the term "secondary boycott" is generally used as a "short-hand reference to the conduct forbidden by Section 8(b)(4),"[14] as noted earlier the actual language of Section 8(b)(4) is intentionally broad and our application of that section need not be limited by that term when, as here, a union's conduct fits within the actual language of the statute.[15]

For interpretation of such a broadly drafted legislative provision the Supreme Court suggests, in *National Woodwork Mfrs.*, examining the problem to which the legislation was addressed.[16] In this regard, the general congressional declaration of purpose and policy stated in the Act itself is "to promote the full flow of commerce" and "to define and proscribe practices on the part of labor and management which affect commerce and are inimical to the general welfare." Thus, as the Supreme Court stated in *Allen Bradley Co. v. Local 3*,[17] Congress was concerned with preserving a "competitive business economy" and balancing this goal with preserving "the rights of labor to organize to better its conditions through the agency of collective bargaining." And, specifically regarding Section 8(b)(4), the Supreme Court has found "the dual Congressional objectives of preserving the right of labor organizations to bring pressure to bear on offending employers in primary labor disputes and of shielding unoffending employers and others from pressures in controversies not their own."[18] Although it is fairly clear here that the aim of the Unions is to circumvent the circuit court decision finding the LCDs to be independent contractors rather than employees, the fact remains that these LCDs have been found to be independent contractors and, as such, the Unions' efforts on their behalf[19] fall neither within "the right of labor to organize to better its conditions" (*Allen Bradley*, supra) or "the rights of labor organizations to bring pressure to bear on offending employers in primary labor disputes" (*Denver Building Trades*, supra). Moreover, the Respondents' activities clearly had a deleterious effect on commerce. As a matter of balancing general policy objectives, then, the equations are not balanced in the Respondents' favor.

Additionally, note should be made of the intent behind the 1959 amendments to Section 8(b)(4). It is clear from the legislative history that the Congress was concerned, in part, with instances during which unions had used coercive tactics where their objectives were unrelated to representing employees. Thus, the Senate report on the bill states that it was designed to include "boycotts by railroad employees, agriculture workers, Government employees, and *other groups* now excluded from the secondary boycott ban of the Taft-Hartley Act—secondary boycotts by these groups are just as much against the public interest as boycotts by anyone else."[20] Thus the courts have found that Section 8(b)(4) encompasses conduct on behalf of individuals found not to be statutory employees.[21] And, consistent with this legislative history, the Supreme Court agreed with the court of appeals in *Allied International*, supra, involving a refusal by longshoremen to unload vessels with cargo shipped from the Soviet Union, that it is "more rather than less objectionable that a national labor union has chosen to marshal against neutral parties the considerable powers derived by its local and itself under the federal labor laws in aid of a random political objective far removed from what has traditionally been thought to be the realm of legitimate union activity."[22]

Given the strong legislative and case history, some equally strong indication that picketing on behalf of independent contractors, i.e., forcing or requiring any "person" to cease using the products of any other producer, was intended to be protected by the proviso shielding primary activity would seem to be required. However, we find no implication in either the legislative history or case precedent that Congress intended the "primary" proviso to apply to this conduct. Indeed, what precedent there is weighs heavily against such an extension of the definition of "primary." Thus, in *Santini Bros.*, the union was attempting to become the collective-bargaining representative of a group of truckdrivers. Since the Board found those drivers to be independent contractors, it also found the union's conduct violative of Section 8(b)(4).[23]

We note in a related vein that it is not necessary, in order to find unlawful "secondary" activity, to

[13] *Delta Steamship*, supra at 417.

[14] Ibid.

[15] Significantly the words "secondary boycott" do not appear in Sec. 8(b)(4) or elsewhere in the statute.

[16] 386 U.S. 612, 620 fn. 5 (1967).

[17] 325 U.S. 797, 806 (1945), quoted in *NLRB v. International Rice Milling Co.*, 341 U.S. 665 fn. 7 (1951). See also *Maritime Union v. NLRB*, 342 F.2d 538, 544 (2d Cir. 1965).

[18] *NLRB v. Denver Building Trades Council*, 341 U.S. 675, 692 (1951).

[19] Contrary to the judge's finding that the Respondents acted only in an advisory capacity, as noted above the Respondents admit in their answer and on the record that they picketed the Charging Parties.

[20] 1959 U.S. Code Long & Ad. News 2394 (emphasis added).

[21] See, e.g., *Chicago Calumet Stevedoring*, supra, and *Marriot In-Flite Service v. Transport Workers*, 557 F.2d 295 (2d Cir. 1977).

[22] *Allied International*, supra at 1664.

[23] 208 NLRB 184 (1974). See also *Teamsters Local 221 (Perkins Motor Transport)*, 222 NLRB 423 (1976).

find that a "primary" dispute exists at all.[24] For example, in *Monarch Long Beach*, supra, the union urged consumers to boycott those soft drinks sold by Monarch, a retail store, which were not locally bottled. Since the location of bottling was not clearly marked on the soft drink containers, the union in effect was urging a general boycott of soft drinks sold by Monarch. The court found "ample authority to support the Board's view that it need not identify a 'primary labor dispute' to find a violation of Section 8(b)(4)(ii)(B)."[25]

In conclusion, the Union's picketing here, directed at the LCDs with the objective of circumventing the circuit courts' decision finding that the LCDs are independent contractors, was violative of Section 8(b)(4)(ii)(B) of the Act. And, it is not material whether or not the Unions' ultimate goal was lawful, since its intermediate goal, that of causing the interruption of leases between the Charging Parties and the LCDs, in the absence of a primary labor dispute, was clearly within the scope of the broad proscription of Section 8(b)(4)(ii)(B).

With regard to the alleged violation of Section 8(b)(4)(i)(B)—the picketing of the Yellow Cab garage housing only vehicles operated by commissioned drivers —there is no evidence that the Respondents could not have learned that no LCDs used the garage before they commenced picketing. Concededly, the Respondents ceased picketing at that garage as soon as they were apprised by a representative of the Seafarers that no LCDs were present. However, "[t]he Act does not say you may picket whenever you wish, and against any employer you may wish, and continue picketing while you inquire and determine—in your own judgment—whether you have a right to do such picketing."[26] Accordingly, we find the Respondents' conduct to be violative of Section 8(b)(4)(i)(B) of the Act.

CONCLUSIONS OF LAW

1. Respondents Production Workers Union of Chicago and Vicinity, Local 707 and The National Production Workers Union are labor organizations within the meaning of Section 2(5) of the Act.

2. By picketing the Charging Parties with an object of interrupting the leases between the Charging Parties and the leased cab drivers and inducing the commissioned drivers to cease work, the Respondents have violated Section 8(b)(4)(i) and (ii)(B) of the Act.

3. These unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that the Respondents have engaged in certain unfair labor practices, it shall be recommended that the Respondents be ordered to cease and desist therefrom and that they take certain affirmative action designed to effectuate the policies of the Act.

ORDER

The Respondents, Production Workers Union of Chicago and Vicinity, Local 707; The National Production Workers Union, Chicago, Illinois, their officers, agents, and representatives, shall

1. Cease and desist from

(a) Threatening, coercing, or restraining Checker Taxi Company, Inc. and Yellow Cab Company, Inc. or any other persons engaged in commerce or an industry affecting commerce, where an object thereof is to force the above-named persons or any other person to cease doing business with leased cab drivers under circumstances prohibited by Section 8(b)(4)(ii)(B) of the Act.

(b) Engaging in or inducing or encouraging employees of the Yellow Cab Company, Inc. or other employees engaged in commerce or in an industry affecting commerce to engage in a work stoppage or strike or refusal in the course of their employment to use or handle any materials or to perform any service as prohibited by Section 8(b)(4)(i)(B) of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Post at their business office and meeting halls copies of the attached notice marked "Appendix."[27] Copies of the notice, on forms provided by the Regional Director for Region 13, after being signed by the Respondents' authorized representative, shall be posted by the Respondents immediately upon receipt and maintained by them for 60 consecutive days in conspicuous places including all places where notices to members are customari-

[24] *Delta Steamship*, 346 F.2d 411 at fn. 14. See also *Bow & Arrow Manor*, 206 NLRB 581 (1973). Thus, while we find that the *restrictive* scope of Sec. 8(b)(4) is not limited to "labor disputes," this finding is thoroughly consistent with our conclusion that the "primary proviso" was not intended to exempt picketing by labor organizations on behalf of independent contractors. Indeed, that is precisely our point—it is unnecessary to even decide here where the "primary" disputes lie, or whether there is any primary dispute at all, since it is clear that the Union here is *not* engaged in a primary labor dispute with the employers.

[25] *Monarch Long Beach*, 657 F.2d at 1259. See also *Delta Steamship*, supra.

[26] *Broadcast Employees (Osprey Productions)*, 226 NLRB 641, 644 (1976).

[27] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

ly posted. Reasonable steps shall be taken by the Respondents to ensure that the notices are not altered, defaced, or covered by any other material.

(b) Sign and mail to the Regional Director for Region 13 sufficient copies of said notice, to be furnished by him for posting by Checker Taxi Company, Inc. and Yellow Cab Company, Inc. if willing.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondents have taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT threaten, coerce, or restrain Checker Taxi Company, Inc., or Yellow Cab Company, Inc. or any other person engaged in commerce or in an industry affecting commerce, where the object thereof is to force the above-named persons or any other person to cease doing business with leased cab drivers under circumstances prohibited by Section 8(b)(4)(ii)(B) of the Act.

WE WILL NOT induce or encourage employees of the Yellow Cab Company, Inc. or any other employer engaged in commerce to engage in a work stoppage or strike or refusal in the course of their employment to use or handle any materials or perform any service as prohibited by Section 8(b)(4)(i)(B) of the Act.

PRODUCTION WORKERS UNION OF CHICAGO AND VICINITY, LOCAL 707; THE NATIONAL PRODUCTION WORKERS UNION

DECISION

PRELIMINARY STATEMENT

STANLEY N. OHLBAUM, Administrative Law Judge. This consolidated proceeding[1] under the National Labor Relations Act was litigated before me in Chicago, Illinois, on October 22–24, 1980, with all parties participating throughout by counsel, who were afforded full opportunity to present evidence and contentions and thereafter to file briefs received by November 26, 1980. Additional documents were subsequently received. These[2] have been made part of the record which, together with briefs, have been carefully considered.

The basic issue is whether Respondent Unions have violated Section 8(b)(4)(i) and (ii)(B) of the Act in various respects to be described.

On the entire record and my observation of the testimonial demeanor of the witnesses, I make the following

FINDINGS AND CONCLUSIONS

I. PARTIES; JURISDICTION

At all material times, Respondents Production Workers Union of Chicago and Vicinity, Local 707 and The National Production Workers Union have been and are labor organizations within the meaning of Section 2(5) of the Act, with their principal office in Chicago, Illinois. At all material times Charging Party Checker Taxi Company, Inc. (Checker Taxi or Checker) has been and is a New York corporation and Charging Party Yellow Cab Company (Yellow Cab or Yellow) has been and is a Maine corporation; each of said Charging Parties has maintained an office and place of business in and has been engaged in providing public taxicab service in Chicago, Illinois. During the representative year immediately preceding issuance of the consolidated complaint, each of the Charging Parties derived gross revenues exceeding $500,000 in its business operations; and, during the same period, each of the Charging Parties annually purchased and received goods and materials valued in excess of $50,000 at and for use in its business operations in Illinois.

I find that at all material times each of the Charging Parties has been and is a person engaged in commerce within the meaning of the Act.[3]

II. ALLEGED UNFAIR LABOR PRACTICES

A. *Facts as Found*

Much basic fact here is not in essential dispute. The record contains expansive colloquy with counsel exploring their basic contentions in what appears to be fundamentally a case of novel impression.

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[1] Based on a consolidated complaint issued on September 23 by the Board's Acting Regional Director for Region 13, stemming from charges filed by the Charging Parties on September 2 as amended on September 9, 1980.

[2] I.e., (1) a December 15, 1980 one-page letter from Respondents' counsel, with attached five-page transcript of proceedings before Honorable Prentice H. Marshall, U.S. district judge for the Northern District of Illinois, Eastern Division, in Case No. 80 C 4819 entitled *Donald J. Crawford, Acting for the National Labor Relations Board, Petitioner v. Production Workers Union of Chicago, Local 707; The National Production Workers, Respondents* (marked herein ALJ Exhs. 1 and 2); (2) a seven-page December 19, 1980 letter from the Charging Parties' counsel, responsive to the foregoing item (1) (ALJ Exh. 3); and (3) a January 21, 1981 one-page letter from Respondents' counsel, with attached seven-page opinion of Justice Jiganti on behalf of the Illinois Appellate Court, First District, on December 31, 1980, in Case No. 80-2516 entitled *Yellow Cab Company, Inc. and Checker Taxi Company, Inc., Plaintiffs-Appellants vs. Production Workers Union of Chicago and Vicinity, Local 707, an Affiliate of the National Production Workers Union: National Production Workers Union [et al.], Defendants-Appellees* (ALJ Exhs. 4 and 5).

[3] Conclusions concerning jurisdiction over the subject matter of this proceeding are set forth infra.

Charging Parties Checker Taxi and Yellow Cab control most of the taxicab industry in Chicago. Of the 4600 taxicabs franchised in Chicago, Yellow Cab owns 2166 and Checker Taxi 1500, for an aggregate of 3666, with only 934 comprising all of the remainder. By Chicago ordinance, cabs may be operated only by the licensees or franchise (medallion) holders, who may, however, lease out their cabs; but such lessees (leased cab drivers or LCDs) may not sublease or permit the cabs to be operated by others. Yellow Cab maintains seven Chicago cab garages, with only one (South Indiana Avenue) housing cabs operated solely by drivers (commission drivers) in its own employ, all six others housing only LCD-operated cabs. Checker Taxi maintains five Chicago cab garages, with cabs in only one (North Elston Avenue) housing cabs operated by "commission drivers" in its own employ as well as cabs operated by LCDs; all of its four other garages house only LCD-operated cabs. All garages of each Company are staffed and maintained by nonunionized managerial and clerical personnel and by unionized maintenance and service employees (carwashers, greasers, mechanics, radio technicians, etc.) represented by Seafarers Union Local 777. There is no indication that the traveling public patronizes any of these garages. Taxicabs are leased out by each of the Companies to LCDs on a daily, half-daily, several days, or weekly basis, the predominant arrangement being the daily lease at a base rental of $41 or $43.

Over the course of the past several years (2 in the case of Yellow Cab, 5 in the case of Checker Taxi), both Yellow Cab and Checker Taxi have converted the essential nature of their operations from running their cabs through their own employees (commission drivers)—with whom they were under obligation to bargain collectively under the Act—to the present system of leasing out their taxicabs to individual independent operators (LCDs), so that as of August 1980 only 340 of Yellow Cab's 2166 cabs were operated by its own commission driver employees and the balance of 1826 by LCDs; and similarly, at the time of this trial, only 200 of Checker Taxi's 1500 cabs were operated by drivers in its own employ and the balance of 1300 by LCDs.[4] The commission driver-operated cabs and the LCD-operated cabs of each of the Companies are not commingled, but segregated from each other by identifying numbers.

At all times here material, Charging Parties Checker Taxi and Yellow Cab have been involved in "providing" public taxicab service in Chicago through their ownership of taxicabs, franchised by the city of Chicago, operated through the foregoing two different categories of drivers—i.e., (1) a dwindling number of commission drivers in their direct employ as employees within the meaning of the Act and represented for collective bargaining by Seafarers Union and (2) an ever-increasing number of operators to whom they rent or lease their taxicabs (leased cab drivers or LCDs). As to the second category (LCDs), the complaint (par. II(g)) alleges that they (i.e., the LCDs) have at all material times been and are independent contractors.[5] As has already been indicated, the first category drivers—i.e., the taxicab companies' commission drivers in their employ as employees—have been and are, together with the Companies' "inside" maintenance and automotive service personnel, represented for collective bargaining by Seafarers Local Union 777, and it is stipulated that Respondents do not seek to represent any of them. At least since the conversion of the Charging Parties' operations from direct employment of drivers to the leasing of their cabs, the LCDs—as they no longer have the status of employees within the meaning of the Act—have been unrepresented for collective bargaining as employees.

Because of mounting dissatisfaction with what they regarded as the unsatisfactory and increasingly onerous terms and provisions under which the Charging Parties were leasing out their taxicabs, the LCDs, under leadership of one of their number, Reverend Joseph McAfee, associated themselves to deal collectively with the taxicab companies in order to obtain more favorable lease terms. There accordingly came a time, in early July 1980, when McAfee consulted with officials of Respondent Unions to seek the benefit of their supposed expertise in dealing with the taxicab companies to obtain more favorable lease terms. Before the end of July, McAfee had enlisted about 1200 fellow LCDs in this cooperative endeavor. McAfee did not seek to enlist any "commission driver" employee or inside employee, nor is there any indication or claim that any person in that category at any time joined therein.

On this basis, in late July or early August 1980, there was organized, formed, or constituted within Respondents an infrastructure known as the Leased Taxicab Drivers Division,[6] for a time with its own separate office location and meeting place. Initiation fees and dues, collected from LCDs who joined, were utilized for office rent and maintenance and for organizational expenditures.

By letters to each of the Charging Parties on August 8, 1980, from Respondents on behalf of the "overwhelming majority of the drivers who are leasing cabs from your company," Respondents requested "that you meet with us for the purpose of reaching an agreement setting forth uniform conditions regarding the leasing of these cabs" (G.C. Exhs. 11 and 12). The Charging Parties failed to accede to this request. It is conceded that the Charging Parties have at all times refused to recognize, meet, or negotiate with Respondents or the LCDs in any way concerning the terms and conditions on which the taxicabs are leased or rented out. Indeed, Checker Taxi acknowledges posting notices to the effect that it would "never" deal with Respondents, while Yellow Cab ac-

[4] This changeover in Yellow and Checker operations from their own "commission driver" employees to independent contractor LCDs is discussed in the opinions of U.S. Circuit Court of Appeals Judge MacKinnon at 603 F.2d 862 (1978) in the case cited in fn. 5, infra.

[5] It is also so conceded by all parties and has likewise been so determined by the U.S. court of appeals in its October 20, 1978 (as amended July 5 and 27, 1979) decision in *Seafarers Local 777 v. NLRB*, 603 F.2d 862 (G.C. Exh. 2). The General Counsel has indicated on the record here, on behalf of the Board, that the Board acquiesces in that decision and that it is binding and controlling here on the issue of the status of the LCDs as independent contractors as distinguished from employees within the meaning of the Act.

[6] See, e.g., G.C. Exhs. 20, 21, and 24.

knowledges that it has publicized that it would not deal with Respondents since the LCDs are independent contractors with whom it is under no obligation to negotiate under the Act or otherwise. It is stipulated that the nature of the operations of the Charging Parties has in no way changed since or in consequence of the U.S. court of appeals 1978 decision cited supra (fn. 5) determining the LCDs to be independent contractors and not employees within the meaning of the Act.

Commencing on August 12, 1980, LCDs picketed and handbilled various Chicago garages of the Charging Parties, admittedly in order to attempt to induce the Charging Parties to negotiate with them for improved lease terms and conditions for the LCDs, as well as to induce potential LCDs to refrain from leasing taxicabs until the taxicab companies so negotiated. The picket signs read: "Please do not lease a cab until an agreement is signed concerning your working conditions" (G.C. Exh. 13); "On Strike Production Workers Union Local 707" (G.C. Exh. 14);[7] "Lease Cabs on Strike Production Workers Union Local 707" (G.C. Exh. 15); and "Lease Cab 707 Drivers 707 on Strike Yellow & Checker Taxi Cab Company" (G.C. Exh. 16). Handbills (G.C. Exhs. 17–25) were distributed reflecting meetings held or to be held by LCDs on various dates in July, August, and September 1980 in order to attempt to deal collectively with the Charging Parties taxicab companies so as to achieve more equitable or advantageous taxicab lease/rental terms. There is no doubt that the picketing activity has been effective in reducing the volume of taxicabs leased by LCDs from the Charging Parties, with substantial losses of revenue to the Charging Parties[8] (to say nothing of losses of revenue to the nonleasing LCDs).

With only a single, brief, and unintended exception,[9] at no time were any of the picketing efforts staged, aimed, or beamed at any of the Charging Parties' commission drivers or other employees or at any persons other than the Charging Parties themselves and their potential LCDs—neither to organize them, nor to solicit their membership in or support of Respondents, nor to seek to persuade them to cease, interrupt, or otherwise interfere with their work, work arrangements, relationships, or deliveries.

[7] Although commission drivers and inside employees could hardly have been misled since they were firmly represented by another union of their own, the Seafarers, under a subsisting collective agreement, and the picketing was (with the sole incidental exceptions described and dealt with infra) limited to garages housing only LCD-operated vehicles, nevertheless, according to testimony of the General Counsel's witness Stroud, an official of Respondents, use of this particular sign was unauthorized and was discontinued by Respondents immediately on discovery within a day or less after it was displayed.

[8] Estimated by Yellow Cab President Logue at over $300,000 out of gross annual revenues exceeding $22 million and by Checker Taxi President Feldman at over $250,000 out of gross annual revenues of $16 million although the diminution by the trial date was only 5 percent (or 400 leases per week).

[9] This occurred at the very inception of the picketing, around 5:30 a.m. on August 12, 1980, at Yellow Cab's South Indiana Avenue garage housing only vehicles of its commission driver employees. As soon as an official of the Seafarers Union arrived shortly thereafter and explained that the garage housed no LCD-operated vehicles, the LCD pickets left at once. The entire incident—clearly an unintended error—lasted no more than possibly a half-hour.

Although there is ample evidence, some undisputed and persuasive, that *nonpicket-related* acts of violence[10] occurred at various street locations during the period of the effort by the LCDs to get the Charging Parties to agree to discuss their lease terms, this is not alleged in the consolidated complaint as violative of the Act on the part of Respondents; nor is there substantial evidence persuasively linking those acts to Respondents. It is also undisputed that, during part of the picketing period, a few of the Charging Parties' suppliers' employees, apparently unwilling to cross the picket "line," failed to make deliveries (or, in one case, a pickup).

On September 9, 1980, the Board's Acting Regional Director in Chicago, with whom the charges here had been filed a week earlier, petitioned the U.S. District Court for the Northern District of Illinois, Eastern Division, for a temporary injunction under Section 10(1) of the Act pending final dispositon of the instant proceeding (G.C. Exhs. 7–10). On December 11, 1980, the petition was denied (ALJ Exhs. 1–3).[11] An injunction proceeding had also been commenced in the Circuit Court of Cook County, Illinois, by the two taxicab companies who are the Charging Parties here against Respondents, their officials, and all LCDs acting in concert. On September 8, 1980, following a trial in which some 1384 pages of transcript were taken, Judge George A. Higgins of the court denied plaintiffs' application for a temporary injunction (R. Exh. 3), among other things concluding (id. at 1378–79):

> . . . that the individual Defendants and all Lease Drivers have the Constitutional Right to picket in a peaceful and lawful manner on the public way as a means of communicating complaints and grievances, and that they have the right to engage the services of the Defendant Union to assist them in their endeavors, and that these rights, under the First Amendment to the Constitution of the United States cannot be enjoined or otherwise denied.

On December 31, 1980, this decision was unanimously affirmed by the Illinois Appellate Court (ALJ Exh. 5), which in part stated "that the plaintiffs failed to establish an illegal purpose for the defendants' actions" and that:

> . . . [t]he [trial] court found that there was no evidentiary connection between the acts of violence cited by the plaintiffs and the lawsuit before it. The parties introduced sharply conflicting testimony concerning the extent and nature of the violence

[10] Including much windshield smashing and threats by wholly unidentified persons, as well as by one or two LCDs, and also much tire slashing, as well as arson, to cabs. On one occasion at Checker's North Pulaski garage, police were called to disperse a large, nonviolent group allegedly interdicting access to the garage while exclaiming, "Don't ride Checker and Yellow. They are unsafe cars."

[11] Although U.S. District Judge Prentice Marshall's decision (ALJ Exh. 2) appears to be based, at least in part, upon his belief that the LCDs were employees or their "equivalent" within the contemplation of the Act, the complaint here (par. II[g]) alleges, all of the parties agree, and the U.S. court of appeals (fn. 5, supra) had determined the opposite. In any event, Judge Marshall's decision is not dispositive here. *NLRB v. Denver Building & Construction Trades Council*, 341 U.S. 675, 681–683 (1951).

which occurred. . . . The defendants offered testimony that the Union opposed the violence and even offered a reward for information leading to the arrest of those who committed violent acts. We believe that the evidence supports the trial court's finding that there was no nexus between the alleged violent acts and the defendants in this cause.[12]

B. *Discussion and Resolution*

1. The basic question: legality of the picketing

The Charging Parties, owners-franchisees of predominating portions of the Chicago taxicab fleet, have during the past several years altered their basic method of operation from employing their own drivers to drive their fleet to leasing out their cabs, usually on a daily basis, to individual cab drivers who are concededly not employees as defined by the Act but independent contractors not within the Act's coverage. Dissatisfied with the cab-leasing terms imposed on them, substantially similarly, by the taxicab companies, the leased cab drivers have attempted, through Respondent Unions as their advisers presumably skilled in negotiating, to deal collectively with the taxicab companies in order to obtain more favorable lease terms. The taxicab companies have refused to negotiate, claiming they are not obligated to do so since the leased cab drivers are not employees under the Act, which is not applicable to them. When the organized leased cab drivers, carrying banners containing Respondents' name, thereupon picketed the taxicab companies at their cab storage garages in an attempt to compel them to negotiate and in order to persuade other potential cab lessee-drivers not to rent cabs until such negotiations occurred, the taxicab companies sought to invoke the Act as allegedly applicable to that activity by filing charges against Respondents alleging that the picketing constituted a secondary boycott in violation of Section 8(b)(4)(i) and (ii)(B) of the Act. This presents the threshold issue here, i.e., whether the described picketing violates Section 8(b)(4)(i) or (ii)(B). After close consideration, I have concluded that it does not.

Section 8(b)(4)(i) and (ii)(B) makes it an unfair *labor* practice for a labor organization or its agents:

> (4)(i) to engage in, or to induce or encourage any individual *employed* by any person engaged in commerce or in an industry affecting commerce to engage in, a *strike* or a *refusal* in the course of his *employment* to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is:
>
> . . . .
>
> (B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his *employees* unless such labor organization has been certified as the representative of such *employees* under the provisions of section 9: *Provided, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing.* [*Emphasis added.*]

The basic question presented, i.e., whether the picketing here was in violation of Section 8(b)(4)(i) and (ii)(B), appears to be novel; no case directly in point has been cited by counsel. Thus, the Charging Parties' counsel's impressively scholarly 90-page brief arrays cases for the most part dealing with conventional secondary boycott situations in one way or another involving traditional employer-employee relationships, with attempted embroilment of another employer or employees alien to the controversy, within the frame of reference of traditional industrial disputes,[13] without providing a single case dispositive of the principal issue here. Since of the myriad of cases assembled none is dispositive or substantially assistive, it would serve no useful purpose to indulge in a harrowing beating through the thicket only to point out repetitively that each cited case thus differs from the described *non*employer-employee, *non*industrial relations dispute situation here, seemingly for the first time in Board annals, presented.

At the threshold, it is clear that the mere *colloquium, joinder*, association, or organization of the LCDs for dealing collectively with the taxicab companies was not violative of the Act, since the Act contains no proscription of such activity. See *National Woodwork Mfrs. v. NLRB*, 386 U.S. 612, 645 (1967). Beyond this, as to the picketing, certainly the prohibitions of the Act should be read with an eye cocked toward its purposes:

> The most universal and effectual way of discovering the true meaning of a law, when the words are dubious, is by considering the reason and spirit of it, or the cause which moved the legislator to enact it. [1 W. Blackstone *Commentaries* 61.]

[12] While these determinations are likewise not dispositive herein, we have been instructed to accord them deserving weight. *Mitchell Plastics*, 117 NLRB 597, 598 fn. 1 (1957), enfd. as modified 260 F.2d 472 (6th Cir. 1958); *Seyfert Foods Co.*, 109 NLRB 800, 810 fn. 5 (1954); *Sun Co. San Bernardino, California*, 105 NLRB 515, 521 (1953), enfd. as modified 215 F.2d 379 (9th Cir. 1954); *Aerovox Corp.*, 104 NLRB 246, 247 1953), enfd. 211 F.2d 640 (D.C. Cir. 1954), cert. denied 347 U.S. 968 (1954); *Nashville Corp.*, 94 NLRB 1567, 1568–69 (1951).

[13] With a few cases, heavily relied on by the Charging Parties, seemingly *sui generis* because of the perhaps unique configurations of the prevailing extraordinary and ambivalent jural relationships at various levels among "employed," "employers," and "employees" (or even both simultaneously), "contractors," "subcontractors," "hirers," and "users" as in the highly singular, *Janus*-like performing arts (music; ballet) field. Cf. *Musicians Local 16 (Manor, Inc.)*, 206 NLRB 581 (1973), enfd. 512 F.2d 911 (D.C. Cir. 1975); *Musical Artists (National Symphony Orchestra Assn.)*, 157 NLRB 735 (1966).

It cannot be without significance that the introductory "declaration of policy" of the 1947 "Labor Management Relations Act" is couched in terms of the interrelationship of "*employers, employees*, and labor organizations," the "rights of both *employees* and *employers*," and the regulation of "practices on the part of *labor and management*" (1947 Act, Sec. 1; emphasis added); nor can it be devoid of design that the basic frame of reference constituting the "Findings and Policies" of the Act is likewise cast in terms of pacification of tensions between "employers" and "employees" (Sec. 1, as amended by 1947 Act, Sec. 101). Nowhere is any legislative purpose to be found in or gleaned from the Act to regulate the relationships between entrepreneurs as distinguished from those between employers and employees (and labor organizations as proxies of employees). It is conceded by the parties here that the leased cab drivers on whose behalf Respondents sought to negotiate improved lease terms are not employees but independent contractors or entrepreneurs, whose entry into leasing arrangements with the taxicab companies was entirely optional on the part of both the lessees and the lessors. Thus, the attempt by the leased cab drivers to obtain more favorable lease terms, and failing that to withhold their trade if the existing less favorable leases were not ameliorated, meanwhile publicizing that endeavor through first amendment-protected communicatory picketing, may hardly be regarded, even with inordinate linguistic stretching, to constitute that unfair *labor* practice by a labor organization in that situation representing *employees* "refus[ing] in the course of [their] *employment* . . . [to] handle or work on any goods . . . or to perform any services" (Act, Sec. 8(b)(4)(i) supra), within the proscription of the Labor Act's provision here invoked.

Since there is concededly no employer-employee relationship between the primary contestants here (i.e., the leased cab drivers and the taxicab companies)[14] nor employee-employer strife requiring pacification through the processes of the Board for any of the reasons recited in the preamble of the Act, I am unable to discern how Respondents' picketing here falls under the umbrella of the Act's purposes or proscriptions. While it may be argued—in what appears to be a somewhat wooden or gunbarrel reading of selected words of Section 8(b)(4)(i) and (ii)(B)[15]—that that provision is applicable to the situation here per se simply because a labor organization is involved and charged, as distinguished from the leased cab drivers themselves, such an interpretation appears to be strained and out of keeping with the declared purposes of the Act. The labor organizations here functioned at most as advisers of the independently contracting, entrepreneurial leased cab drivers who were their principals, and whom they represented—in a segregated groupment known as the *Leased Taxicab Drivers Division* not commingled with the membership at large of the Unions—not as employees but only because those entrepreneurs had invoked their assistance as presumed experts in the negotiating art. Since there was no labor dispute here[16] and the activities of Respondents were simply not those of a labor organization qua labor organization, the picketing for improved leases does not fall comfortably within the regulatory prescription of the Act, and I do not believe it should be deposited or engrafted there by administrative-judicial fiat. Cf. *NLRB v. Longshoremen ILA (Ocean Shipping)* and *National Woodwork Mfrs. v. NLRB*, supra at fn. 16.

There is a further answer to the argument that the picketing was violative of the Act because it was "connected" with Respondents labor organizations, although it would not have been if it had been carried out merely by their principals, the leased cab drivers. Just as the Act was not intended to regulate the behavior of employers generally, but only certain aspects of their relationships with employees and their representatives, so, too, the Act was not intended to regulate the behavior of labor organizations generally, but only certain aspects of their *employee vis-a-vis employer* related activities. It is admitted, indeed even alleged, here that no employer-employee relationship existed between the Charging Parties taxicab companies and the leased cab drivers, the independent contractors who had enlisted the supposed negotiating expertise—but not qua labor union in relation to themselves—of Respondents. The Act does not prevent labor organizations from advising or representing persons, groups, or other organizations who are not employees or in matters which are not employment related. Nor

[14] The amended Act explicitly excludes "independent contractor" from its definition of "employee." Act, Sec. 2(3).

[15] *Qui haeret in litera haeret in cortice*. As stated by Chief Judge Sobeloff in *NLRB v. Longshoremen ILA (Ocean Shipping)*, 332 F.2d 992 at 997 (4th Cir. 1964), "Section 8(b)(4) must be interpreted, not merely read literally," citing *Electrical Workers IUE Local 761 v. NLRB*, 366 U.S. 667, 672 (1961), and Lesnick, *The Gravamen of the Secondary Boycott*, 62 Colum. L. Rev. 1363 (1962). Cf. also *NLRB v. Fruit Packers*, 377 U.S. 58, 63–73 (1964), citing *Holy Trinity Church v. U.S.*, 143 U.S. 457, 459 (1892), in which the Court had pointed out:

> It is a familiar rule that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers. This has been often asserted, and the reports are full of cases illustrating its application. This is not the substitution of the will of the judge for that of the legislator; for frequently words of general meaning are used in a statute, words broad enough to include an act in question, and yet a consideration of the whole legislation, or of the circumstances surrounding its enactment, or of the absurd results which follow from giving such broad meaning to the words, makes it unreasonable to believe that the legislator intended to include the particular act.

[16] "The Act has been interpreted as conferring Board jurisdiction over a variety of labor matters, but there can be no jurisdiction where the complaint presents a controversy unrelated to the resolution of a 'labor dispute' as defined. . . . Not every activity of a labor organization, not even every controversy in which it may become involved, is a 'labor dispute' within the statutory meaning. . . . [Here the union, which declined to supply members to work on ships carrying on trade with Cuba (characterized by the court as 'a general political question,' 332 F.2d at 996)] is not seeking to alter any terms or conditions of employment." *NLRB v. Longshoremen ILA Local 1335 (Ocean Shipping)*, supra at 995–996. In par. 5(g) of his September 9, 1980 petition to the U.S. district court for a preliminary injunction herein (fn. 2, supra), the Board's Acting Regional Director expressly asserted that "[a]t no times material herein have Respondents [the Unions] been engaged in a labor dispute with the [taxicab] Companies." (G.C. Exh. 7, p. 4.) It is to be noted that the Act's definition of "labor dispute" (Act, Sec. 2(9)) is couched in terms of "any controversy concerning terms, tenure or conditions of *employment*, or concerning the association or representation of persons in negotiating . . . or seeking to arrange terms or conditions of *employment*," even though the immediate "*disputants* [do not] stand in the proximate relation of employer and employee" (id., emphasis added). Cf. also *Woodwork Mfrs. v. NLRB*, 386 U.S. 612 at 645 (1967).

does the Act place any ban on the picketing of even employers by independent contractors (or their agents), whether the latter be customers, buyers, sellers, lessors, or lessees; nor of independent contractors by other independent contractors. Nor does it circumscribe the freedom of expression of labor organizations in, at any rate, matters unrelated to labor disputes, nor otherwise curb first amendment guarantees. Cf., e.g., *Steelworkers Local 14055 v. NLRB*, 524 F.2d 853 (D.C. Cir. 1975), remanded for reconsideration under changed circumstances 429 U.S. 807 (1976). The Act is not a full-scale "Emily Post" behavioral capsule covering everything a labor organization may or may not do. *NLRB v. Longshoremen ILA Local 1335 (Ocean Shipping)*, supra. It would seem, for example, that for a labor organization not representing employees in any labor controversy to boycott or picket a real estate landlord or a rental car lessor to attempt to persuade him to reduce his rent or grant more favorable lease terms, or to picket a merchant to reduce his prices, or even secondarily to picket a customer of a bank with an object of compelling the bank to reduce its interest rates would no more violate the Act than if any other person—employer, lessee, potential lessee, customer, or agricultural worker not within the Act's coverage—did so, as they indeed have on innumerable occasions. Although the picketing of the taxicab companies here was "primary" and limited to primary sites (i.e., business locations of the Charging Parties themselves) in that it was beamed at the parties directly involved, while also not within an employment-related "labor dispute" context,[17] it is to be noted that not all secondary boycott or picket activity, even within a "labor dispute" configuration, is violative of the Act. Cf. *NLRB v. Fruit Packers*, 377 U.S. 58 (1964); *NLRB v. International Rice Milling Co.*, 341 U.S. 665, 672–673 (1951). Existence of an objective proscribed by the Act may not be inferred on the basis of picketing alone. Cf. *Houston Building Trades Council (Everett Construction)*, 136 NLRB 321, 323–324 (1962); *Laborers Local 41 (Calumet Contractors)*, 133 NLRB 512, 513 (1961). Were this otherwise, grave constitutional questions would arise. It is a cardinal principle of statutory construction to avoid, if at all possible, resolving a case on the basis of determining a constitutional question.[18]

A union, in its activities in support or on behalf of persons or causes not within the protection or prohibition of the Act, is entitled to exercise its first amendment and other constitutional rights like any other individual or organization. Since the actions of Respondent Unions here were solely on behalf of persons (i.e., leased cab driver entrepreneurs) explicitly excluded from the definition of employees under the Act, and solely in furtherance of ends sought by those nonemployees not concerning any aspect of an employment relationship, they were of that category. I accordingly conclude that it was not violative of the Act for the entrepreneurial cab drivers, acting in concert or counseled by Respondents, not to lease cabs from the Charging Parties' taxicab companies, or for them or Respondents to attempt through picketing and handbilling to persuade other potential entrepreneurial cab lessees not to lease cabs from those companies, until the companies bargained about the lease terms. It would be a strange anomaly if the Act that was intended to free employees to organize for collective action toward employers were permitted to be turned against consumers or lessees organizing for collective action toward their suppliers or lessors. No basis has been shown to attribute any such purpose, as is now essayed in this novel proceeding, to the framers of the Act. Cf. *NLRB v. Longshoremen ILA (Ocean Shipping)*, supra. If Congress had intended to brand activity of this kind illegal, with the attendant stringent if not quasicriminal penalties, it could readily have said so in plain words, obviating the necessity for the tortuous statutory constructions here advanced to support the prosecution's case. "It is a rule of statutory construction that a *casus omissus* cannot be supplied by the courts." McCaffrey, *Statutory Construction* 25. Cf. *Levberg v. Schumacher*, 225 N.Y. 167 (1919). Respondents are correct in maintaining that the burden is not on them to establish the inapplicability of the Act or that their actions were not unlawful.

For the foregoing reasons, it is concluded that the picketing activities here did not fall within the purview, and were therefore not violative, of the Act.

2. Other incidents

It remains to consider whether various incidents, some arguably related to and others clearly unrelated to the picketing, were violative of Section 8(b)(4)(i) or (ii)(B).

We begin with a strong condemnation of any violence of the type which occurred. While it is clear that such incidents call for police action, it does not follow that they therefore constitute violation by Respondents of Section 8(b)(4) of the Act. Cf. *NLRB v. International Rice Milling Co.*, supra at 671–672 (1951). It needs no saying that all kinds of criminal acts are, unfortunately, constantly occurring, but that the mere commission of crime, even by a union, does not necessarily constitute a violation of the particular Act under which this proceeding is required to be judged.

It is to be noted that the consolidated complaint does not even allege that Respondents committed, are responsible for, or violated the Act through any violent acts. Further, however, as in the lengthy case tried before the Circuit Court of Cook County and affirmed by the Illinois Appellate Court (supra), there is simply an absence of substantial evidence linking Respondents to any act of violence here. The gap cannot be supplied through suspicion, surmise, or conjecture, particularly since serious crime is involved and Respondents are entitled to the benefit of a presumption of innocence. This proceeding is governed by the Administrative Procedure Act, which requires that findings and conclusions be based on sub-

[17] It is reemphasized that the Act's definition of "labor dispute" is cast in terms of controversies concerned with "*employment*." NLRA, Sec. 2(9), emphasis added.

[18] Cf., e.g., *Steelworkers Local 14055 v. NLRB*, supra; *Nebbia v. New York*, 291 U.S. 502, 537–539 (1934); *People v. Barber*, 289 N.Y. 378 (1943); *Johnson v. City of New York*, 274 N.Y. 411 (1973); *Tauza v. Susquehanna Coal Co.*, 220 N.Y. 259 (1917). Statutes are presumed constitutional. *Butterfield v. Stranahan*, 192 U.S. 470, 493 (1904). And it is not for an agency created by statute to assail its own legislative birth certificate as unconstitutional. Cf. *U.S. v. Butler*, 297 U.S. 1 (1936); *Panitz v. District of Columbia*, 112 F.2d 39, 41–42 (D.C. Cir. 1940).

stantial credible evidence,[19] lacking here insofar as providing reliably persuasive linkage of any violent acts to Respondents. Indeed, none of the violence has been shown to have been picket-related. Under these circumstances, to pronounce Respondents guilty of serious violent crime here would find no adequate support in the record.[20]

With regard to the alleged failure of some "commission drivers" in the employ of the taxicab companies to report for work or cross the picket "lines" here, and of a few merchandise suppliers to make some expected deliveries (and one service company to make a usual call), it is to be emphasized at the outset that the picketing was in no way beamed at them and that they were not among its objects. The commission drivers as well as all "inside" maintenance and service employees of the taxicab companies were and are represented by the Seafarers Union, and no organizational objective is attributed to Respondents. If any of these persons elected on occasion not to report for work, whatever the reason or reasons may have been (not here shown through the testimony of any of them), or even not to cross a picket line because of some perhaps strongly held or perhaps misperceived (depending on the point of view) "general principle" which some unionists and others choose to avow, that hardly supports a finding of illegality here, since such was not an object of the picketing; to hold otherwise would substitute possible *effect* for the Act's test of *object*, or to suppose object solely from possible effect. Cf., e.g., *International Rice Milling Co.*, supra; *Baldovin v. Longshoremen ILA*, 626 F.2d 445 (5th Cir. 1980); *Maritime Union (Shippers Stevedoring)*, 245 NLRB 149 (1979).

This leaves only, as meriting mention, the isolated incident at Yellow Cab's South Indiana Avenue garage which, although housing only cabs of commission drivers, was inadvertently picketed for perhaps a half hour at the very outset of the picketing activity around 5:30 a.m. on August 12, 1980, but which was immediately discontinued (without repetition) when the error was pointed out. Under the circumstances, such an isolated and almost immediately rectified and unreiterated error may hardly be deemed to warrant extension of the Board's strong remedial arm.

In sum: Here the direct, primary, and only dispute of the leased cabdriving entrepreneurs, represented by Respondents not as a labor union but only for technical advisory purposes, was with the taxicab companies, which refused to negotiate regarding the terms on which they were leasing their cabs to the cabdriving entrepreneurs. This was the only reason the taxicab companies were being picketed. Obviously it was not and could not have been "an object" of that picketing to force or require the taxicab companies to cease doing business with the leased cabdrivers, since the taxicab companies were perfectly willing to continue leasing cabs to the drivers on the existing companies-imposed terms. Nor was an object of the entrepreneurial picketing, purposed to achieve more favorable leases, to induce or encourage leased cabdriver entrepreneurs to cease using the cabs of or to do business with the taxicab companies, violative of Section 8(b)(4)(B), since, not being employees, they were not engaging and could not engage in or induce or encourage other cabdriving entrepreneurs to engage in "a strike or a refusal in the course of [their] *employment* to use . . . or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services" (Act, Sec. 8(b)(4)(i); emphasis added); nor did or could they "threaten, coerce, or restrain" the overwhelming number of leased cabdriving entrepreneurs who had made common cause with them, as well as those who perhaps had not, to "cease" doing business with the taxicab companies or "force or require . . . any *other* employer to recognize or bargain with a labor organization as the representative of his *employees*" (id., Sec. 8(b)(4)(ii)(B); emphasis added.) The direct and primary dispute remained with the taxicab companies, at their own site locations. The picketing was not purposed to make the taxicab companies stop leasing cabs to the pickets or others; nor was it an object of the picketing to "force or require" leased cabdriving entrepreneurs to stop doing business with the taxicab companies, but merely to urge them as fellow entrepreneurs to withhold their trade until the taxicabs companies were willing to discuss, rather than impose, lease terms; and, finally, even if an object had been to "force or require" some entrepreneurial leased cabdrivers to withhold their trade, it would still not have been violative of the Act, since the entire issue concerning lease terms was not in an employment or industrial relations context within the declared purposes or *schema* of the Act. Insofar as any effect of the picketing on the taxicab companies' commission driver employees was concerned, concededly it had no organizational objective and, I find, it was not an object thereof to enmesh them in any way violative of the Act, any work interruption on their part not having been established by substantial credible evidence (as through the testimony of even a single such employee) to have been other than uncoerced, voluntary, or an incidental effect or byproduct of the lawful picketing. Insofar as violent and disorderly acts are concerned, while not alleged in the consolidated complaint as violative of the Act, they have in any event not been established by substantial credible evidence to have been committed by, at the direction of, or with the authorization, connivance, or approbation of Respondents; and they should be dealt with through the local law enforcement machinery.

For these reasons, I have concluded that the consolidated complaint should be dismissed in its entirety.

[19] Administrative Procedure Act, 5 U.S.C. §§ 556(d) and 706(2)(E); *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229, 230 (1938); *Willapoint Oysters v. Ewing*, 174 F.2d 676, 690, 691 (9th Cir. 1949), cert. denied 338 U.S. 860 (1949); *NLRB v. Bell Oil & Gas Co.*, 98 F.2d 406, 410 (5th Cir. 1938); *NLRB v. A. S. Abell Co.*, 97 F.2d 951, 958 (4th Cir. 1938). Cf. *Blue Flash Express*, 109 NLRB 591, 592 (1954); Attorney General's Manual on the Administrative Procedure Act 75 (1947).

[20] It is strongly emphasized that disorderly or criminal conduct, whether or not connected with picketing, is in no manner here condoned, but, on the contrary, deplored and denounced. Such conduct should be reported to local police or other law enforcement authorities for investigation and prosecution in the usual way. As for the occasional colorful or exuberant language ascribed to some pickets here, it appears to have been little more than the usual outcropping—on both sides—of a rancorous situation exacerbated by the refusal of one side to even listen to or to talk with the other. Cf., e.g., *NLRB v. International Rice Milling Co.*, supra at 670–673.

CONCLUSIONS OF LAW

1. Jurisdiction is properly asserted herein over the persons of the parties to this proceeding.

2. The leased taxicab drivers of each of the Charging Parties taxicab companies, who have been picketing the Charging Parties and on whose behalf Respondents sought to negotiate with the Charging Parties, have in the inception, purpose, course, and conduct of that picketing been and continue to be independent contractors and customers of the Charging Parties and not employees within the meaning of the Act.

3. Said picketing activities of said leased taxicab drivers and insofar as participated in by Respondents were and are in lawful exercise of constitutionally guaranteed rights of said leased taxicab drivers and of Respondents, in pursuance of a primary economic contention between independently contracting taxicab-driving entrepreneurs and the Charging Parties concerning terms, provisions, and conditions governing the rental of taxicabs owned by and franchised to the Charging Parties.

4. Jurisdiction is not properly asserted herein over the subject matter of the said picketing activities of Respondents seeking to achieve more favorable leasing arrangements on behalf of said independently contracting taxicab-driving entrepreneurs with the Charging Parties.

5. Said picketing activities have not been and are not in violation of the Act.

6. It has not been established by substantial credible evidence that Respondents have violated the Act in any other respect alleged in the consolidated complaint.

7. For the reasons set forth in section III, supra, the consolidated complaint should be dismissed.

[Recommended Order for dismissal omitted from publication.]

Mastell Trailer Corporation *and* District No. 77, International Association of Machinists and Aerospace Workers, AFL-CIO. Case 18-CA-6750

14 December 1984

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS ZIMMERMAN AND DENNIS

On 28 September 1983 Administrative Law Judge John H. West issued the attached supplemental decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.

Unlike the Chairman, we find the judge did not err by extending the backpay period to 31 July 1980.[2] The Respondent failed to meet its burden of proving that the backpay period termination date should be other than 31 July, the date the General Counsel alleged in his backpay specification.

In the original unfair labor practice proceeding,[3] the Board found that the Respondent discharged 11 employees in violation of Section 8(a)(3) and (1) of the Act and awarded backpay from the discharge date, 11 June, to the date of their employment, or waiver of employment, with Midway Trailer, which purchased a portion of the Respondent's assets. The Board concluded that "even assuming Respondent's financial condition was precarious, it is obvious that Respondent's practice and intention, until June 11, 1980, and the advent of the Union, was to keep its repair shop employees working and occupied in spite of its economic difficulties."[4]

The Eighth Circuit[5] affirmed the Board's finding that the discharges were unlawful, but remanded the backpay issue to further consider when, in the exercise of reasonable business judgment, the Respondent would have been forced to close the shop.

It is well settled that in a backpay proceeding the General Counsel's sole burden is to show the gross amounts of backpay due. *Kansas Refined Helium Co.*, 252 NLRB 1156, 1157 (1980), enfd. 683 F.2d 1296 (10th Cir. 1982); *NLRB v. Brown & Root, Inc.*, 311 F.2d 447, 454 (8th Cir. 1963). Once he has done so, "the burden is upon the employer to establish facts which would . . . mitigate that liability." *Brown & Root*, 311 F.2d at 454.

In *Brown & Root*, the Eighth Circuit observed that "in many cases it is difficult for the Board to determine precisely the amount of backpay which should be awarded to an employee." Id. at 452. The court went on to state that the Board may use close approximations, and may adopt formulas reasonably designed to produce close approximations, so long as the method selected is not arbitrary or unreasonable under the circumstances. Accord: *Iron Workers Local 378 (Judson Steel)*, 227 NLRB 692 (1977); *Bagel Bakers Council v. NLRB*, 555 F.2d 304 (2d Cir. 1977).

The Respondent has raised an affirmative defense that it would have been forced to close 13 June, and thus jobs for the discriminatees were not available thereafter. The burden of going forward with evidence to prove a defense based on lack of job availability rests with the Respondent. *NLRB v. Mastro Plastics Corp.*, 354 F.2d 170, 176 (2d Cir. 1965), cert. denied 384 U.S. 972 (1966); *Underwood Machinery Co.*, 95 NLRB 1386, 1392–93 (1951).

In the instant case, the General Counsel in the backpay specification and at the hearing met his burden of showing the gross amounts of backpay due. The General Counsel reasonably selected 31 July to terminate the Respondent's backpay liability, as the third quarter of the Respondent's fiscal year ended on that date and as the court of appeals had concluded that the record did not support an award of backpay for August.[6]

The burden of establishing its affirmative defense therefore fell on the Respondent. At the backpay hearing, the Respondent failed to meet its burden. In an effort to demonstrate that it would have closed the shop 13 June, the Respondent merely reiterated evidence which the judge discredited at the original hearing. The judge in the backpay proceeding specifically found that "Mastell was not being truthful when he testified that he had decided on June 10 to close the shop and parts department on June 13," and that Mastell was attempting to find ways to keep the shop open and "was not about to call it quits." The Respondent failed to present any evidence at the backpay hearing to show that it would have been forced to close its

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] All dates are in 1980 unless otherwise indicated.

[3] 258 NLRB 1234 (1981).

[4] Id. at 1240.

[5] *Mastell Trailer Corp. v. NLRB*, 682 F.2d 753 (8th Cir. 1982).

[6] 682 F.2d at 756.

shop on a date earlier than 31 July but later than 13 June.

Our dissenting colleague would remand the case to the judge for further findings as to when the Respondent would have been forced to close the shop absent unlawful discrimination. But, because the Respondent insisted on presenting evidence only with regard to 13 June, and because the judges in both the original and backpay proceedings discredited that evidence, no finding of a different date is supported by this record.

In the alternative, our dissenting colleague would remand the case for further evidence. This option, however, would give the Respondent two bites at the apple. The Respondent had full opportunity to produce evidence, if it had such evidence, of when it would have been forced to close the shop other than 13 June. It failed to avail itself of the opportunity. A remand for further evidence would cause additional delay, and would not likely elicit substantially different evidence from that the Respondent previously adduced. Further, in its 31 August 1982 statement of position following the court remand, the Respondent stated:

> [T]he position of Mastell Trailer Corporation [is] that this matter not be remanded to Region 18 for a subsequent back pay hearing. The testimony which will be adduced at such hearing will be no different than that adduced approximately twenty months ago when this matter was initially heard with the exception that Mastell would be calling its banker and accounting firm to further substantiate its deteriorating economic condition. The record dictates that Mastell would have shut down its shop and parts department on June 13, 1980 regardless of the union.

In other words, the Respondent stated it did not desire a backpay hearing to present evidence.

Unlike our dissenting colleague, we see no conflict between our decision and the court of appeals' statement, as follows (682 F.2d at 756):

> The Board should employ an economic analysis to determine when Mastell, in the exercise of reasonable business judgment and, with appropriate concern for the welfare of its employees, would have been forced to close its repair shop and parts department. Backpay should then be computed from the date of actual discharge to the date the employees would have been discharged in the absence of antiunion animus.

We do not interpret this statement as changing long-established Board and court law regarding evidentiary burdens in backpay proceedings. Rather, we view the court's direction as requiring us to analyze the Respondent's economic evidence in light of evidence of union animus. This we believe the judge properly did.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Mastell Trailer Corporation, St. Paul, Minnesota, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

CHAIRMAN DOTSON, dissenting.

Contrary to my colleagues, I am unable to adopt the judge's calculation of the appropriate amount of backpay owing in this proceeding. In my view, the judge's finding that the backpay period extends to 31 July 1980[1] is unsupported by the record in this proceeding and is based on a rationale at odds with the remand order of the court of appeals.

In *Mastell Trailer Corp. v. NLRB*,[2] the United States Court of Appeals for the Eighth Circuit enforced on the merits the Board's finding[3] that the Respondent violated the Act by closing its repair shop and parts operation and discharging employees on 11 June because of their union activities. The Eighth Circuit, however, vacated and remanded for additional Board consideration matters pertaining to the proper backpay entitlement of the unlawfully discharged employees. Contrary to the Board's order of backpay extending to August, the court concluded that although the record justified a backpay order "for a short period of time" the award of backpay into August "appears punitive in nature" inasmuch as the Respondent's financial condition "continued to deteriorate during June, July, and August."[4] Because of the deficiencies in the Board's analysis regarding the backpay issue, the court specifically ordered:

> The Board should employ an economic analysis to determine when Mastell, in the exercise of reasonable business judgment and, with appropriate concern for the welfare of its employees, would have been forced to close its repair shop and parts department. Backpay should then be computed from the date of actual discharge to the date the employees would have been discharged in the absence of antiunion animus.

[1] All dates are in 1980.
[2] 682 F.2d 753 (8th Cir. 1982).
[3] 258 NLRB 1234 (1981).
[4] 682 F.2d at 756.

At the compliance hearing following the court's remand the General Counsel presented as the sole witness in support of the backpay specification Compliance Supervisor James Miller. Miller testified that he did not speak with anyone in the Respondent's management in determining when the Respondent likely would have closed its shop in the absence of the employees' union activities and that in drafting the backpay specification it was "assumed" that the Respondent would have kept open its shop until 31 July. According to Miller, this assumption was reached because it so happened that 31 July was the end of the third quarter of the Respondent's fiscal business year. The General Counsel presented no other evidence.

The Respondent contended at the hearing that it was on the brink of imminent financial collapse in June and would have closed its shop for economic reasons shortly after 11 June. Consistent with the Eighth Circuit's description of the Respondent's perilous financial condition in June, the Respondent's banker Bradley Rinsum testified that the Respondent could not have continued to sustain the losses it already had incurred in view of its outstanding business debts. Indeed, it is undisputed that the Respondent had to obtain additional credit from its bank immediately prior to 11 June just to meet its payroll and also was required to seek an advance under its existing loan arrangement to pay employees their accrued vacation pay.

Notwithstanding this uncontradicted record evidence of the Respondent's critical economic condition, the judge dismissed this evidence of a likely imminent shutdown as "purely speculative" and completely failed to undertake the economic analysis ordered by the Eighth Circuit. Instead, the judge accepted the General Counsel's "assumption" that the Respondent would not have closed its shop until the end of the fiscal quarter on 31 July. The judge made this finding because "Board calculations based on calendar quarters have been approved" by the courts, citing *NLRB v. Brown & Root, Inc.*[5] *Brown & Root*, however, concerned the propriety of the customary quarterly formula used by the Board in calculating gross backpay once the proper backpay period has been determined[6] and therefore does not answer the question of *when* backpay ceases to accrue because of a loss of employment pursuant to legitimate business reasons. In seeking to answer that question, the happenstance of when the Respondent concludes its fiscal quarterly period has only minimal, if any, probative value.

More importantly, in *Brown & Root* the Eighth Circuit adopted a standard that the General Counsel's backpay calculation must not be "arbitrary or unreasonable in the circumstances involved." 311 F.2d at 452. Applying this reasonableness standard to the instant proceeding in light of the court's instructions on remand, it is clear that the Eighth Circuit has ordered the Board to engage in an "economic analysis" and that application of the assumption proffered by the General Counsel derived solely from the date the Respondent commenced its fiscal year does not satisfy that requirement. It therefore follows that the failure of the judge and the majority to render a decision based on the mode of analysis ordered by the Eighth Circuit is to engage in precisely the "arbitrary or unreasonable" calculation the Eighth Circuit directed the Board to avoid in *Brown & Root.*

In sum, given the law of this case as ordered by the Eighth Circuit, I would find that a calculation of backpay based solely on the General Counsel's fiscal year assumption is arbitrary and unreasonable. Accordingly, it is my view that the General Counsel has failed to satisfy his burden of presenting a reasonable basis for awarding backpay to 31 July. I would therefore remand this proceeding to the judge with instructions to make sufficient additional findings of fact in line with the economic analysis ordered by the Eighth Circuit or, in the alternative, I would remand this proceeding to the judge for rehearing for the purpose of taking additional evidence sufficient to enable the Board to comply with the directions of the court of appeals.[7]

[5] 311 F.2d 447 (8th Cir. 1963).

[6] The court rejected the employer's contention in *Brown & Root* that a gross backpay formula based on a "lump sum" amount was appropriate rather than one based on calendar quarters.

[7] The majority concedes that it is the General Counsel's burden and not the Respondent's burden to show the gross amount of backpay due. This calculation, of course, requires the General Counsel to demonstrate a reasonable basis to support the gross backpay period set forth in the backpay specification. In determining that the gross backpay period terminated on 31 July 1980, the General Counsel and the majority rely exclusively on the fact that 31 July 1980 is the date ending the third quarter of the Respondent's fiscal year. Why is the Respondent's fiscal year a reasonable date to terminate the gross backpay period? The majority offers no explanation. What is the connection between the Respondent's fiscal year and the likely closing of its shop? The majority again offers no explanation. Instead, the majority merely *assumes* that 31 July 1980 is a reasonable date to terminate the backpay period. To rely exclusively on such an assumption is to ignore the Eighth Circuit's admonition to employ an economic analysis in computing the appropriate amounts of backpay in this case. Unlike my colleagues, I decline to do so.

SUPPLEMENTAL DECISION

JOHN H. WEST, Administrative Law Judge. The National Labor Relations Board (Board), in its decision herein, see *Mastell Trailer Corp.*, 258 NLRB 1234 (1981), adopted the findings and conclusions of an administrative

law judge who recommended, among other things, a backpay award from the day of the involved employees' unlawful discharge, June 11, 1980,[1] to the date of their employment or waiver of employment with the corporation which purchased a portion of Respondent's operation. On review, the court in *Mastell Trailer Corp. v. NLRB*, 682 F.2d 753 at 755 (8th Cir. 1982), as here pertinent, determined that when Respondent unlawfully discharged the employees it was in "financial plight . . . [and] would not have operated for very long." The court went on to state at 756:

> As we review the record, it justifies a backpay order for a short period of time. Because Mastell's financial condition continued to deteriorate during June, July, and August, the record does not appear to support a backpay award for August. The award of backpay to August lacks evidentiary support, and therefore, appears punitive in nature.

It then concluded at 756:

> Accordingly, we . . . vacate and remand the backpay issue to the Board. The Board should employ an economic analysis to determine when Mastell, in the exercise of reasonable business judgment and, with appropriate concern for the welfare of its employees, would have been forced to close its repair shop and parts department. Backpay should then be computed from the date of actual discharge to the date the employees would have been discharged in the absence of antiunion animus.

On January 4, 1983, the Board's Regional Director for Region 18 issued a backpay specification and notice of hearing, which specifies a backpay period which ends on July 31, "the date on which the Respondent would have closed the [involved] shop repair facility."

In its answer, Respondent denied that the appropriate period of backpay ends on July 31. It states two affirmative defenses. The first alleges that due to deteriorating economic conditions Respondent would have closed its repair shop and discharged the 11 employees on June 13 and, therefore, the backpay period should end on that date. The second alleges that the 11 discharged employees failed to make a reasonable and diligent search and a good-faith effort to find interim employment and to otherwise mitigate their damages following their discharge.

A supplemental hearing was held on April 11, 1983, in Minneapolis, Minnesota. On the entire record thus made, including my observation of the demeanor of the witnesses, and after due consideration of the briefs filed by the General Counsel and counsel for Respondent, I make the following findings of fact and conclusions of law.

The General Counsel called one witness, James Miller, who is a compliance supervisor with the Board, and who testified that he compiled the information for the backpay specifications; that he assisted in drafting the backpay specification; that it assumed that Mastell would have kept its shop open until July 31; and that he did not talk with anyone in Respondent's management regarding when it would have closed its shop.

The General Counsel then argued at the hearing that the computation of backpay on a quarterly basis has been approved by the Board; that[2] while the involved "employees were reinstated or effectively declined or waived reinstatement . . . with Respondent's successor on August 12 . . . [i]n view of the decision of the Eighth Circuit Court of Appeals, it appears inappropriate to seek backpay for any part of August"; and that it is Respondent's burden to establish that the discriminatees would have been laid off due to economic considerations prior to July 31, but for the unlawful layoff of June 11.

With respect to the backpay period, Respondent called four witnesses: David Mastell, who owns Respondent, Bradley Rinsum, who is Respondent's banker, and Robert Schneider and Jack McCabe, who own the successor corporation and who formerly were Respondent's shop service manager and parts manager, respectively. Of these witnesses, only Rinsum did not testify at the first hearing.

In the April 1983 hearing, Schneider testified that he knew Respondent was losing money. At monthly meetings with Mastell every area of the Company was discussed. Mastell's philosophy had always been to try to keep the men working, "and at a couple of different times, he told me if they had to sweep floors, to keep them busy, not to lay them off"; that the employees in the repair shop were repairing few customer-owned truck trailers; that to keep the men busy they repaired Respondent-owned units, which it was trying to sell and, therefore, no return was had until these units were sold. Prior to 1980 about 75 percent of the trailers repaired were customer-owned; that on the day the shop closed Respondent had only two customer-owned trailers in the shop. He was surprised when the shop was closed down. He knew it was coming but he "just didn't think it would be that quick." In the January or March 1980 management meeting it was determined that, if conditions could not be improved within 3 or 4 months, something would have to be done or the Company might go bankrupt. The successor corporation, which purchased Respondent's parts and repair business (and more recently Respondent's fabrication business), grew from 2 employees in August to 15 employees (not counting office personnel) in April 1983. The successor corporation did not purchase the trailer sales portion of Respondent's business and, therefore, did not have the expenses of the trailer inventory.

McCabe testified that the fact that Respondent had an accumulated loss of over $100,000 was brought up in a management meeting held between June 1 and June 7. He was not surprised when the shop shut down because "with the losses we were having every month, I was surprised he didn't do it three or four months before that." One of the two banks which extended credit to the successor corporation was the same bank at which Respondent had its line of credit. He did not remember whether

[1] All dates are in 1980 unless otherwise stated.

[2] Respondent operates on a fiscal year basis, and July 31 would have been the end of its third quarter.

at the above-described June management meeting Mastell said he was considering laying off all shop employees or shutting down the business. He was not advised prior to June 11 that Mastell was going to close the shop.

Mastell testified that from the start of fiscal 1979 to June 1980 Respondent went from 22 to 11 employees in the repair shop. While during fiscal 1979 about 85 percent of the work of the repair shop was on customer-owned units and the remainder of the work was on Respondent's units which it was selling, there was a decrease in shop work in 1980 due to a loss of major accounts. In the spring of the year 85 percent of the work was on equipment Respondent was attempting to sell. The accountant who Respondent employed, who testified at the prior hearing, advised Mastell in March to liquidate all but the sales department (Respondent had about 120 trailers for sale in the spring of 1980). At the time of the April 1983 hearing he thought the account was out of State (the accountant did not testify). On June 9, he received the May 31 profit/loss statement which showed a loss of almost $23,000 in May with an accumulated loss for year-to-date of over $103,000. The accountant again advised liquidation; and then prepared a statement of income and expenses by department (according to the statement, the shop lost over $57,000 and the parts department lost over $26,000 during the year-to-date period. Mastell, on June 9, showed Rinsum both the profit and loss and the department income and expense statements. He decided to close the shop and parts department while lying awake the morning of June 10, and decided that he was going to shut them on Friday, June 13. He did not tell anyone because he "was hoping—maybe a trailer sale would come up, maybe I could have liquidated something—anything to pull it off." While his mind was made up he had hopes that something drastic would happen. He was calling on customers on June 11 when he learned that "the Union was going to come in" with a contract that afternoon. He was relieved because he believed it was no longer necessary to feel guilty about closing the shop and parts department. He "was overdrawn $2,000 from the payroll from the . . . [preceding week and] . . . [t]he bank was good enough to cover the checks that went through, and I had to borrow money for the payroll." When the shop was closed there were only two customers' trailers which needed a total of 10 hours of work; he could not reasonably liquidate Respondent's trailer inventory because at that time he could only expect 25 cents on the dollar, even though he had personally guaranteed the loan covering his inventory, his personal assets would not have covered the difference between what he owed and what he believed his inventory was worth at the time.[3] He paid the discharged employees the 1 to 3 weeks' vacation they had accrued with funds obtained from his line of credit. Prior to the discharge he made every effort to keep his shop and parts employees working. He was not going to give the employees any advance warning of the closing and at his last meeting with the employees, in May 1980, he advised them they would be receiving a raise but, at the same time, there could be layoffs if things did not turn around. He was trying to get repair business on June 11 so that he could go "to the bank and . . . [get] more money to pay the payroll and extend it." He never suggested to employees that they cut their wages to save their jobs; his banker left him with the impression that he should liquidate. He testified that he had laid off employees in the repair shop in the past without any advance notice.

Rinsum testified that the agreement between his bank and Respondent provided for (a) a floor plan for the requisition and holding of trailers for resale, (b) an accounts receivable financing package, and (c) an installment credit line for the acquisition of equipment. The initial line of credit his bank gave to Respondent was $250,000 for trailers and either $100,000 or $150,000 for accounts receivable. The bank had a 90-day note with an interest rate that eventually floated at 2 percent above prime. He reviewed Respondent's monthly financial statements and he did see a breakdown for each department, but he neither recalled nor was he interested in how individual departments were doing. He believed it was a wise business decision to shut down the repair shop on June 11 because he could see no way for Respondent to satisfy the debts that were outstanding at that point but he "could only evaluate that by the end result . . . since he did not have information at . . . [his] disposal with which to make such a judgment at the time." The week before Mastell laid off the shop employees, he had to obtain additional credit at his bank to pay them. Mastell also had to take an advance under the existing commitment to pay the employees for their accrued vacations. He did not know whether the income the shop employees generated exceeded labor costs; but he knew that Respondent could not have continued to sustain its losses.

Contentions

On brief, the General Counsel contends that while Respondent pled, as an affirmative defense, that the shop would have closed on June 13, it chose to offer nothing more, with the exception of Respondent's banker, than testimony and evidence already discredited. Assertedly, Rinsum failed to shed any light in that, while he was of the opinion that Respondent's decision to shut down the shop on June 11 was a good business decision, he conceded that he did not recall whether labor cost exceeded income generated by the shop in the spring of 1980 and could not state how a particular department of Respondent's business was performing. It is argued by the General Counsel that "much of Rinsum's testimony buttresses the argument that in spite of its economic difficulties, Respondent intended to continue to operate." (G.C. Br. 6.) Assertedly, since Respondent failed to prove with any degree of certainty when the discriminatees would have been laid off absent the discrimination, the presumption is that the backpay specification accurately sets forth the backpay period.

Respondent, on brief, contends that when the record establishes that the employees would have been laid off "eventually" due to economic reasons, it becomes incumbent on the Board to determine when economic factors

[3] Respondent had a $400,000 line of credit in 1979 with 90-day notes on its inventory of new and used trailers.

would have forced a shutdown irrespective of union animus, and limited backpay accordingly. Mastell requests that the

> . . . award of back pay to the discharged employees [be limited] to the period of June 11, 1980 to June 13, 1980 and submits that any award past June 13, 1980 will be punitive in nature, will award the discharged employees more than they would have received absent the 8(a)(3) violation and will be contrary to the remand of the 8th Circuit Court of Appeals [R. Br. 16].

In the alternative, Respondent argues that employees Michael Faricy and James Gear did not make a good-faith effort to mitigate losses in that the former allegedly made no attempt to find employment in other trailer shops in the Twin City area and the latter was "offered" factory work but did not accept the employment because he did not like the hours or the location.

Analysis

In this type of proceeding the General Counsel has the burden of establishing as nearly as possible what the employees would have earned but for the unlawful conduct of the Respondent. *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177 (1941), and *NLRB v. Brown & Root, Inc.*, 311 F.2d 447 (8th Cir. 1963). The General Counsel has the burden of establishing a formula for the calculation of gross backpay due to employees, but in many cases it is difficult to ascertain the precise amount due and, therefore, a wide range of discretion is accorded the fashioning of such a formula provided it is reasonably designed to produce approximations and it is not arbitrary and unreasonable. Once the General Counsel has established a reasonable formula, the burden then falls on Respondent to establish facts which would negate or diminish the existence of liability. *Brown & Root, Inc.*, supra. Board calculations based on calendar quarters have been approved. Id.

It would seem that Respondent has misread *Mastell Trailer Corp. v. NLRB*, supra, in asserting that "any award past June 13, 1980 . . . will be contrary to the remand of the 8th Circuit Court of Appeals." The evidence Respondent submitted herein does not speak to—as the court directed—when Respondent would have been *forced* to close its repair shop and parts department, in the exercise of reasonable business judgment and with appropriate concern for the welfare of its employees. The evidence speaks to when Mastell alleges he would have closed absent union animus, namely, June 13. This evidence was formerly discredited. After listening to him testify, it is my opinion that Mastell was not being truthful when he testified that he had decided on June 10 to close the shop and parts department on June 13. Mastell may have engaged in self-deception. He impressed me as being a fighter. With only 2 years of high school, he has accomplished a great deal. He did not listen to his accountant who earlier had told him to "throw in the towel." He did make some changes which included some layoffs. But he was not about to call it quits. Not until he felt betrayed was he willing to close down a portion of the business he built. Mastell was not going to close the shop and the parts department on June 13. He was attempting to find ways to avoid doing just that. And if he had not succeeded he would have found a way to prolong what may have been inevitable. Mastell impressed me as being a stubborn man who would not rely on the "experts." How long he could have kept the repair shop and the parts department open is, on this record, purely speculative. He had extended his line of credit to meet one payroll. He was also able to further extend it to cover accrued vacations. Possibly there could have been alternatives. But Mastell did not discuss alternatives with the employees. It was not indicated how far his bank would have extended his credit line to make up any differences in the income and labor costs for the shop and parts department. Respondent focuses solely on June 13. But again, Mastell's testimony regarding June 13 is not credited. His accountant did not testify herein and banker Rinsum did not provide the answer to the court's question.

In my opinion Respondent has not met its burden of demonstrating when "in the exercise of reasonable business judgment and, with appropriate concern for the welfare of its employees, [it] would have been *forced* to close its repair shop and parts department." (Emphasis added.)

Regarding Respondent's contentions about employees Faricy and Gear, it is my opinion that based on the evidence of record, both made good-faith efforts to find other employment during the backpay period. Gear did not receive an offer of factory work, contrary to Respondent's assertion on brief.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[4]

ORDER

The Respondent, Mastell Trailer Corporation, St. Paul, Minnesota, its officers, agents, successors, and assigns, is ordered to pay the persons listed below the amounts set forth opposite their names, together with interest, computed in the manner prescribed in *Florida Steel Corp.*, 231 NLRB 651 (1977). See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962):

Sidney Albee	$ 544
Michael Faricy	2188
James Gear	3024
Edwin Hohn	2188
Thomas Mauder	2541
Paul Madison	2906
Dan Sapp	2448
Thomas Solem	3024
Dennis Alm	3024
Warren Scribner	3024

[4] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

Health Enterprises of America, Inc., d/b/a Canterbury Villa *and* United Paper Workers International Union and its Local Union No. 571, AFL-CIO. Cases 8-CA-14834 and 8-CA-14834-2

14 December 1984

DECISION AND ORDER

BY MEMBERS ZIMMERMAN, HUNTER, AND DENNIS

On 16 May 1983 Administrative Law Judge Thomas A. Ricci issued the attached decision. The Respondent and the General Counsel filed exceptions and supporting briefs, and the Charging Party filed a brief in answer to the Respondent's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions,[2] but not to adopt the recommended Order.

We agree with the judge that the Respondent unlawfully instituted several unilateral changes in its employees' terms and conditions of employment. We believe, however, that the judge's recommended Order lacks sufficient specificity as to the unlawful changes made and the affirmative steps that the Respondent must take to remedy those violations of the Act. We shall provide that the Respondent make the employees whole for any monetary losses they suffered as a result of the unilateral changes. Payments to employees shall be made with interest as prescribed in *Florida Steel Corp.*, 231 NLRB 651 (1977). See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962).

Similarly, we agree with the judge that the strike that commenced 24 May 1981 was an unfair labor practice strike and that Joyce Green was unlawfully discharged while participating in the unfair labor practice strike. Again, however, we find the judge's recommended Order to be inadequate concerning those matters. Accordingly, we shall order that the Respondent offer the strikers, on their unconditional applications to return to work, immediate and full reinstatement to their former positions or, if these positions no longer exist, to substantially equivalent positions, without prejudice to their seniority and other rights and privileges, dismissing, if necessary, persons hired on or after 24 May 1981, and to make them whole for any loss of earnings they may suffer as result of the Respondent's refusal, if any, to reinstate them in a timely fashion by paying to each of them a sum of money equal to that each would have earned as wages during the period commencing 5 days after the date on which each unconditionally offers to return to work to the date of the Respondent's offer of reinstatement, less any net earnings during such period. The Board has found that the 5-day period is a reasonable accommodation between the interests of the employees in returning to work as quickly as possible and the employer's need to effectuate that return in an orderly manner.[3] Accordingly, if the Respondent has already rejected, or later rejects, unduly delays, or ignores any unconditional offer to return to work, or attaches unlawful conditions to its offer of reinstatement, the 5-day period serves no useful purpose and backpay will commence as of the unconditional offer to return to work.[4]

Having further found, in agreement with the judge, that during the strike the Respondent terminated Joyce Green in violation of Section 8(a)(3) and (1) of the Act, we shall order the Respondent to offer Joyce Green immediate and full reinstatement to her former position or, if that position no longer exists, to a substantially equivalent position, without prejudice to her seniority or other rights and privileges, dismissing, if necessary, persons hired on or after the date of her discharge, and to make her whole for any loss of earnings she may have suffered as a result of the discrimination practiced against her.[5]

In each instance where backpay is appropriate, such backpay and interest shall be computed in the manner prescribed in *F. W. Woolworth Co.*, 90

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

While Member Hunter agrees that there is no basis for overruling the judge's credibility findings, he disapproves of the judge's conclusions that the Respondent's owner gave false testimony under oath.

[2] We disavow the judge's statement that "[i]n a sense the strikers were former employees . . . ." See *Laidlaw Corp.*, 171 NLRB 1366 (1968), enfd. 414 F.2d 99 (7th Cir. 1969), cert. denied 397 U.S. 920 (1970).

In addition we find it unnecessary to rely on his discussion of the so-called "hypothetical employer" in par. 8 of the section of his decision headed "Violations of Section 8(a)(3)."

Finally, we agree with the judge that the Respondent's no-solicitation rule violated Sec. 8(a)(1), but we do not rely on *T.R.W. Bearings*, 257 NLRB 442 (1981), and rely instead on *Beth Israel Hospital*, 223 NLRB 1193 (1976), affd. 437 U.S. 483 (1978).

[3] *Drug Package Co.*, 228 NLRB 108 (1977).

[4] *Newport News Shipbuilding Co.*, 236 NLRB 1637 (1978), enfd. 602 F.2d 73 (4th Cir. 1979).

[5] *Abilities & Goodwill*, 241 NLRB 27 (1979), enf. denied on other grounds 616 F.2d 6 (1st Cir. 1979).

Member Dennis agrees with the dissent in *Abilities & Goodwill* that the majority in that case improvidently overruled more than 30 years of Board precedent requiring unlawfully discharged strikers to offer to return to work in order to initiate the running of backpay. Absent a majority to overrule *Abilities & Goodwill*, Member Dennis will apply the remedy set forth in that decision.

NLRB 289 (1950), and *Florida Steel Corp.*, supra. Finally, we find that the Respondent's misconduct was egregious and demonstrates a general disregard for the employees' fundamental rights. Therefore, we shall issue a broad order requiring the Respondent to cease and desist from infringing "in any other manner" on employees' Section 7 rights. *Hickmott Foods*, 242 NLRB 1357 (1979).

Accordingly, for the foregoing reasons, we shall substitute the Order below for that recommended by the judge.[6]

ORDER

The National Labor Relations Board orders that the Respondent, Health Enterprises of America, Inc., d/b/a Canterbury Villa, Milan, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Telling employees that they should quit their union membership.

(b) Coercively interrogating employees concerning their union activities.

(c) Telling employees the owner of the Respondent will never sign a collective-bargaining agreement with the Union.

(d) Telling employees they will regret having engaged in union activities.

(e) Telling employees that the Respondent will not bargain with the Union because it filed charges with the National Labor Relations Board.

(f) Promulgating or maintaining an unlawful no-solicitation rule.

(g) Discharging or in any other manner discriminating against its employees because of their union or other protected concerted activities.

(h) Dealing directly with its employees, or discussing terms and conditions of employment with its employees while bypassing the employees' established collective-bargaining representative.

(i) Unilaterally changing its employees' terms and conditions of employment including, but not limited to, insurance benefits, working hours, rates of pay, incentive plans, and vacation pay and eligibility standards, provided, however, that nothing in this Decision and Order shall be construed as authorizing or requiring the Respondent to withdraw or eliminate any benefits presently enjoyed by the Respondent's employees absent the express consent of the Union.

(j) Refusing to bargain in good faith with United Paper Workers International Union and its Local Union No. 571, AFL–CIO as the exclusive representative of its employees in the following appropriate unit:

> All full-time and regular part-time service and maintenance employees including laundry employees, housekeeping employees, dietary employees, nurses aides and LPN's, excluding registered nurses, therapists, professional employees, business and admitting office employees, guards and supervisors as defined in the Act, employed by the Respondent at its Canterbury Villa Nursing Home.

(k) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Restore all terms and conditions of employment specified in paragraph 1(i) above to the status quo as it existed before the unlawful unilateral changes were made, to the extent such changes were detrimental to the employees.

(b) Make whole any employees who may have been detrimentally affected by the changes in terms and conditions of employment specifically described in paragraph 1(i) above, with interest on any monetary losses the employees may have suffered to be computed in the manner set forth in this Decision and Order.

(c) Offer immediate and full reinstatement to Laura Baisden, Sandra Baisden, Glenda Foster, Charlotte Habeck, Joan Kuhlman, Ethel Signs, and Emily Walker to their former positions or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and make them whole for any loss of earnings they may have suffered as a result of the discrimination practiced against them in the manner set forth in this Decision and Order.

(d) Offer immediate and full reinstatement to Joyce Green to her former position or, if that position no longer exists, to a substantially equivalent position, without prejudice to her seniority or other rights and privileges, dismissing, if necessary, persons hired on or after the date of her discharge, and make her whole for any loss of earnings she may have suffered as a result of the discrimination practiced against her in the manner set forth in this Decision and Order.

(e) Remove from its files any reference to the unlawful discharges and notify the employees in writing that this has been done and that the discharges will not be used against them in any way.

(f) Offer the unfair labor practice strikers, upon their unconditional applications to return to work,

[6] We shall also correct certain omissions and other minor errors in the judge's recommended Order so as to conform the Order to our traditional practice and the specific violations found.

immediate and full reinstatement to their former positions or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority and other rights and privileges, dismissing, if necessary, persons hired on or after 24 May 1981, and make them whole for any loss of earnings they may have suffered in the manner set forth in this Decision and Order.

(g) Recognize and, on request, bargain in good faith with the aforesaid labor organization as the exclusive representative of the employees in the above-described appropriate unit with regard to rates of pay, hours of employment, and other terms and conditions of employment, and embody in a signed agreement any understanding reached.

(h) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(i) Post at its Milan, Ohio nursing home copies of the attached notice marked "Appendix."[7] Copies of the notice, on forms provided by the Regional Director for Region 8, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(j) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[7] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT tell employees they should quit their union membership.

WE WILL NOT coercively interrogate employees concerning their union activities.

WE WILL NOT tell employees the owner of the Company will never sign a collective-bargaining agreement with the Union.

WE WILL NOT tell employees they will regret having engaged in union activities.

WE WILL NOT tell employees that the Company will not bargain with the Union because it filed charges with the National Labor Relations Board.

WE WILL NOT promulgate or maintain an unlawful no-solicitation rule.

WE WILL NOT discharge or in other manner discriminate against our employees because of their union or other protected activities.

WE WILL NOT deal directly with our employees, or discuss terms and conditions of employment with our employees while bypassing the employees' established collective-bargaining representative.

WE WILL NOT unilaterally change our employees' terms and conditions of employment including, but not limited to, insurance benefits, working hours, rates of pay, incentive plans, and vacation pay and eligibility standards, and WE WILL NOT withdraw or eliminate any benefits presently enjoyed by our employees absent the express consent of the Union.

WE WILL NOT refuse to bargain in good faith with United Paper Workers International Union and its Local Union No. 571, AFL–CIO as the exclusive representative of our employees in the following appropriate unit:

> All full-time and regular part-time service and maintenance employees including laundry employees, housekeeping employees, dietary employees, nurses aides and LPN's, excluding registered nurses, therapists, professional employees, business and admitting office employees, guards and supervisors as defined in the Act, employed by the Respondent at its Canterbury Villa Nursing Home.

WE WILL NOT in any other manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL restore all terms and conditions of employment to the status quo as it existed before the unilateral changes were made, to the extent such changes were detrimental to our employees.

WE WILL make whole any employees who may have been detrimentally affected by the changes in terms and conditions of employment with interest on any monetary losses our employees may have suffered.

WE WILL offer immediate and full reinstatement to Laura Baisden, Sandra Baisden, Glenda Foster, Charlotte Habeck, Joan Kuhlman, Ethel Signs, and Emily Walker to their former positions or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and make them whole for any loss of earnings they may have suffered as a result of the discrimination practiced against them, with interest.

WE WILL offer immediate and full reinstatement to Joyce Green to her former position or, if that position no longer exists, to a substantially equivalent position, without prejudice to her seniority or other rights and privileges, dismissing, if necessary, persons hired on or after her discharge and make her whole for any loss of earnings she may have suffered as a result of the discrimination practiced against her, with interest.

WE WILL notify the above-named employees that we have removed from our files, and have asked the Employer to remove from the Employer's files, any reference to their discharges and that the discharges will not be used against them in any way.

WE WILL offer the unfair labor practice strikers, upon their unconditional applications to return to work, immediate and full reinstatement to their former positions or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority and other rights and privileges, terminating, if necessary, persons hired on or after 24 May 1981, and make them whole for any loss of earnings they may have suffered, with interest.

WE WILL recognize, and on request, bargain with the above-named labor organization as the exclusive representative of our employees in the above-described appropriate unit with regard to rates of pay, hours of employment and other terms and conditions of employment, and embody in a signed agreement any understanding reached.

HEALTH ENTERPRISES OF AMERICA, INC., D/B/A CANTERBURY VILLA

DECISION

STATEMENT OF THE CASE

THOMAS A. RICCI, Administrative Law Judge. A hearing in this proceeding was held on February 16 and 17, 1983, at Sandusky, Ohio, on complaint of the General Counsel against Health Enterprises of America, Inc., d/b/a Canterbury Villa (the Respondent or the Company). The original complaint issued on June 18, 1981, based on a charge filed on May 6, 1981, by United Paper Workers International Union and its Local Union No. 571, AFL–CIO (the Union). A second charge was filed on June 5, 1981, and a second complaint was issued on July 16, 1981, involving the same parties. The issues presented are whether, as alleged in the complaint, the Respondent unlawfully refused to bargain with the Union, and discharged a number of employees in violation of Section 8(a)(3) of the Act. Briefs were filed by all parties.

On the entire record, and from my observation of the witnesses, I make the following

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT

The Respondent, an Ohio corporation, operates a facility in Milan, Ohio, where it is engaged in the operation of a nursing home. Annually it derives gross revenues in excess of $100,000 from this operation and receives goods valued in excess of $2000 at this location directly from points outside the State. I find that the Respondent is an employer within the meaning of the Act.

II. THE LABOR ORGANIZATION INVOLVED

I find that the United Paper Workers International Union and its Local Union No. 571, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. *The Case in Brief*

The events giving rise to this case occurred at a nursing home located in Milan, Ohio, which the Respondent purchased on February 1, 1981. There were about 70 employees working there at the time, about 50 to 55 of them represented by Local 571 of the Paperworkers Union, which filed this charge. The Union had been certified as bargaining agent following a Board election the year before in 1980. Within 2 months of taking over the business, Peter Kern, the owner and president of the Company, started to change conditions of employment unilaterally, dealing directly with the employees as though the Union were not in the picture at all. He gave pay raises, changed vacation allowances, established new work rules, etc. While doing this he met a few times with union agents, ostensibly carrying on simultaneous collective bargaining. There came a time when the Union filed charges with the Board, claiming the Respondent was not bargaining in good faith. With this, the Company formally cut off all recognition of the Union, asserting that because of the charges filed, it was no longer obligated under the statute to continue recognition of the exclusive certified bargaining agent. And it continued to deal with the employees directly, still ignoring the Union's existence. It promised them benefits and advised them to stay away from the Union for at least 6 months, so that they could judge for themselves how more generous his personal treatment of them was without a union.

The first question presented is: Did the Respondent violate Section 8(a)(5) of the Act by refusing to bargain with the Union and by dealing directly with the employ-

ees and changing their conditions of employment behind the Union's back, as it were?

In May 1981 the Union decided to strike, and gave the Respondent the usual 10-day notice of such intent. The strike was set to begin at 7 a.m. on May 24. On May 23 the Union decided otherwise, and chose to continue bargaining instead. After the 7 a.m. shift reported to work on May 24 seven of the employees were summarily discharged. Within a matter of an hour or so, the Union again switched position and started the strike, and the picketing, that very day.

The second major issue presented is: Were the seven employees discharged because of the union activities—in violation of Section 8(a)(3) of the Act, or were they released for just cause, as the Respondent contends? Most of the employees struck, at least 40 of them. The picketing went on for several months. If either of the first two questions is answered affirmatively in favor of the complaint—allegations of refusal to bargain and in fact illegal discharge of seven employees—it follows that it was an unfair labor practice strike which followed. In that event, each and every one of the strikers has a statutory right to be returned to work upon unconditional application.

A final major allegation of the complaint is that the Respondent discharged 40 of the strikers after the strike started. As to that, see below.

B. *Violations of Section 8(a)(5)*

That Kern, the owner of the business, was adamantly opposed to having a union represent the employees in this place is the clearest reality shown on this record. He admitted the fact a number of times verbatim, both to the employees when he gathered them apart from the Union, and at the hearing while testifying. It matters not that he believed a union is a bad thing in nursing homes, that the possibility of strike could endanger the well-being of the patients. The law is clear, and he simply cast it aside. The Respondent took over the very same business of the predecessor, the same full complement of employees, the same building and equipment, the same supervisory staff, etc. The duty to bargain with the established certified union could not be questioned. *NLRB v. Burns Security Service*, 406 U.S. 272 (1972).

Two months after he arrived, about April, Kern announced to the employees, without a word to the Union, that he was changing the health and life insurance policy then in effect. The new policy became available to more employees than in the past. On May 3 he also changed the work schedule, ordering the day shift to work 7-1/2 hours a day instead of the old 7 hours. On April 24 he called all the employees to a meeting where he addressed them for perhaps an hour. His initial message to them that day was that he had no intention of having anything at all to do with the Union, that Robert Moore, the Union's business representative, with whom he had been talking, was no longer welcome, and that he had written a letter to the Union telling them that. He also distributed to the employees that day a new policy handbook to take the place of one which had governed conditions of employment under his predecessor. It made a number of changes in their benefits—such as, among others, with respect to a grievance procedure, holiday and vacation benefits, a discipline system, a no-solicitation rule, etc. There is little need to quote the various employees who were present and who testified about what he said that day, for Kern's own words suffice to prove the unfair labor practices. For example:

> Q. Did you ask the employees to give you six months time within which to see what you could do with the nursing home and to help them, and if at the end of that time they were still dissatisfied, they could have their union?
>
> A. Yes, I did tell them that . . . I told them that we didn't normally conduct ourselves in the way that they had been treated and, yes, that, you know, within 6 months, we will let them make their decision.

This was the employer telling his employees they could do better dealing with him directly than through the Union of their choice, promising to improve the terms of employment within 6 months to the point where they themselves would quit the Union. But they had already chosen to be represented by the Union. If ever there was a clear violation of Section 8(a)(5) of this statute this was it, without need for citing precedent!

In early May, Kern held a number of small group meetings with the employees, talked to three or four at a time in his office, privately. Again he explained the changes he had made and the way he thought it would all benefit them. Asked did he tell them, as some of the employees testified at the hearing, that he would never sign a union contract, Kern denied it. Then came the following:

> Q. Directing your attention again to these small group meetings, isn't it true that you told the employees that were gathered in small groups that these proposals were only for the employees that would stay on and not for those who would go on strike?
>
> A. No. I didn't tell them that. I said that these wages and policies were going into effect. If they went on strike, they obviously wouldn't be there to participate in them. If they stayed that's what was going on.
>
> . . . .
>
> Q. Did you tell the people that they could strike and get nothing or accept what you were offering and not strike and drop the Union?
>
> A. No. What I told them, again, is that as of May 1st or June 1st or whatever date this document went up on the board, that it was going to be the rates of pay and benefits, etc. If they went on strike, they wouldn't physically be there to get a paycheck.
>
> Q. Did you tell the employees—did you ask the employees for a chance and tell them that this was hard to get rid of a union once they had it and if they weren't successful, they could try again and get one?
>
> A. Yes, I believe I said something like that.

In light of the foregoing testimony from Kern himself, of course, I credit the following testimony of the employees. Joyce Green spoke of the April 24 mass meeting of employees. "He said that he wanted to know what the Paperworkers was doing in a health facility. He would not sit down and negotiate with Robert Moore because we had filed an unfair labor practice charge against him. He said he wanted no third party and he still held the ballgame." "He wanted us to sit down and listen. We told him that we were not there to bargain with him and any great offers that he had to take them to the bargaining table. He said I'm not here to bargain. This is an offer. If you stay and you don't strike, that is what you get. This is for the employees who will stay. We told him we were for the Union and it didn't seemed to make any difference . . . I told him there is nothing more than a bribe. This is better than what we asked for at the table. He kept going back and forth and he said, you like the word, Joyce? I said, yes, I do. He said, let's call it a mass bribe for conversation's sake, so that's what he did . . . He said he would never put his name on a contract. He said he had the money, time and ability to hold us off for four years." On May 8 Green was called to the office for a small group meeting, four employees sitting with Kern. "How did the meeting start out? Did Mr. Kern make a long speech? A. No. He said to discuss the policies that he implemented into the facility . . . . He asked if anybody would like to know what he would offer without the union to just give him a phone number."

In April and into early May, Landis was the nursing home administrator, an admitted supervisor. About May 1 she told Green: "Why don't you quit . . . the union." When Green said she would not, Landis came back with "you will not win and you can't win, you are going to hurt a lot of people doing this."

Linda Brown recalled Kern saying at the April 24 meeting "to give him a chance, to not have the union, but give him six months and at the end of six months if you don't like what he said or what he gave us, then we could have our union back. He would allow it. He did make a comment before all this. He said he was probably hanging himself or crucifying himself for making this statement, but he was going to state it anyway." As to her attendance at one of the small group meetings, Brown said Kern "brought out about benefits at other homes, and he would—he would get the same things, but he didn't want to deal with a union and he talked about going to Florida."

Shirley Holmes, present with Joyce at one of the small meetings, testified that when Joyce asked was the raise being offered as a bribe, Kern said: "If you want it to be a bribe, call it a massive bribe . . . . He kept on saying, you take this. Drop the union. Get rid of the union. You accept this. Don't strike."

From Laura Baisden's testimony about a May 5 talk with Administrator Landis: "She stopped me and asked me why—she said, I wanted to talk to you for a minute, but this was very confidential. I don't want it to go no further. She said, I want to ask you why are you girls starting a union in here? I didn't answer at that moment, and she said let me ask you a question: If your grandparents was in here, would you start a union? I said, well, I said it wasn't, like, it wasn't up to me to do anything, because I wasn't supposed to, and she said if you do, that you'll be sorry of it, and that you'll regret it."

By its entire course of conduct in dealing directly with the employees in total disregard of their chosen bargaining agent the Respondent violated Section 8(a)(5) of the Act most flagrantly. *Medo Photo Supply Corp.*, 321 U.S. 678 (1944). I also find that by unilaterally changing the scheduled hours of work, the established health and life insurance benefits,[1] the policy handbook, the vacation benefits previously enjoyed by all the employees, and by giving raises, all without giving the Union an opportunity to bargain on all these subjects, the Respondent violated Section 8(a)(5) of the Act. I also find that by deliberately refusing to recognize the Union as bargaining agent because it had filed charges of unfair labor practices with the Board, the Respondent again violated Section 8(a)(5). *Equitable Life Insurance Co.*, 133 NLRB 1675 (1961).

I also find that by Kern's statement to the employees that he would not recognize the Union because it had filed charges against the Respondent with the National Labor Relations Board, by his statement that he would never sign a contract with the Union, by his statement to employees that they should refrain from continued adherence to the Union while he satisfied their economic demands directly, by Administrator Landis' statement that employees should quit the Union and that their union activity would hurt the employees instead, and by her interrogation of employees as to why they wished to be represented by the Union, the Respondent violated Section 8(a)(1) of the Act.

The new rules announced by the Company in the revised policy handbook contain the following no-solicitation rule:

> No person is permitted to solicit for any purpose on the grounds or within the building of this facility, unless prior approval is obtained from the Administrator.

I find that by the announcement and enforcement of this no-solicitation rule the Respondent violated Section 8(a)(1) of the Act. *T.R.W. Bearings, Inc.*, 257 NLRB 442 (1981). Cf. also *Gillette's*, 226 NLRB 819 (1976).

C. *Violations of Section 8(a)(3)*

As already stated, the Union changed its strategy and decided not to strike on May 24. That morning, the day shift, scheduled to start at 7 a.m., reported for work as

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[1] Contrary to the Respondent's contention, the mere fact that the revised insurance plan then put into effect at this nursing home, which in fact changed the character of the insurance benefit enjoyed by the employees, conformed with the insurance then in effect at its other nursing homes, is not a sufficient defense to this element of the complaint here. The duty to bargain with a certified bargaining agent embraces all conditions of employment involving the employees in that appropriate unit. Here the bargaining unit is not disputed. It is as follows:

> All full-time and regular part-time service and maintenance employees including laundry employees, housekeeping employees, dietary employees, nursing aides and LPN's excluding registered nurses, therapists, professional employees, business and admitting office employees, guards and supervisors as defined in the Act, employed by the Respondent at its Canterbury Villa Nursing Home.

usual. Some of the women testified about that. All said they arrived, as usual, before 7 a.m., sat in the lobby talking and some of them having coffee, as they always did, clocked in before 7 a.m., and went to their work stations at 7 a.m. At 9 or 9:30 a.m., each of these seven was called to the office and fired. Why were they discharged?

It is an old principle of Board law that when an employer is charged with discharging a person for an illegal reason, and the affirmative reason advanced by the employer is false, the inference that the true reason was an improper one is greatly strengthened. *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466 (9th Cir. 1966), enfg. 151 NLRB 1329 (1965).[2] The facts of this case present exactly such a situation. Kern testified that he decided to discharge these ladies because they had "falsified" their timecards that morning. Again and again he repeated the statement at the hearing. And each woman was given a notice, prepared before they were called to the office, reading: "Falsification of timecard." Kern explained this on the ground that the policy book provided that the employees were not to clock in more than 5 minutes earlier than their starting time; in this instance it would have been 6:55 a.m. The timecards in this place are punched by a clock, and there is therefore no way the recorded time could be false. More important, Kern admitted that no matter exactly when the employee punches her card, she is only paid for the scheduled hours—from 7 a.m. to 3 p.m. or to 3:30 p.m. The word "false," therefore, was a pure fiction of the imagination.

But what completely destroyed Kern's credibility in this entire case is that the cards of four of the seven women show they punched in at exactly 6:56 a.m.! Kern even said he looked at the cards before writing the discharge slips. His antiunion feeling may have carried him away, but that he was giving false testimony under oath in this case is an absolute fact. This, to say nothing of the fact the clocking-in rule which Kern now professes to have enforced was unilaterally and therefore illegally established in the first place. *Latex Industries*, 252 NLRB 855 (1980).

There are other grounds for not believing Kern as to why he discharged these women, but in the light of the first fact, there is little reason for belaboring the matter. Three of the ladies did clock in earlier, one at 6:44 a.m. and two at 6:45 a.m. It was stipulated that in the past others had also clocked in more the 5 minutes before starting time, a number of times, but there is no evidence in the least indicating anyone had been criticized before for that fact. As he rambled along in his self-exculpatory testimony, Kern merged two asserted offenses by the girls into one. He said that sitting in the lobby waiting for 7 o'clock, and talking loudly among themselves, they did not move on to the work stations on time, that they deliberately stayed there 10 to 15 minutes beyond 7 o'clock. With that assertion, he explained the use of the word "falsification" out of his mouth as meaning "falsification in the sense they weren't working; expecting to be paid, but not working." It will not do, for the use of the word falsification in the discharge slips given to the girls is tied directly to the "timecards," not the sitting idly while waiting. Such attempts at double-talking serves all the more to completely discredit the Respondent's principal witness.

Kern's second asserted reason for the discharges is that the seven women were told by a supervisor to go to work after 7 o'clock and ignored him. He testified that from his office, next to the lobby, he saw the women just sitting and talking among themselves after 7 a.m., and sent his assistant, Richard Macaluso, to tell them to get work. Macaluso, the administrator of the home who had been hired 2 weeks earlier in this place, said that about 7:10 a.m. he went out and "asked them if they were planning on going to work, and if they were, I would like them to report to their stations," but that all that happened was "a lot of chitchat and laughing about it." Kern added that about 7:15 a.m. he went out and told the girls to get to work, and that they then did.

All seven of the women involved testified that as they gathered at various times before 7 a.m., they only did what they had always done—had coffee if there was enough time, talked among themselves, and went to their stations directly at 7 o'clock. Each one of them denied either Macaluso or Kern came out of the office to order them to go to work. Several of them did recall Kern putting his head out of the office door to tell them to be more quiet. They explained there was much to do in the lobby at that time because many women were arriving, with valises and things, who had never worked there before. These outsiders had been hired in expectation of the announced strike and formed a complete complement of replacements in advance of the day. Considering the situation in its entirety, I credit these women.

The question remains: Why were these women discharged? After 7 o'clock, Kern realized that, with the anticipated strike replacements having arrived, he was double-staffed on the day shift. He said as much. Having brought some of his employees from other homes he owns, and having hired some new replacements, it can be presumed he had reason to believe they would not be enthusiastic unioneers. After all, as opposed to any union as Kern admitted he was, he must be expected to have taken such precautions when faced with a strike situation. The inference must be that he decided to get rid of the old people who had at least threatened strike and whom he could do without at the moment. He gave no other reason for sending them home.

Had this been an employer who kept his hands off the employee's right to be represented by a union, who had not committed such clear unfair labor practices before that date, who in all other respects complied with the

[2] As stated in 362 F.2d at 470:

> Actual motive, a state of mind, being the question, it is seldom that direct evidence will be available that is not also self-serving. In such cases, the self-serving declaration is not conclusive; the trier of fact may infer motive from the total circumstances proved. Otherwise no person accused of unlawful motive who took the stand and testified to a lawful motive could be brought to book. Nor is the trier of fact—here the trial examiner—required to be any more naif than is a judge. If he finds that the stated motive for a discharge is false, he certainly can infer that there is another motive. More than that, he can infer that the motive is one that the employer desires to conceal—an unlawful motive—at least where, as in this case, the surrounding facts tend to reinforce that inference.

law of the land, the question raised by these seven discharges might appear in a different light. The operator of a nursing home has a responsibility to see that the patients are cared for. That is why the law calls for a 10-day strike notice, so that he can take the requisite precautions to see that the patients are looked after. May he, in order to achieve that perfectly proper objective, hire replacements in advance of the announced strike, even promising them permanent employment, and insist on keeping them when the intended strikers change their minds at the last, critical moment?

I do not reach that question in this case, and decision here is not intended to rule against that hypothetical employer. Kern did not give that as his reason when he discharged the ladies. He did not even advance it at the hearing. Moreover, his revealed animosity towards any form of union activity strongly strengthens the conclusion, which I reach, that he seized on the immediate situation to get rid of some of the employees who had refused to heed his advice and delay any union activity for at least 6 months.

I find that by discharging Laura Baisden, Sandra Baisden, Glenda Foster, Charlotte Habeck, Joan Kuhlman, Ethel Signs, and Emily Walker at that moment the Respondent violated Section 8(a)(3) and (1) of the Act as alleged in the complaint.

And finally I find that the strike which commenced on May 24, 1981, was an unfair labor practice strike engaged in by the employees in protest of the unfair labor practices committed by the Respondent.

D. *The Alleged Discharge of All the Strikers*

As stated above, the Union set the time for the strike to start at 7 a.m., and the decision not to strike, made the night before, was not communicated to the Company. In preparation for the strike the Company not only hired a full complement of replacements, but also, not knowing what would happen, hired guards to look after the premises. When the morning shift came to work, to the Company's surprise, they all started to work. While seven of these were later fired, others remained, and continued to work.

When the seven were discharged, about 9 o'clock, they all went to the home of Joyce Green, where other employees were gathered. It was there, about 9:30 or 10 o'clock, in consultation with the union representative, that the decision was made to begin the strike. The entire group then went back to the nursing home, and started picketing. At that moment, some of the early morning shift employees walked off the job, but some of them, old employees, remained at work. The picketing continued for a number of months. Most of the employees joined the strike, but the record does show quite clearly that some, a few at least, remained at work, in addition to the few of the morning shift who came at 7 a.m. and stayed.

The second complaint, issued on July 16, 1981, alleges, without detail, that that day—on May 24—the Respondent discharged 40 named employees. Considering the record as a whole, I take this to mean every one of the employees who decided that day to strike. Neither of the charges, filed long before that complaint was issued, says anything about the entire group being anything but employees who chose to withhold their services. Neither the Union, which filed the charges, nor the employees, thought they had been discharged instead. There is no evidence to prove that all these people were fired, and I shall therefore dismiss this blunderbuss allegation.

The entire case in support of this part of the complaint centers on a letter Kern wrote to the Union 3 days after the strike started. He testified, and no one contradicted him on this point, that after the strike began a Purolater Company truck making delivery to the nursing home had been prevented from entering the home by the picket line. That truck was delivering payroll information from another office of this multiestablished company. Kern wrote to the Union thereafter that, because of this difficulty of the delivery being made to the home, there would be a delay in preparing paychecks, and that employees who still had pay coming to them would receive it in the mail, and should not come to the nursing home to get their checks. In this letter Kern referred to the strikers as "former staff members"; he wrote "Any former employees attempting to enter the facility personally to secure their checks will be immediately requested to leave the facility." Does this phrase, used by Kern in referring to the strikers at that moment, amount to proof that he then and there discharged them all in violation of Section 8(a)(3) of the statute? I think not.

In a sense the strikers were former employees, because they had voluntarily quit work, and if Kern told them then to stay out of the place, he had every right to do so. Since when do strikers have a right to enter the struck place of business? Had Kern been better versed in the intricacies of Board law, he would have known that strikers of any kind, economic or unfair labor practice strikers, have inchoate reinstatement rights if ever they choose to abandon their strike. But to hold that by such a passing phrase, perfectly understandable in the circumstances of the moment, is tantamount to actual discharge, is a play on words.

When Green, the employee president of the local union, heard of the discharge of the seven that morning, she tried to get Kern on the telephone to discuss that matter, but Kern refused to talk to her, so she went to the Home to talk to him about it, but the guard on duty refused to let her in. She was not reporting to work on her regular shift, and certainly there is no claim she intended to come in to work at all. How does the fact the owner did not want to talk to her that day help prove a violation of Section 8(a)(3)? Moreover, the Union's business agent also appeared at the jobsite after the picket line was up. He quoted the guard as saying "my duties are to keep peace here . . . he didn't want to have any problems with the females that were on picket duty in front of the Villa?" Again, the guard was talking to the leader of the strikers, telling him and the strikers to stay out of the place. Do strikers have a right to enter the premises for any reason at all, except it be to offer to abandon the strike?

At the hearing the General Counsel came up with two timecards, one for Audie Overton and one for Shirley Burris, for May 24, 1981. They show that Overton

clocked in at 6:40 a.m. and clocked out at 12:10 p.m.; and that Burris clocked in at 6:45 a.m. and out at 11:20 a.m. On each card is written the word "terminated." Neither Overton nor Burris appeared at the hearing. The indications are that they joined the strike when they clocked out on May 24, and remained strikers thereafter. Whatever became of them during the 22-month interval between the start of the strike and the day of the hearing remains unknown. Asked, at the hearing, to explain the word terminated on these two cards, Kern said he did not "remember," he did not know, and added he "imagined" it must have been because they improperly left their duty stations during their shifts, "not finishing out their work day."

I am unable to find a violation of the statute with respect to these two employees. An unfair labor practice is conduct by an employer vis-a-vis his employees, some action on his part that the employees at least know about, or hear about, if not actually done to them personally. There is no evidence, indeed no contention, that Overton or Burris, or any union officials, ever knew about what was written on those two cards until the time the General Counsel examined the company records in preparation for this hearing. I do not think it can be said, in terms of statutory law, that an employee is in fact discharged, unless the employee is told about it. Especially is this logic applicable when the employees voluntarily strike, and for such a long time choose to remain on strike. Unspoken evil intent in the mind of an employer is not an unfair labor practice.

One direct discharge I do find. About 10 days after the start of the strike, Green, who had not yet received a paycheck, called in and was told to bring in the key to the janitor's room, which she still had in her possession. She came and talked to Macaluso, the administrator of the Home. When she looked at the paycheck he gave her, she noticed her 15 days of paid vacation had not been included. When she told this to Macaluso, his only response was, "You're fired." She left and was never recalled.

It matters not that thereafter Green joined the picket line. She had a right to take the top management representative at the home at the moment at his word, that she had really been terminated. I find that by discharging Green the Respondent violated Section 8(a)(1) and (3) of the Act.

In the course of his many conversations with the employees, in small and in large groups, the president of the Respondent said many other things in support of his general antiunion campaign which could be said to constitute unfair labor practices under the statute. Indeed, many of them are listed in the complaints in addition to those found herein. But no useful purpose would be served by belaboring those details here now. Two years have already passed since the events, and the important thing is to remedy the improper conduct without further delay.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES ON COMMERCE

The activities of the Respondent set forth in section III, above, occurring in connection with its operations described in section I, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

The Respondent must be ordered to cease and desist from continuing to commit the unfair labor practices found herein. It must also be ordered to bargain with the Union in good faith on request, to offer unconditional reinstatement to the eight employees illegally discharged, and to make them whole for any loss of earnings they lost as a consequence, to revert to its former practice with respect to rules of conduct and employee benefits such as existed before the unlawful unilateral changes, without particular attention to restoring those benefits which the employees enjoyed and which were thus illegally taken away from them. And, of course, the Respondent must post the appropriate notices.

CONCLUSIONS OF LAW

1. By dealing directly with its employees represented by the Union while bypassing their established bargaining agent, and by unilaterally changing conditions of employment, the Respondent has engaged in and is engaging in unfair labor practices in violation of Section 8(a)(5) of the Act.

2. By refusing to bargain with United Paper Workers Independent Union and its Local Union No. 571, AFL-CIO, in good faith, as the representative of all employees in the appropriate bargaining unit the Respondent has violated Section 8(a)(5) of the Act.

3. By discharging Laura Baisden, Sandra Baisden, Glenda Foster, Charlotte Habeck, Joan Kuhlman, Ethel Signs, Emily Walker, and Joyce Green, for engaging in protected union activity, the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(3) of the Act.

4. By the foregoing conduct, and by the conduct of its management representatives in telling employees they should quit the Union, in coercively interrogating employees concerning their union activities, in telling employees the owner of the Company would never sign a collective-bargaining agreement with the Union, in telling employees they would regret having engaged in union activities, and in telling employees the Respondent would not bargain with their chosen representatives because it had filed charges with the Labor Board, the Employer has violated and is violating Section 8(a)(1) of the Act.

5. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

[Recommended Order omitted from publication.]

Dayton Typographical Service, Inc. *and* **Jack A. Hoendorf.** Case 9–CA–16957

14 December 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS ZIMMERMAN AND HUNTER

On 4 November 1982 Administrative Law Judge Thomas E. Bracken issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings, and conclusions[1] and to adopt the recommended Order.

We agree with the judge's finding that the Respondent violated Section 8(a)(1) by discharging employee Hoendorf. In so doing we have considered the Respondent's contention that Hoendorf was not engaged in concerted activity in light of the Board's recent decision in *Meyers Industries*, 268 NLRB 493 (1984). In *Meyers* the Board overruled *Alleluia Cushion Co.*[2] and held, inter alia, that it would require that for an employee's activity to be concerted it must "be engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself."[3]

The finding that Hoendorf was engaged in concerted activity is based on credited record evidence that four employees in the Respondent's customer service department (Hoendorf, Long, Fugate, and Runck) jointly presented certain complaints to Supervisor Southam in November 1980. Among these complaints was the three full-time salaried employees' (Hoendorf, Long, and Fugate) expressed disagreement with the Respondent's policy in assigning Saturday work without compensation. Hoendorf's complaints to Supervisor Logan (Southam's replacement) in December 1980 and January 1981 involved this same Saturday uncompensated work policy.

The Respondent's contention that Hoendorf was engaged in individual griping is based on the absence of evidence that Hoendorf was an authorized spokesman and the asserted absence of legitimate concern by the other employees. This latter assertion is predicated on the Respondent's further claim that Long and Fugate decided not to pursue the Saturday work without compensation matter after Southam told them that nobody would receive compensation unless Saturday work became a regular occurrence.

There is no affirmative evidence that Long and Fugate told the Respondent that they were no longer concerned about the Saturday work without compensation matter. Nor does the record show that the Respondent took any affirmative steps to resolve this complaint. The matter continued to be a common concern to the three employees and was recognized as such by Supervisor Logan. Thus, the judge found that in January 1981 "Logan himself plainly recognized that Hoendorf was speaking for the other full-time service employees, when he protested to Hoendorf that the decision he had to make about Saturday overtime was going to affect three other people." In the circumstances here, in which the November 1980 meeting with Supervisor Southam plainly represented concerted activity, we find that Hoendorf's December 1980 and January 1981 complaints to Supervisor Logan concerning Saturday work without compensation were a continuation of the concerted activity.

Having found that Hoendorf was engaged in protected concerted activity we turn to the reason for his discharge. The judge found that the Respondent's stated reason for Hoendorf's discharge was pretextual and that the real reason was Hoendorf's role as the principal spokesman for the service representative in demanding compensation for working on Saturdays. We agree. Accordingly, we adopt the judge's finding that Hoendorf's discharge violated Section 8(a)(1).

The judge also found that the Respondent violated Section 8(a)(1) by interrogating employee Fugate concerning matters related to the pending unfair labor practice case without observing the necessary safeguards and by asking Fugate for a copy of his affidavit given to the Board. In so finding the judge relied on the principles set forth in *Johnnie's Poultry Co.*[4] and its progeny.

In its exceptions the Respondent relies mainly on the Sixth Circuit's decision in *Anserphone* that refused enforcement of an earlier Board decision. We

[1] In item 3 of his Conclusions of Law, the judge inadvertently named Hoendorf as the subject of the Respondent's unlawful interrogation. Consistent with his findings on this issue, we correct this Conclusion of Law to name employee Fugate as the individual involved.

[2] 221 NLRB 999 (1975).

[3] *Meyers*, supra.

[4] 146 NLRB 770 (1964). See also *Kyle & Stephen, Inc.*, 259 NLRB 731 (1981).

In finding the violations involving Fugate Member Hunter adopts the judge's reliance on *Johnnie's Poultry Co.* and its progeny. Accordingly, he finds it unnecessary to pass on his colleagues' additional rationale for finding these violations.

Member Zimmerman also adopts the judge's reliance on *Johnnie's Poultry Co.*, but he further agrees with the distinction drawn between the present case and *Anserphone, Inc. v. NLRB*, 632 F.2d 4 (6th Cir. 1980).

note that the court did not expressly pass on the standard applied by the Board. Instead, the court considered the circumstances as a whole and concluded that no coercion had occurred.

The circumstances in *Anserphone* differ from the instant case. There the court relied on affirmative evidence to show that no fear of reprisal occurred in connection with the interrogation. It cited one employee's refusal to be interviewed and found that another employee submitted a copy of his Board affidavit not out of fear but in a spirit of cooperation.

There is no such affirmative evidence of refusal to be interviewed here. Further, the fact that Fugate responded to the solicitation of his affidavit by the Respondent's counsel by asking if it was legal to give the affidavit to the Respondent is at odds with a finding that Fugate provided the affidavit in a spirit of cooperation.

It is also significant that the Respondent did not limit its interview to matters raised in the complaint, which made no mention of Fugate, but sought Fugate's affidavit which potentially covered matters outside the complaint and which would not have been available to the Respondent unless and until Fugate was called to testify at the hearing. For these reasons we find that the circumstances as a whole give rise to a finding that the interview of Fugate, including the request for his affidavit, constituted coercive interrogation and our finding of a violation conforms to the Sixth Circuit's standard.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Dayton Typographical Service, Inc., Dayton, Ohio, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

DECISION

STATEMENT OF THE CASE

THOMAS E. BRACKEN, Administrative Law Judge. This case was tried at Dayton, Ohio, May 5–6, 1982. The charge was filed by Jack A. Hoendorf on June 10, 1981,[1] and the complaint was issued July 16. The primary issue is whether the Company, the Respondent,[2] unlawfully laid off and/or discharged Hoendorf in violation of Section 8(a)(1) of the National Labor Relations Act.

On the entire record, including my observation of the demeanor of the witnesses, and after due consideration of the briefs filed by the General Counsel and the Company, I make the following

[1] All dates are in 1981 unless otherwise indicated.

[2] The name of the Company was amended at the trial.

FINDINGS OF FACT

I. JURISDICTION

The Company, an Ohio corporation, is engaged in the manufacture, processing, and nonretail sale of typesetting at its facility in Dayton, Ohio, at which it purchased and received products, goods, and materials in excess of $50,000 directly from points outside the State of Ohio, during the calendar year ending December 31, 1980. The Company admits, and I find, that it is an employer engaged in commerce and in operations affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES[3]

A. *Background*

The Respondent is a long-established typesetting company, having been in business for over 50 years. One of its departments, and the only one involved in this case, is the customer service department. At all times material to this case, there were four employees in this department. Jack Hoendorf had been hired in 1962, George R. Long in 1966, Paul Fugate in 1972, and Wava Runck in 1978. All but Runck were full-time employees, and none of them belonged to a union.[4] The immediate supervisor of these four employees in 1980 was William Southam. William C. Taylor was the president and chief executive officer of the Company, and his father, John N. Taylor, was chairman of the Board, and partially retired.

Hoendorf, the charging party, at the time of his hiring in 1962 started to work as a typesetter in the plant. In 1966 Hoendorf had been promoted to the position of assistant foreman in the hot metal department. Because of technological changes from hot metal type to computerized photographic composition in about 1976, Hoendorf was transferred to the phototronic department for training as a print-out reader. Hoendorf did not attain enough skill in this position and in about 1977, gave up his union affiliation, and was placed in the customer service department on a salary.

A customer service representative serves as a middlemen between the salesman who secures the printing job and the customer. After the salesman brings the printing job to the department, the service representative marks up the job for the composing department, and then sees it through the plant to completion. At times he must telephone customers to straighten out various printing matters. As President William Taylor testified, the job requires a highly skilled person with experience in the industry, as this person must deal with the Company's over 500 different styles of printed letters, which come in 19 different sizes. The nature of the business often subjected

[3] The testimony was substantially free of direct evidentiary conflict. The facts as found are based on a composite of the testimonial and documentary evidence in the record.

[4] The employees in the plant composing room where the typesetting took place were members of a union, but they are not involved in this case. However, the general foreman of this department, Curtis Couch, had constant contact with the customer service representatives as will be set forth hereafter.

the work force to slack periods of 10 days to 2 weeks. As testified to by Wava Runck without contradiction, "It's an extremely unpredictable business."

In August 1980 Tom Alexander was hired for the purpose of subsequently becoming sales manager. He worked as a trainee in various departments and in September worked in the customer service department.[5] Alexander testified that in late October or early November, while he was training as a salesman, he and the Company's Toledo salesman brought to the customer service department a large "bear" of a job, a real "toughie." He sat it down on Hoendorf's desk and Hoendorf stated that he would not do the job, that he would quit first. Alexander became upset and walked upstairs to his office. Here, after he asked the Toledo salesman, "Is this what's been going on?", Alexander testified as follows:

> And, he said, "We have constant battles with the service department as a whole," of which Jack represented, in trying to get work in the plant of difficult jobs of any work. That there was always a reason why of—they needed more of this or more of that or whatever the way of information, which could be—could be fair. But, it—there was this conflict between the sales and the service department in bringing in difficult jobs.

After Alexander cooled off, he went back to the service department, saw that Hoendorf had settled down, the two reviewed the difficult job, and the job was produced. Alexander admitted that after the job was finished he complimented Hoendorf on a job well done.

Hoendorf admitted that he had words with Alexander about the "atrocious" condition of a job Alexander had brought in the department, and had told him that he would not work on it. However, after both cooled off, Hoendorf did the job. Alexander did not reprimand him, and the first time he subsequently heard the job discussed was on the day he was terminated. Hoendorf further testified that "messy" jobs came in at least once a week.

B. *The Events of November*

In early November, the Company had completed a difficult job for a major customer on time. When this customer thanked the Company for doing so, Couch, the composing room foreman, stated that this had been accomplished in spite of the customer service department. The four service representatives had been at loggerheads with Couch for some time, regarding his treatment of them as inhuman and demeaning. Immediately following his caustic remark about the major job being done in spite of the service department, the four service representatives, Fugate, Hoendorf, Long, and Runck, gathered in their area and decided to take their complaints to their supervisor, Southam. Fugate told the other three employees to jot down their grievances, and he would secure a meeting with Southam.

On a following Saturday the four representatives met with Southam in his office. Fugate was the lead speaker telling their supervisor that there was constant friction between the service department and Couch, and they wanted something done about it, or they would go to the owners. The employees also complained about the physical working conditions in their department, contending that it was too crowded and outmoded.

Hoendorf brought up the problem of working on Saturdays, and was joined in this discussion by Fugate and Long. Formerly, the practice of having one employee work on Saturday had not been a problem, as Southam himself had worked them, or Wava Runck was given the assignment. Unlike the other service representatives, Runck worked a 5-1/2-hour day, and was not on salary, but received an hourly rate. Thus, when she had worked Saturdays, she had been paid at her hourly rate. However, when either of the three men worked on Saturdays, they received no additional pay for such time, or were not given a corresponding amount of time off. Southam listened to their complaint about working on Saturday without compensation, and advised that he would try to take care of the problem. Working conditions did improve substantially after the meeting, but no word was received as to their demand for compensation for Saturday work.

C. *The Events of December*

In mid-December Tom Alexander called a meeting of the full-time service representatives to announce a reorganization that would require some personnel changes in their department. Southam did the initial talking, and notified the employees that he was moving upstairs to be the director of typography. Alexander then made what he knew to be a very controversial announcement, by stating that Paul Logan, a former employee, had been hired to return to work in Southam's place as the service manager.[6] The announcement caught all three service representatives by surprise. Hoendorf said that he did not think he could work for Logan as he had had "a hell of a time just working with him." Fugate stated that he did not know if he could work for Logan or not, but he would take it one day at a time.

[5] Alexander testified that during this period he had a "perception" that Hoendorf watched the clock. Since Hoendorf worked until 7 p.m. and Alexander worked until 5 p.m., it is evident that Alexander could not have observed Hoendorf watching the clock so as to leave work right on the minute, or a few minutes before his scheduled time for leaving.

[6] Logan had first started to work for the Respondent in 1973, as a customer service representative. Fugate and Long had worked side-by-side with Logan during this period, but Hoendorf had not as he was still in the hot metal department. In 1975, Logan became the sales representative for the Dayton area. In March 1980 he ceased working for the Respondent to take a job out of town. Nine months later he was hired back as the customer service manager. Logan admitted that he and Hoendorf did not get along "very well" when he was the Dayton salesman. He also testified that when he took jobs to Hoendorf that he had sold, he received complaints about the status of the job, sometimes with threats that he would not do the job. In Hoendorf's opinion, Logan had been an agitator and a big mouth during their relationship. Logan also admitted that he had some "verbal misunderstanding" with Fugate when he would bring to him a job he classified as a "bucket of bolts" or "can of worms." Fugate testified that he and Logan had had many shouting matches over the work Logan brought to him in the department, and that he had a personality conflict with Logan.

Following that meeting, Alexander recommended to Logan that he hold a breakfast meeting with each of the full-time customer representatives. Logan did take Hoendorf to breakfast about December 21, and here he tried to iron out their differences. Logan admitted that when he asked Hoendorf to express his concerns, Hoendorf brought up the subject of Saturday overtime, "out of the clear blue sky." Logan advised Hoendorf that he was not going to work every Saturday like Southam had done, but he would think about the problem.[7] Logan also took Fugate to breakfast, where they exchanged views in trying to straighten things out so as to benefit the Company. Logan did not take Long to breakfast, as Long's hours of work were from 2 to 10:30 p.m. Also, Logan and Long had always gotten along, and had a good working relationship.

D. *The Events of Early January*

Early in January, Alexander took over as sales manager, heading up the sales force, customer service department, and shipping. Logan assumed the duties of manager of the customer service department. A few days thereafter, Hoendorf and Logan had a discussion about working on Saturdays, and overtime pay. Logan's description of the meeting is more detailed than Hoendorf and is set forth as follows:

> I had a confrontation with Jack. I walked in the Service Department one morning and—it was one evening because George Long was still there. It was possibly, you know, 3:00 o'clock, and Jack, at that time, he says, "Hey", He says "You know, Saturday is coming up." He says, "What are you going to do about Saturday work?"
>
> And I said, "Well, Jack, I have not made that decision yet." I said, "You know", I says, "I'll let you know."
>
> He says, "Well, it's Saturday. You had better make a decision now."
>
> And I said, "Look, I will work this Saturday. I'll be here." You know, I said, "Don't worry about it Jack." I said, "You know, you're making a mountain out of a mole hill." I said, "I will make that decision. But, I said, you know, I don't really feel that, you know, it's a concern to discuss out here in front of George Long's presence." You know, I said, "The door is open. If you want to go in and talk."
>
> And at that point, he pointed his finger at me and he says, "Well, I'll tell you one thing, I'm not working Saturdays without being compensated for it."
>
> At that point, I said, "Jack, I'm not going to discuss this any further."
>
> I turned around, went back in my office and closed the door.

On cross-examination when Logan again recounted this same conversation he stated that he had also told Hoendorf the decision he had to make on Saturday overtime was "going to affect those other people," and that "It's not an item to discuss right out here in front of Long."

Hoendorf also testified to a second conversation that he had with Logan within about the same week, about Saturday overtime. Logan, while walking through the plant, stated that he had yet to make up his mind as to which employee would work Saturday. Hoendorf replied that it was not going to be him unless he received time off, or was paid for the time. Logan thereupon replied "Well, there's no if's and's or but's about it. You're not going to get paid for it." Hoendorf then reminded Logan that he had an awful short memory, as he used to work on Saturdays, and got Mondays off.[8] Logan contended that his receiving Mondays off was different, as he had worked on Saturdays on a regular basis. As the argument progressed Logan became angry and loud, but Hoendorf maintained his position that "If you work on a Saturday, you get off on a Monday or you get paid for it." Fugate corroborated Logan's account of this meeting as he recalled Hoendorf arguing that the service representatives should not have to work Saturdays without compensation, because Logan had been compensated when he worked Saturdays. He also recalled that Logan had said that situation was different, as he had worked every Saturday. Hoendorf's and Fugate's testimony was uncontradicted and is credited.

A week or so later, towards the middle of January, Hoendorf testified that he had another conversation with Logan, as it was approaching the time when the Company normally made evaluations of its employees so as to determine which employees were going to receive a raise. Hoendorf asked Logan if he was going to evaluate the employees, or if Alexander was going to do it, so as to see if there were to be raises. Logan replied that he was not going to answer the question at that time, and Hoendorf did not "push it." Logan admitted that he remembered a conversation in which Hoendorf brought up raises and evaluations, but he could not pinpoint the time. I credit Hoendorf's uncontradicted testimony that this conversation took place toward the middle of January.

E. *The Layoff of Jack Hoendorf*

1. According to Hoendorf

Hoendorf testified that on the afternoon of January 19, William Taylor called him to come to the president's office. After Hoendorf arrived, William Taylor told him to sit down and then the following conversation took place:

> And he said, "I've got some bad news for you, Jack. I'm going to have to lay you off."
>
> And I said, "Why me?"
>
> And he said, "Well," he said, "Work's slow," and he said, "Your attitude leaves a lot to be desired."
>
> Q. Uh-huh.

[7] On rebuttal Hoendorf testified that Logan said he was not going to work any Saturdays. It is not necessary to rule on credibility in this instance, as both parties agree that the problem of Saturday overtime was discussed.

[8] Hoendorf was obviously referring to Logan's 3 years' employment with the Company as a customer service representative.

A. And—

Q. Did—

A. —"All this stink that you've been putting up about working Saturdays."

And I said, "Well, I don't think I put up any more complaint about that than the other people."

And he—his opinion was that I did put up more stink about it.

Q. Uh-huh.

A. And he said there's—he said, "We just don't have the work."

And I said, "Well", I said, "am I being laid off or fired?"

He said, "No, you're being laid off."

Hoendorf's paycheck had already been made out and on receiving it, he left.

Several hours prior to Hoendorf's layoff, Wava Runck had had a conversation with Logan, in which he had informed her that Hoendorf was to be laid off that afternoon. She then asked, "If I quit, will that save Jack's job," and was told that it would not. When she left work at 2 p.m. Logan told her that maybe the layoff was not going to happen.

2. According to Respondent

President Taylor testified that in "April, May, June of 1980," he was working on the largest single job the Respondent had ever produced, working on it himself an average of 6 hours a day. He further testified:

> On a couple of instances, I would ask for Jack's cooperation and his cooperation was not cooperative. I do remember an instance in which I asked him to come into the conference room and help me and he said it would be a lot smarter, Bill if you had one of the girls take this and—and reorder it and shuffle—and transfer some mark-up over to it. I said okay, Jack, fine. Let's get that done. I have got to get the job done.

At this time W. Taylor told himself, "I want this turkey out of here," and made up his mind "that he had to go." When asked on direct examination why he did not terminate Hoendorf at that time he testified:

> A. Well, because I wanted to reorganize the company. I knew I had a gentleman coming on staff to reorganize the company and to—in the commerrcial area, now. And, I feel as a manager or as a management technique, that I shouldn't go around and start shuffling all of these things around. I should give him the opportunity to come in and make some evaluations himself.
>
> And, the customer service department—the commercial customer service department, during that year of 1980,—it wasn't just Jack. Paul Fugate was going to be next if he didn't change his attitude. And, I—I came in and worked with some of those people at that time. And, I, myself, had had that confrontation kind of—I don't like doing this and whatever.
>
> I had a company that sales were declining. I had a company, and with that department, I felt those people were unmotivated and I didn't think it was the best thing for me to go in there and fire somebody out of the—right away.

The president further testified that in the first of the year 1981, the quarterly and annual budgets were being prepared. From these he determined that it was necessary to reduce the force in the service department. As he had already made his mind up that Hoendorf was "going to go," he had no problem deciding that it was Hoendorf who would be terminated.

W. Taylor then called Alexander to the office and told him that they both knew they wanted Hoendorf terminated, but he thought they should call Logan in and get his concurrence. When Logan arrived, he was told the Company wanted to eliminate a full-time customer service representative, and asked for his recommendation. Logan promptly responded "Hoendorf," for the reasons that he had the least departmental seniority, he would have less customer impact, and he thought Jack had a bad attitude.

W. Taylor, in accordance with company policy as to discharges, at some point that day informed his father that he was laying Hoendorf off. His father replied, "Fine, go ahead." John Taylor testified that when his son came to him, the president had told him that the reason for the layoff was because Hoendorf was not cooperating with his fellow employees.

W. Taylor thereafter had Hoendorf come to his office, where he told him he was laying him off. When Hoendorf asked why me, W. Taylor told him that, "We don't have any work down there and we had to select somebody and when we reviewed three people there of full-time personnel, you're it." When Hoendorf asked again why he had been selected, the president testified as follows:

> And, I said, "Jack, your attitude in this company has been awful for a long, long time. His response to me was—is that, "Well, I didn't have any problem working for Bill Southam."
>
> And, I said, "Well, perhaps you didn't have any problem with Bill Southam. But, your attitude within the company, both before Bill Southam—or when Bill Southam was your supervisor and afterwards, you have created a lot of friction in the company." I mentioned—well, that's what I said then. I said, "You have created a lot of friction in the company. There are a lot of people in this company that you have alienated, including me."
>
> And, he said, "Well, what do you mean?" So, I relayed a number of things that I felt that—one I had received second and third hand and some of my direct experiences with Jack, which included—I had heard that Jack confronted Paul Logan in the service department in front of other people concerning Saturday overtime. I said, "Jack, if you want to talk to him about it you don't get at him right in the middle of things, when other people are on the phone with customers and whatever. I had

> heard that second or third hand—I believe Bill Southam had told me that Jack had confronted Paul Logan in the customer service department about wages and review time—"When are you going to—We want to know when we are going to get our reviews."
>
> And, I told him then—I said, "You're handling it the wrong way. You're—You're creating a problem in front of everybody in the—the customer service department." I mentioned to him that his relationship with Curt Couch was awful. And, I'm sorry. But, Curt Couch, in my opinion, is a very good employee for Dayton Typographic Service.

W. Taylor also told him that his incident with Tom Alexander almost cost him his job at that time. The president then gave him his check and told him that he would be carried on the Company's medical plan for several months, but not to count on coming back.

F. *Post Layoff Events*

On the morning following Hoendorf's termination, Wava Runck, who was the first service representative to come in each morning, asked Logan what to say to customers who asked for Hoendorf. Logan in turn discussed this with Alexander, and the sales manager advised him: "Let's tell them we're reorganizing," as he did not want to tell customers that "we're really slow." Logan then advised Runck to say that there had been a major reorganization at Dayton Typographic and that Jack Hoendorf did not fit in the reorganization, so he had been terminated.

One of several customers who inquired about Hoendorf was John Voight, who was the art director of the Valvoline Company, in Ashland, Kentucky. Following this phone conversation, Voight wrote to John Taylor in a letter dated February 16, General Counsel's Exhibit 3. In this letter Voight pointed out to the chairman of the Board that Valvoline spends about $60,000 a year for type from the Respondent. The art director stated that he was surprised at the termination of Hoendorf, as he regarded him as "one of your best service employees." Voight went on to write that:

> I have known Jack for many years and have never spoken with a more pleasant person. I felt that while talking with Jack concerning copy, that I could rest assured that he would deliver the quality material that I expected.

Voight concluded his letter by stating that he hoped the Respondent would reverse its decision as to Hoendorf.

By letter dated February 24, Chairman of the Board Taylor replied to the Valvoline letter, General Counsel's Exhibit 4. J. Taylor, after giving a brief history of Hoendorf's employment with the Company, obliquely explained to Voight why the Company had terminated Hoendorf:

> The independence that goes with free thinking is most welcome here—everyone can have their say and will be listened to but when management decided to restructure and reorganize the entire sales and service departments, he could not accept their planning. His unhappiness was well known throughout the Company. I felt that I could not ignore the recommendation of department heads and management and agreed with his leaving.

In the chairman's final paragraph he stated that he deeply regretted, and was somewhat hurt because Hoendorf had not come to his office and said goodbye.

Hoendorf received copies of both letters from Voight, and then went to see Chairman Taylor in late February or early March. After a few pleasantries were exchanged, Hoendorf asked if there were any chance of his coming back to work. The chairman advised him that any call back decision was up to W. Taylor, but did say he would give Hoendorf a good recommendation for another job.[9]

Paul Fugate testified without contradiction that "Shortly after Jack left the Company," the Respondent hired two new employees, Herman Rose and Debbie Rife. Fugate knew Rose to have long experience in type and type setting as the two men had previously worked together at the Standard Register where he had been a work-up man. He did not know Rife's background nor was it otherwise set forth in the record. As to Rose, Runck testified that "he does do customer service on the overloads since we are shorthanded," and that Rose seeks advice from the other three service representatives when he does such work.

Alexander admitted that the Company placed advertisements in the Cincinnati and Dayton newspapers for service representatives. However, he contended that Rose was hired to be a librarian, which was "a new function that we created." He further testified that during the period that Rose was learning the duties of a librarian he was given "a little bit of training in the service department so that he could help out in emergency situations." W. Taylor also admitted that Debbie Rife did some service representative work, but only as an experiment. When asked why, if the Company were overstaffed, it needed more help, the sales manager answered, "We were getting busier, sir."

G. *Discussion and Conclusion*

Section 7 of the Act guarantees to employees the right to "engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection" and Section 8(a)(1) forbids an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7." Thus, if Hoendorf's activity is of the type contemplated by Section 7, and if he was discharged for having engaged in it, then the Company violated Section 8(a)(1).

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[9] Respondent objected to the admission of the Valvoline letter of February 24, 1981, G.C. Exh. 3, asserting that it was not a business record. That it clearly was a business record is shown not only by Chairman Taylor's swift reply to it, but also by other company action. Both letters were shown to Alexander, and to placate this substantial customer, Alexander and another company representative, Bill Shipley, were sent to Valvoline to explain Hoendorf's dismissal to Art Director Voight.

1. Concerted activity

The General Counsel contends that Hoendorf, Fugate, Long, and Runck were engaged in concerted activity in November 1980 when they jointly presented their complaints to Southam, and that when Hoendorf continued to press the complaint about overtime work on Saturday, he continued to be engaged in concerted activity and was entitled to the protection of Section 7. Respondent in its brief, vigorously denies that Hoendorf was engaged in concerted activity, and further argues that even if he were, the Respondent had no knowledge that he had engaged in such activity. Respondent contends that Hoendorf was terminated for various lawful reasons.

The record is crystal clear that the four service representatives engaged in concerted activity when they held a meeting in November with their supervisor, Southam, to expressly present their complaints. While Fugate led off in reciting their grievances to their supervisor, all employees joined in the conversation. They all wanted relief from Couch's demeaning and antagonistic treatment, they all wanted the physical condition of their office improved. Also, the three full-time employees, Hoendorf, Fugate, and Long, expressed their disagreement with the procedure then used by the Company when service employees worked on Saturdays, and made it plain to Southam that they did not want to work on Saturdays, unless they received some form of compensation for so doing.

Thereafter, Southam did secure for them some improvement as to the condition of their office. As to their feud with Couch, the record shows no run-ins with him after that November meeting. However, as November passed, they received no word whatsoever as to their complaint about working on Saturdays for no compensation.

Thus, on December 21 at Hoendorf's breakfast conference with Logan, when Hoendorf brought up the matter of Saturday overtime, he was continuing to express the group grievance that had originally been presented in November to his previous supervisor, Southam. Again, in early January, when, as Logan described it, he had a confrontation with Hoendorf in the plant, Hoendorf was continuing to express a grievance over a matter of importance to all three full-time service employees. Logan himself plainly recognized that Hoendorf was speaking for the other full-time service employees, when he protested to Hoendorf that the decision he had to make about Saturday overtime was going to affect three other people. Then, a few days later, when Logan told Hoendorf and Fugate that he had not made up his mind as to which employee would work on Saturday, the supervisor clearly recognized that he had a problem involving not one employee, but a group of employees. Hoendorf once again pressed the same argument that the service representatives had jointly made a month and a half previously, that they wanted some compensation for working on Saturdays.

Respondent in its brief states correctly there was no evidence that the employees met and elected Hoendorf as their spokesman. But such is not the test as to whether an employer is engaged in concerted activity. The brief also sets forth testimony of Long and Fugate that they did not ask or authorize Hoendorf to speak for them. However, when Wava Runck was asked if she ever authorized Hoendorf to speak for her, she replied that she had not, but to this she added, "What concerned one of us concerned all of us at this point." Certainly Runck's statement shows that she regarded Hoendorf's protests as protests of the service employees as a group.

Thus, not only did Hoendorf's repeated complaints about Saturday overtime meet the Board's criteria for concerted activity[10] but they also meet the criteria of the Sixth Circuit of the United States Court of Appeals, several of whose decisions are cited by the Respondent in its brief. The Sixth Circuit, in a case cited by Respondent, *Jim Causley Pontiac v. NLRB*, 620 F.2d 122 (1980), in its turn, quotes favorably one of its own decisions concerning concerted activity, *NLRB v. Guernsey-Muskingum*, 285 F.2d 8 (6th Cir. 1960). In this latter case, the Sixth Circuit set forth the criteria it found necessary to prove concerted activity as follows:

> [I]t is sufficient to constitute concert of action if from all of the facts and circumstances in the case a reasonable inference can be drawn that the men involved considered that they had a grievance and decided among themselves, that they would take it up with management.

Certainly the evidence is clear that Hoendorf, Fugate, Long, and Runck considered that they had grievances with the Respondent, and decided among themselves to take them up with management. They were thus engaged in concerted activity in November as was Hoendorf when he pressed their grievances about Saturday overtime in December and January.

Employer Knowledge

Respondent argues in its brief that neither W. Taylor nor Alexander had knowledge in January, when W. Taylor discharged Hoendorf, that the employees had met with Southam in November, and complained about not receiving compensation for working on Saturdays. Therefore, argues Respondent, it had no knowledge that Hoendorf ever engaged in what it apparently admits was concerted activity. This argument falls for several reasons. The first is that Southam's knowledge of Hoendorf's activities is imputed to the employer by law. *Pellegrini Bros. Wines*, 239 NLRB 1220 (1979); *Red Line Transfer & Storage Co.*, 204 NLRB 116 (1973). Likewise, Logan's knowledge of Hoendorf's continued complaints about Saturday overtime December and January is imputed to the employer.

In addition, I find it incredible that Southam did not tell W. Taylor about the multiple grievances registered by the four employees in November. W. Taylor testified that Southam informed him that Hoendorf had confronted Logan about Saturday overtime 10 days before Hoendorf's layoff. W. Taylor also admitted that Southam had

[10] *Chemical Laboratories*, 201 NLRB 734 (1972). It is well established that the decisions of the Board are binding on administrative law judges, until they are overruled by the Supreme Court, or until the Board changes its position.

told him that Hoendorf confronted Logan in the customer service department about raises and evaluations. Certainly, if Southam reported to the president two confrontations of one employee with one supervisor, it strains credulity that he would not have reported the November meeting to the president, and outlined the multiple grievances presented to him by those four veteran employees. Southam was still working for the Respondent at the time of the hearing as a high supervisor, yet he was not called to testify. I therefore draw the inference that Respondent's unexplained failure to produce this witness was for the reaon that the witness' testimony would have been adverse to the Respondent. *G.C. Murphy Co.*, 223 NLRB 604 (1976), enfd. 550 F.2d 1004 (4th Cir. 1977).

I also do not credit Alexander's testimony that it was not until late January that he learned from Logan that there was a problem about Saturday overtime pay. Alexander, by W. Taylor's own testimony, knew about it prior to Hoendorf's discharge, as Alexander discussed it with the president in a bar. As W. Taylor testified, when he asked what the problem about overtime was between Logan and Hoendorf, Alexander informed him that "Oh, that was just Jack getting at Paul."

Finally, W. Taylor's testimony as to his conversation with Hoendorf at the exit interview shows clearly that the president knew Hoendorf was engaged in concerted activity. When Hoendorf asked W. Taylor what he meant by his statement that he had a bad attitude, W. Taylor told him that he should not have confronted Logan about Saturday overtime in front of the other employees, and that his confrontations were creating a problem in front of everybody in the customer service department.

2. The General Counsel's proof

In applying the teachings of *Wright Line*, 251 NLRB 1083 (1980), I find that the General Counsel has sustained his burden of establishing a prima facie case that Hoendorf's concerted activities motivated Respondent's decision to discharge him.

The evidence as set forth above clearly establishes that Hoendorf was engaged in concerted activities that were protected by Section 7 of the Act, from the time of the employees' meeting in November with Southam, through his December breakfast meeting with Logan, and including his several confrontations in the customer service department with Logan in January.

The record is also equally clear that the Respondent Employer had knowledge of Hoendorf's concerted activities, as Supervisors Southam and Logan knew about it, as well as Sales Manager Alexander, and also the president himself, William Taylor. Not only did Respondent, through its supervisors, have knowledge that Hoendorf was engaged in concerted activity, they also knew that he was the most vocal and aggressive spokesman of the four customer service representatives. The company officials knew that it was Hoendorf who kept alive and kept bringing up the group's November complaint, that the service department employees wanted some form of compensation for working on Saturdays. W. Taylor particularly resented Hoendorf bringing up the grievance on Saturday overtime as he showed in the exit interview when he told Hoendorf he had been wrong to bring up Saturday overtime in front of customer service employees.

The record is uncontested that Hoendorf was a competent service representative. Long, a veteran with 15 years with the Company, who with Runck was a most sincere and credible witness, testified that Hoendorf was very knowledgeable, a very good worker who made few mistakes. Runck, the other most credible witness, had 11 years of service as a service representative, 4 with the Respondent and 7 with a competitor. She testified that Hoendorf was "extremely good," that he helped her when she needed help, his technical skills were good, and he had a good rapport with the customers. Not one of Respondent's witnesses criticized Hoendorf's skills as a service representative. As to the one "messy" job on which Alexander stated that Hoendorf's attitude was bad, Hoendorf not only did this job, but was complimented by Alexander for his work.

The record also indicates that the Company had a relaxed policy as to the discharge of an employee. As Chairman of the Board Wilson wrote to Voight, only 10 nonunion employees had been discharged in the prior 50 years.

3. Respondent's reasons for the discharge

I turn now to the reasons offered by the Respondent for Hoendorf's discharge, to rebut the General Counsel's case. W. Taylor testified that it is the practice of the Respondent for the various departments to prepare a budget for the current quarter and year. When budget figures started coming in, in the first week of January 1981, it was obvious to him that there had been a tremendous swing in costs versus revenue in the customer service department. The president then determined that "Business was so bad," that it was necessary to reduce the force in the service department.[11] It was at this point that W. Taylor decided to lay Hoendorf off.

Thus, the evidence shows that Respondent's basic reason for terminating Hoendorf was because its revenues had gone down in the customer service department in the first week of the first quarter and, as forcefully stated by the president, "Business was awful."

Sales Manager Alexander supported the president's contention that business was bad by pointing out an equally bleak picture. He testified that in August the Company's markets were not only going down but dying. Then he testified that in, apparently, September, "We were down very, very badly and had been down really, for—for quite a while."

I do not find that Respondent's stated reasons for Hoendorf's discharge stand scrutiny. Although W. Taylor testified that business was so bad he had to discharge an employee, Respondent produced absolutely no records to support this contention. By the president's own testimony there were quarterly budgets and annual budgets. In addition, such an old, established corporation

[11] W. Taylor admitted that the book department was working overtime and that Couch was looking for employees to hire in the composing room.

would have had numerous financial records such as annual statements, profit-and-loss statements, and tax records to substantiate the oral statements of W. Taylor and Alexander that business was awful. This failure of the Respondent to submit such documentary evidence causes me to believe that its financial records would not have supported its claim that revenues were down, costs were up, and business was bad.[12]

Respondent's running of advertisements in newspapers for service representatives following Hoendorf's discharge, and the hiring of two new employees, does not square with W. Taylor's and Alexander's claims that business was so bad it required the layoff of a service representative. While Respondent claimed that Rose was used as a librarian, he was also admittedly used for overload service representative work, as was the other newly hired employee, Rife. Alexander justified the hiring of these two new employees by stating that the Company was getting busier. However, this simply bears out Runck's testimony that the business was subject to slack periods.

It is also to be noted that the Respondent gave shifting and inconsistent reasons for Hoendorf's discharge. As Chairman Taylor testified, his son told him that the layoff was because Hoendorf would not cooperate with his fellow employees. Chairman Taylor in turn informed Art Director Voight that it was because Hoendorf was unhappy since he could not accept the Company's planning for reorganization.

The original reason that President Taylor gave Hoendorf for his discharge, because "we don't have any work down there" has been reviewed above and has been discredited. W. Taylor's further remarks to Hoendorf underpinning his basic reason, also do not stand scrutiny. As to Hoendorf's attitude, the Company's salesman from Toledo told Alexander that "We have constant battles with the service department as a whole." As to not getting along with Couch, all three other service representatives testified vehemently of their troubles with and dislike of Couch.

Finally, I find it incredible that President Taylor would wait from the spring of 1980 to January 1981 without telling Hoendorf that he did not like his attitude. According to W. Taylor, he had made his mind up in April, May, or June 1980, that he was going to let Hoendorf go, after he was uncooperative on a big job. Yet, prior to the date of discharge, he never expressed any dissatisfaction to Hoendorf, even though "sales were terrible" at the time Hoendorf was uncooperative. This failure to give any warning to Hoendorf is further evidence that the discharge was pretextual. *Chicago Perforating Co.*, 147 NLRB 583 (1964).

From the foregoing I conclude that Respondent's stated reason for Hoendorf's discharge was a pretext, and that Respondent sought to disguise the true motive. When the asserted motive is not reasonable as I have so found herein, then that fact is evidence that the true motive for discharge is an unlawful one, which Respondent seeks to conceal.[13]

Finding that the alleged reason for Hoendorf's discharge was false, I infer that the true motive was because he was the principal spokesman for the service representatives in demanding compensation for working on Saturdays. W. Taylor himself touched on this reason at the exit interview when he told Hoendorf he had created a lot of friction in the Company. When asked what that meant, the president expressly pointed out that Hoendorf had "confronted Paul Logan in the service department in front of the other people concerning Saturday overtime." Section 7 of the Act gives Hoendorf the right to press that grievance with his supervisor. Accordingly, I find that Respondent's discharge of Hoendorf for engaging in protected concerted activity violated Section 8(a)(1) of the Act. *Farmland Soy Processing Co.*, 263 NLRB 237 (1982).

H. *The 8(a)(1) and (4) Allegation*[14]

The Facts

In the summer of 1981, after the charge was filed, Fugate was interviewed by a law student from the office of Respondent's counsel, and had given him a statement. On April 29, 1982, 5 days prior to the date of this hearing, Respondent's attorney Chester E. Finn came to the Company's conference room and met with Fugate. The attorney informed Fugate that he was representing the Company in the Hoendorf case, and that he was preparing for the trial. The attorney then reviewed with Fugate, the statement he had given to his law clerk in the previous summer. The attorney then asked Fugate if he had been interviewed by any representatives of the National Labor Relations Board. Fugate informed the attorney that he was interviewed by Schlectman of the NLRB, and that he had given her a written statement. Finn then asked Fugate if he would be willing to provide him with a copy of that statement. Fugate testified as follows:

> I asked you if it was legal. You said, "Sure." I said, "Well, is it also legal if the NLRB wants a copy of the statement I gave to the company?"
>
> And you said "Sure, there's nothing wrong with that."

Fugate did not have a copy of his affidavit at this April 29 meeting, and agreed to bring it in the next day, and have a copy made for Finn. On May 4, 1982, Finn again came to the plant. Here, Fugate responded to Logan's call, and took a copy of his affidavit to the office. After Finn and Fugate exchanged greetings, Fugate gave the attorney a copy of his copy of the affidavit, and the meeting then ended with no further con-

[12] If evidence, such as business records, is within the party's particular knowledge and control, and such evidence would strengthen the party's case if offered into evidence, that party is expected to introduce such evidence. The failure of the party to introduce such evidence raises an adverse inference. *Calip Dairies*, 204 NLRB 257 (1973); *Capriccios Restaurant*, 249 NLRB 685 (1980).

[13] *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466 (9th Cir. 1966); *First National Bank of Pueblo*, 240 NLRB 184 (1979).

[14] This allegation was not contained in the original complaint but was added by amendment, during the course of the hearing, when the General Counsel learned that Paul Fugate had given a copy of his affidavit to Respondent's counsel.

versation. Fugate, when asked if the attorney made any threats to him as to anything that might happen to him if he did not give a copy of his statement to Finn, replied, "Absolutely not." He further testified that he was willing to give the attorney a copy of his affidavit.

Discussion

The General Counsel contends that when the Respondent's attorney interrogated Fugate on April 29, and secured a copy of his affidavit on May 4, 1982, it violated Section 8(a)(1) and (4) of the Act, because it failed to comport with the criteria set forth in *Johnnie's Poultry Co.*, 146 NLRB 770 (1964), in that its attorney did not assure Fugate that there would be no reprisals. Respondent, in its brief, candidly admits that no warnings were given to Fugate that there would be no reprisals against him for his actions. Respondent also correctly points out that the testimony shows that at both meetings of Fugate and Finn, the Company's attorney was pleasant and courteous at all times to Fugate.

The General Counsel basically relies on Board law as set forth in *Johnnie's Poultry*. In the recent case of *Kyle & Stephen*, 259 NLRB 731 (1981), the Board once again spelled out its long-held principles as to such interviews:

> *Johnnie's Poultry* requires that when an employer has legitimate cause to inquire into matters concerning an employee's Section 7 rights, such as in preparing the employer's defense in an unfair labor practice proceeding, the employer must follow specific guidelines in questioning the employee to avoid incurring 8(a)(1) liability. Among other requirements, an employer must tell the employee the purpose of the questions, assure the employee freedom from reprisal, and secure the employee's voluntary participation. These safeguards are designed to minimize the coercive impact of employer interrogation and, contrary to the Administrative Law Judge's suggestions, are applicable irrespective of the employer's intent to coerce, the extent of questioning or number of employees so interrogated, or the remoteness of the interrogation to alleged unlawful conduct.

Since the attorney did not adhere to the guideline of assuring Fugate that he would be free of reprisal, I must find that the Respondent's interrogation of Fugate by its attorney, and the attorney's request for a copy of the affidavit that Fugate had given to the Board, violated Section 8(a)(1) of the Act.[15]

Conclusions of Law

1. Dayton Typographical Service, Inc. is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. By discharging Jack A. Hoendorf on January 19, 1981, because of his engaging in protected concerted activities, the Company engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

3. By interrogating Hoendorf concerning matters relating to a pending unfair labor practice case without observing necessary safeguards, and by asking for a copy of the affidavit he had given to the Board, the Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find it necessary to order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having unlawfully discharged Jack A. Hoendorf, I find it necessary to order it to offer him reinstatement and make him whole for lost earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *Florida Steel Corp.*, 231 NLRB 651 (1977). See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[16]

ORDER

The Respondent, Dayton Typographical Service, Inc., Dayton, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging any employees because they engaged in protected concerted activities for their mutual aid and protection.

(b) Asking its employees for copies of statements given by them to the National Labor Relations Board or interrogating them concerning any other information relating to pending unfair labor practice charges in a manner interfering with their rights guaranteed in Section 7 of the National Labor Relations Act.

(c) In any like or related manner interfering with, restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

---

[15] Respondent in its brief relies mainly on the case of *Anserphone, Inc. v. NLRB*, 632 F.2d 4 (6th Cir. 1980). When this case was before the Board, the Board found that the company had not observed the safeguards set forth in *Johnnie's Poultry*, when that employer had interrogated an employee, and asked an employee for a copy of the affidavit she had given to a Board agent. The Board thereupon found that the company had violated the Act. On appeal, the Sixth Circuit did not find the Employer's conduct to be violative of the Act, and refused the enforcement of this portion of the Board's decision. As previously stated administrative law judges are bound by decisions of the Board, until the Supreme Court reverses it. Respondent also cites the Board decision of *United Merchants & Mfrs.*, 223 NLRB 689 (1976), as supporting its position. It is to be observed that in adopting the decision of the administrative law judge in that case, the Board noted that it did so pro forma, in the absence of exceptions to the administrative law judge's finding that interrogation in that case did not violate the Act.

[16] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(a) Offer Jack A. Hoendorf immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, and make him whole for any loss of earnings and other benefits he may have suffered as a result of the discrimination against him, in the manner set forth in the remedy section of the Decision.

(b) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Expunge from its files any reference to the discharge of Jack A. Hoendorf on January 19, 1983, and notify him in writing that this has been done and that evidence of this unlawful discharge will not be used as a basis for future personnel action against him.

(d) Post at its plant in Dayton, Ohio, copies of the attached notice marked "Appendix."[17] Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

[17] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT ask employees for statements given by them to the National Labor Relations Board, or interrogate them concerning matters relating to any pending unfair labor practice case, without observing necessary safeguards.

WE WILL NOT discharge employees for engaging in concerted activities for their mutual aid and protection.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed you in the National Labor Relations Act, as amended.

WE WILL offer Jack A. Hoendorf immediate and full reinstatement to his former job, or if that job no longer exists, to a substantially equivalent position, without prejudice to his former seniority or any privileges previously enjoyed and WE WILL make him whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest.

WE WILL expunge from our files any reference to the disciplinary discharge of Jack A. Hoendorf, on January 19, 1981, and WE WILL notify him that this has been done and that evidence of this unlawful discharge will not be used as a basis for future personnel actions against him.

DAYTON TYPOGRAPHICAL SERVICE, INC.

Seligman & Associates, Inc. and its wholly owned Division, Scott Management Company *and* Local 79, Service Employees International Union, AFL-CIO *and* David Younce. Cases 7-CA-13576, 7-CA-13752 (1-4), 7-CA-14086, and 7-CA-13948

14 December 1984

SUPPLEMENTAL DECISION AND ORDER

MEMBERS ZIMMERMAN, HUNTER, AND DENNIS

On 29 December 1983 Administrative Law Judge William F. Jacobs issued the attached supplemental decision.[1] The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record[2] in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[3] and conclusions and to adopt the recommended Order as modified.[4]

A principal issue presented here is whether the Respondent made and discriminatees David and Susan Younce rejected a valid reinstatement offer, thereby tolling the Respondent's backpay obligation. Contrary to our dissenting colleague, we agree with the judge's finding that the Younces never unequivocally refused a valid offer.

Prior to their unlawful termination on 7 October 1976,[5] Susan and David Younce were employed as caretakers for the Eureka apartment complex managed by the Respondent. On 26 October the Younces received notice to quit the apartment that the Respondent had provided for them rent free. Two days later, Susan Younce filed an unfair labor practice charge against the Respondent.

Irwin Alterman, the Respondent's attorney, investigated the Younce allegations, concluded that they were meritorious, and recommended immediate settlement to the Respondent. Alterman and his client agreed to a settlement proposal for full backpay and reinstatement of the Younces to caretaker positions at a complex other than at the Eureka apartments. On the afternoon of 8 November, Alterman asked Board Agent Whiteman to relay to the Younces the Respondent's offer of reinstatement with backpay to a caretaker's job at the Respondent's Utica Green apartment complex, which was located 30–50 miles away from the Eureka complex. Whiteman then phoned Susan Younce and, according to Younce's credited testimony,[6] asked her, "If Mr. Seligman offered you your job back with backpay would you take it?" Younce replied, "No, I don't want to work there anymore. I don't even want to be around here anymore." Whiteman informed Alterman that the Younces did not want their jobs back. The Younces also apparently received a note from the Respondent asking them to report to work at the Utica Green apartment complex. They did not respond.

Meanwhile, about 5 or 6 November, Susan Younce called the Respondent and asked Scott Seligman, son of the Respondent's owner, if it would be possible for her and her family to obtain a lease and remain in the apartment. Seligman replied that there would not be any problem, but she would first have to drop the unfair labor practice charges against the Respondent. On the morning of 8 November, Susan Younce called Whiteman and told him she wanted to withdraw the charge. Whiteman advised against her doing so, but stated that, if she still wished to withdraw the charge, she would have to do it in writing. She then informed the Re-

[1] The Board's original Decision and Order is reported at 240 NLRB 110 (1979), enfd. 639 F.2d 307 (6th Cir. 1981).

[2] We shall grant the Respondent's motion to reopen the record and admit into evidence, only for purposes relating to the issue of whether the reinstatement offer communicated by Board Agent Whiteman was hypothetical in nature, copies of Whiteman's notes of phone conversations he had with the Respondent's attorney and with discriminatee Susan Younce and an internal memorandum that he wrote concerning the case.

Inasmuch as we have limited the admission of Whiteman's notes and memorandum to the issue of the reinstatement offer's nature, we shall deny the General Counsel's motion to reopen the record to introduce into evidence the affidavit of the General Counsel.

[3] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

We deny the Respondent's requests for oral argument because the record is sufficient to determine all issues presented.

[4] The judge found that the Respondent owed discriminatee Goold $1,860.50 in backpay to cover medical bills resulting from a work-connected injury. The record indicates, however, that Goold has failed to pay his medical bills. Under these circumstances, paying Goold for his medical expenses would constitute a windfall. We shall order instead that the Respondent reimburse directly BiCounty Hospital, Warren, Michigan, and Doctor John Barkay for medical services rendered Goold, thereby placing the parties in the same economic positions they would have been in had the Respondent not unlawfully discharged Goold.

We also adopt the judge's recommendation, made in response to the Respondent's motion, that an amended notice be substituted for the Board's original notice. The Respondent has apparently not yet complied with the notice requirements of the Board's original Order.

[5] All dates hereafter refer to 1976.

[6] The documents introduced into evidence pursuant to the Respondent's motion to reopen the record do not warrant reversing the judge's credibility finding that Whiteman made only a hypothetical offer of reinstatement. The same reasons stated by the judge for crediting Younce's testimony over prior affidavits apply to crediting that testimony over Whiteman's cursory notes and memorandum. In any event, Whiteman's notes, if credited, do not indicate rejection of the offer, but instead indicate that he communicated and Younce accepted the invalid offer to reinstate the discriminatees to another apartment complex.

spondent of her conversation with Whiteman and was told to contact Alterman.

On 10 November the Younces received an eviction notice. The next day, Susan Younce went to Alterman's office. The meeting started with Younce and Alterman discussing her conversations with Seligman about dropping the unfair labor practice charge in order to obtain a lease and to remain in the apartment with her family. Alterman then explained that she would have to give an affidavit about her attempts to drop the charge. He also offered to write a letter for her to the Board withdrawing the charge. Younce agreed to Alterman's requests and, at some point during the meeting, she informed Alterman that she and her husband did not want to be reinstated. Alterman composed the affidavit and the letter stating that Younce wished to withdraw the charge and had no desire to be reinstated. After reading over and making changes in the affidavit and letter, Younce signed both of them. She withdrew her charges with the Board, but a complaint later issued against the Respondent after her husband filed a charge.

The judge found that the Respondent did not make such a firm, unconditional offer of reinstatement sufficiently unequivocal as to toll backpay. He based this conclusion on the facts that: (1) the reinstatement offer received by Susan Younce from Board Agent Whiteman was hypothetical, and therefore did not provide her with the opportunity to make a considered choice whether to accept reinstatement;[7] (2) the Younces were offered similar but not equivalent jobs at the Respondent's Utica Green apartment complex, not the Eureka complex where they had worked prior to their unlawful discharge, and such offers of work at a different location and for different management are not sufficient to toll backpay;[8] and (3) the Respondent, by electing to convey its reinstatement offer through a Board agent instead of proffering it directly, is bound by any resulting confusion.[9]

We agree with the judge's findings for the reasons set forth in his decision. Because there is no credible evidence that the Respondent ever made a legitimate reinstatement offer to the Younces, it has failed to toll its backpay obligation. It is well settled that only when a proper offer is made and unequivocally rejected by the employees is the employer's backpay obligation tolled.[10]

Our dissenting colleague does not contend that the Younces ever received a valid reinstatement offer. Instead, he would depart from clear Board precedent by holding that Susan Younce's renunciation of intent to seek reinstatement or backpay in her 11 November meeting with Alterman waived the Respondent's obligation ever to make a reinstatement offer. We see no reason to make such a change in the law. As a wrongdoer, the Respondent bears the burden of remedying its unfair labor practices.[11] We impose no hardship by requiring that it meet that burden by making a clear, unequivocal, legitimate reinstatement offer even in the face of a discriminatee's apparent understanding and repudiation of the concept of reinstatement.

Moreover, we find, based on Younce's credible testimony, that the circumstances of the 11 November meeting between Younce and Alterman were such that she did not voluntarily renounce reinstatement. Younce went to Alterman under threat of immediate eviction from her apartment, a direct consequence of the Respondent's discrimination against her.[12] It is clear that Younce was intimidated by Alterman's demand at the meeting that she sign a letter and affidavit withdrawing the unfair labor practice charge if she wished to obtain a lease. Indeed, Younce credibly testified that she felt so pressured and nervous that she did not know what she was doing and that she just wanted to "get out of there." Accordingly, inasmuch as Younce's statement that she did not want to be reinstated was made under coercive circumstances, we find that it was not binding.

Inasmuch as the Respondent failed to proffer a specific offer of reinstatement at the same location to the Younces and the Younces did not voluntarily reject such a proper offer, we find that the Respondent's backpay obligations to the Younces have not been tolled.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Seligman & Associates, Inc. and its wholly owned Division, Scott Management Company, Southfield, Michigan, its officers, agents, successors, and assigns, shall pay Clarence Goold,

[7] *Dobbs Houses*, 182 NLRB 675 (1970).
[8] *M. J. McCarthy Motor Sales Co.*, 147 NLRB 605 (1964).
[9] *Rafaire Refrigeration Corp.*, 207 NLRB 523 (1973).
[10] *W. C. McQuaide, Inc.*, 239 NLRB 671 (1978), enfd. 617 F.2d 349 (3d Cir. 1980).

[11] See *Electrical Workers IUE v. NLRB*, 426 F.2d 1243, 1251–52 (D.C. Cir. 1970).
[12] The dissent treats this encounter as a benign, business-like affair, arranged for "Younce's own purposes, i.e., to withdraw the charge and to obtain a lease." Indeed, Younce did desire a lease; otherwise, she and her family faced immediate eviction from the apartment house which they had occupied as a term and condition of the Respondent's employment. Simply put, Younce would not have needed a lease if the Respondent had not unlawfully discharged her. As the law of this case, the discharge was coercive. It is fallacious to suggest that the meeting to obtain a lease as a direct consequence of such coercion was itself devoid of coercion.

David Younce, and Susan Younce the sums set out in the Order as modified.

1. Insert the following paragraph between the first and second paragraphs of the Order.

"The Respondent shall reimburse BiCounty Hospital, Warren, Michigan, $1200 and Doctor John Barkay $660.50 for medical services rendered Clarence Goold for injuries suffered while in the employment of the Respondent."

2. Substitute the attached notice for that of the Board in its original Decision and Order reported at 240 NLRB 110 (1979).

MEMBER HUNTER, dissenting.

I disagree with my colleagues' adoption of the judge's reinstatement order and backpay findings with respect to Susan and David Younce. The judge found that the Respondent did not make a firm, unconditional offer of reinstatement to the Younces sufficient to toll backpay. On this basis, the judge found that the Younces' backpay period commenced on the date of their discharge, 7 October 1976, and is not yet over as they have never been offered reinstatement. Contrary to the judge and my colleagues, I would find that backpay for the Younces was tolled as of 11 November 1976 when they voluntarily rejected employment with the Respondent. In view of the Younces' clear and unequivocal rejection of employment, in my opinion, it is not necessary to determine whether the Board agent, on behalf of the Respondent, communicated a proper reinstatement offer, an inquiry pursued by the judge. Rather, I believe, it is sufficient that the record clearly shows that Susan Younce had been apprised of what reinstatement meant before she gave the rejection to the Respondent. Contrary to my colleagues in the majority, I would not require an employer in this situation to simply extend a futile offer of reinstatement literally only "for the record."

Based on uncontradicted record evidence, which the judge improperly failed to include in his factual recitation, I would find that Susan Younce, on behalf of herself and her husband, rejected employment and tolled backpay as of 11 November 1976. The record clearly shows that both Susan Younce and the Respondent's attorney Alterman testified that, in their meeting held on 11 November 1976, Susan Younce voluntarily said that she did not want her job back. Since the Younces were hired and fired as a caretaker couple, I would find that Susan Younce's rejection included her husband's job. It is obvious that Susan Younce knew the import of her rejection. In her conversation with Board Agent Whiteman on 8 November 1976, Susan Younce was given an adequate explanation as to what reinstatement entailed. As shown by the record, it was in this conversation that Susan Younce first announced that she and her husband did not want their jobs. Thus, I would permit the Respondent to rely on Susan Younce's rejection of employment for her and her husband. I find this result is further supported by the fact that the Respondent had outstanding a reinstatement offer to the Younces which the Board agent had said was communicated to and rejected by Susan Younce.

My colleagues in the majority claim that Younce's unsolicited refusal of employment with the Respondent communicated to the Respondent's attorney was made under "coercive circumstances" and, thus, should not be held binding on the Younces. I disagree. As far as the record shows, the meeting with the Respondent's attorney was conducted in accord with Younce's own purposes, i.e., to withdraw the charge and to obtain a lease. The impetus for the meeting had been Younce's own desire to obtain a lease and withdraw the pending charge. Younce apparently was experiencing difficulty withdrawing her charge on her own. Without disputing these facts, the majority has adopted a per se definition of coercion. In the majority's view, this meeting with Susan Younce automatically was coercive simply because one of the subjects discussed was a benefit lost as a result of the Younces' discharge, i.e., the use of a townhouse at the complex where the Younces worked. Under the majority's definition of coercion, any meeting between an employee and his employer to discuss the effects of an unlawful discharge, including settlement conferences between an employee and his employer to discuss any wages, benefits, or privileges lost through an unlawful discharge, is coercive irrespective of the factual circumstances surrounding such meetings. I cannot accept such a far-reaching approach.

I point out that Younce's rejection of employment was not a quick reaction on her part. The record shows that she had arrived at this decision several days earlier and had first communicated her decision in the conversation with Board Agent Whiteman. Younce's own testimony indicates that she was not "coerced" by Whiteman to reject employment; rather, to the contrary, it appears that Whiteman strongly tried to persuade her to accept employment or at least a backpay settlement but was unsuccessful in his efforts.

I also cannot agree with the majority opinion's handling of Goold's medical expenses. The judge recommended that the Respondent be ordered to pay Goold directly for his medical bills which would have been covered by the Respondent's insurance plan but for Goold's unlawful discharge. However, to date Goold has not been required to

pay these medical bills which were incurred in 1976 and 1977. The Respondent has only excepted to the direct payment to Goold for these medical expenses. Due to the age of these bills, the Respondent claims that collection may be barred by the applicable state statute of limitations and Goold may never be liable for these expenses. To meet this concern, the majority orders the Respondent to directly pay the health care providers who rendered the medical services. I cannot accept my colleagues' approach as sufficient in these circumstances. Instead, I would only order the Respondent to indemnify Goold if any collection action on these bills is instituted. In this way, the Respondent is permitted to pursue its available defenses to a collection action and Goold is held harmless. This kind of remedy, in my view, is more consistent with the aim of the Board's remedial powers to make the discriminatee whole for his out-of-pocket expenses. For all the reasons stated above, I therefore dissent.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT interfere with our employees' rights under Section 7 of the National Labor Relations Act, or discourage membership in Local 79, Service Employees International Union, AFL–CIO, or any other labor organization, by discharging or otherwise discriminating against our employees in regard to hire or tenure of employment or any other term or condition of employment.

WE WILL NOT coercively interrogate or threaten our employees, or prohibit them from talking to new employees about the Union.

WE WILL NOT transfer, promote, or reclassify our employees in an attempt to gerrymander the unit in an NLRB election.

WE WILL NOT threaten to discharge our employees for testifying at an NLRB hearing.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL offer David Younce and Susan Younce full, immediate, and unconditional reinstatement to their former jobs or, if their jobs no longer exist, to substantially equivalent jobs, without prejudice to their seniority or any other rights or privileges previously enjoyed; and WE WILL make them whole for any loss of pay suffered by reason of the discrimination against them, with interest.

WE WILL reimburse BiCounty Hospital and Doctor John Barkay for medical services rendered Clarence Goold as a result of a work-connected accident.

WE HAVE made Larry Davis, Ricky Davis, Charles Davis, Mark Rushing, Harold Dodson, and Madeline Dodson whole for any loss of pay suffered by reason of the discrimination against them, in accordance with the settlement agreement entered into by the parties at the backpay hearing in the instant proceeding.

WE HAVE made unconditional offers of reinstatement to Larry Davis, Ricky Davis, Charles Davis, Mark Rushing, Harold Dodson, and Madeline Dodson and these offers have been refused.

SELIGMAN & ASSOCIATES, INC. AND ITS WHOLLY OWNED DIVISION, SCOTT MANAGEMENT COMPANY

SUPPLEMENTAL DECISION

WILLIAM F. JACOBS, Administrative Law Judge. This is a supplemental proceeding to determine the amount of medical compensation due Clarence Goold and the amount of backpay due David and Susan May Younce, who were found to be discriminatees, unlawfully terminated by Respondent, in a greviously held unfair labor practice hearing.[1] The instant proceeding was held before me on June 6, 7, 9, and 10, 1983, at Detroit, Michigan, based on the amended backpay specification which issued April 26, 1983, and on the amended backpay specification which issued April 26, 1983, and Respondent's answer filed May 2, 1983. All parties were afforded opportunity to participate in the hearing, to present evidence, to examine and cross-examine witnesses, and to argue orally. Briefs were filed by the parties.

FINDINGS OF FACT

The Issues

1. Whether Clarence Goold should be compensated for the medical expenses he incurred as a result of an accident in which he was involved while an employee of Respondent, and if so in what amounts.

2. Whether David and Susan May Younce should receive backpay and if so how much. The subissues are:[2]

(a) Whether David and Susan Younce recieved and rejected a proper reinstatement offer when Seligman's counsel made the offer through Board Agent Whiteman.

(b) Whether the Younces are estopped from seeking backpay.

(c) Whether the amounts due the Younces, as reflected by the backpay specification, are correct.

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[1] The Decision and Order of the Board pursuant to which this hearing was held is reported 240 NLRB 110 (1979), enfd. 639 F.2d 307 (6th Cir. 1981); cert. denied Oct. 5, 1981.

[2] These are also the issues raised in Respondent's brief.

(d) Whether the notice to employees which the Board has ordered posted should be revised to delete reference to reinstatement and backpay.

1. Clarence Goold

Clarence Goold, while employed by Respondent, was involved in an automobile accident on December 19, 1976. At the time of the accident he was engaged in the performance of work-connected duties. As a result of the accident Goold suffered injuries which required medical attention and hospitalization as well as attendant expenses. The total expenses incurred were $1860.50, $1200 of which was attributable to hospitalization which was undergone in April 1977, the rest of which were doctor bills for office visits between December 22, 1976, and August 11, 1977; physiotherapy undergone during the same period; injections, oral medication, and other tests, all accident connected, according to the credited testimony of Goold, supported by a doctor's bill presented at the hearing by Goold. No bill was presented for the $1200 hospitalization[3] which Goold credibly testified he had undergone in April 1977.

Goold credibly testified that while he and his wife were employed as a caretaker couple by Respondent they were covered by a medical and hospitalization plan provided by Respondent and that they had received benefits under the plan in 1976 when his wife became pregnant and all maternity costs including both hospitalization and doctor's bills were paid for through the plan even up to within 2 months of Goold's termination. It is the General Counsel's position that but for Goold's unlawful termination the hospitalization and doctor's bills suffered as a result of his December 19 automobile accident would have been paid by Respondent's insurance plan.

The burden is on the General Counsel in backpay cases to show losses suffered by a discriminatee and reflect those losses in a backpay specification. The burden is on a respondent in this type of case to prove diminution of such losses whether the diminution is the result of interim earnings, failure of the discriminatee reaonably to search for interim employment, unavailability for employment, or of other factors.[4]

In the instant proceeding the General Counsel relies principally on Goold's testimony and the supporting doctor's bill to prove Goold's claim. As noted above, I found Goold to be a credible witness and would rely on his testimony unless Respondent presented evidence to undermine that credibility or evidence to indicate a proper diminution of the total sum of his claim.

Respondent, in presenting its case, did not challenge Goold's testimony that prior to his discharge he and his wife received benefits covering her pregnancy in 1976 including payment of hospitalization and doctor's bills. Since his testimony on this matter went unrefuted, I find that Goold was, in fact, covered by a hospitalization plan prior to his discharge.

Respondent presented only one witness to testify concerning Goold's claim. This was Mary Newkirk, Respondent's assistant controller. But Newkirk was not hired until approximately 2-1/2 years after Goold's accident and discharge and so had no firsthand information concerning the existence or nonexistence of insurance coverage for caretaker couples. Newkirk was asked, in preparation for the instant proceeding, to examine certain files to determine if they contained any reference to any 1976 insurance coverage for caretaker couples. She found none. No explanation was offered as to why Respondent did not call the member of management in charge of such matters in 1976 to testify concerning the matter, nor why one or more caretaker couples employed in 1976 were not called to testify concerning insurance coverage at the time. I find Respondent's choice of Newkirk to testify[5] and its failure to call any knowledgeable witness to testify on the matter were apparent attempts to stonewall on the issue. I draw the adverse inference that if Respondent called knowledgeable management witnesses to testify, their testimony would be contrary to the interest of Respondent. I shall rely on the credible testimony of Goold[6] and find that he was covered at the time of his accident by an insurance plan paid for by Respondent and that but for his unlawful discharge the hospitalization and doctor's bills resulting from injuries sustained by him due to the accident would have been paid by Respondent.[7] Such moneys due are correctly listed in the General Counsel's amended backpay specification.[8]

2. Susan and David Younce

Susan and David Younce were unlawfully terminated by Respondent on October 7, 1976.[9] Before termination both received compensation for their work in the form of separate checks every 2 weeks plus the use for them and their three children of a townhouse located at the complex where they were employed. Following their termination the Younce family continued to occupy the same townhouse apartment which they had lived in while employed by Respondent.

On October 26, a notice to quit issued requiring the Younces to abandon their apartment. Two days later, Susan Younce filed the charge in Case 7-CA-13451 alleging the discriminatory discharge of her and her husband. Shortly after the charge was filed, Irwin Alterman, Respondent's attorney, investigated the circumstances surrounding the allegations contained in the charge and

[3] According to Goold, the hospitalization was for about 10 days. The doctor's bill reflects that Goold made 27 office visits: 4 in December 1976, 8 in January, 2 in February, 1 in March, none in April during which month he was hospitalized, 3 in May, 4 in June, 3 in July and 2 in August.

[4] *Brown & Root, Inc.*, 311 F.2d 447 (1963), 327 F.2d 958 (8th Cir. 1964); *Mastro Plastics Corp.*, 345 F.2d 170 (2d Cir. 1965), cert. denied 384 U.S. 972 (1966); *DeLorean Cadillac*, 231 NLRB 329 (1977).

[5] Newkirk testified as to the existence of a 1978 insurance plan covering salaried employees. I find this testimony irrelevant.

[6] Respondent did not avail himself of his right to subpoena either individuals or documents in connection with Goold's hospitalization or doctor's bills though the names of the hospital and doctor who treated Goold were discussed on the record.

[7] Additional arguments as to why Respondent should not be required to pay these sums, outlined in Respondent's brief, I find to be without merit.

[8] *Sam Tanksley Trucking*, 210 NLRB 656 (1974).

[9] Hereinafter all dates are in 1976 unless otherwise indicated.

determined that they were meritorious. He advised Respondent of his findings and recommended immediate settlement to the Younces with full backpay. His client agreed. Alterman, however, suggested that the Younces be offered caretaker positions at an apartment complex other than Eureka, the one at which they had been employed and at which they had lived prior to their discharge. He did this because it was his understanding that they had been having trouble with the resident manager at Eureka. Again, Respondent's management agreed to Alterman's suggestion.

Having received the agreement of his client, Alterman contacted Board Agent Whiteman, the individual assigned to handle the case for Region 7. By telephone, Alterman advised Whiteman that Respondent would offer the Younces their jobs back with full backpay, less interim earnings. Being more specific, he told Whiteman that the Younces would be offered a caretaker couple's position in one of Respondent's Utica apartment complexes. Utica is located 30–50 miles away from the Eureka complex where the Younces were living and working for Respondent prior to their unlawful discharge. Alterman requested that Whiteman communicate the offer to the Younces.[10] Whiteman ageed to do so.

Following[11] the discussion between Alterman and Whiteman, a telephone conversation took place between Susan Younce and Whiteman during which Whiteman asked Younce a question concerning possible reinstatement. According to the credited testimony of Younce,[12] Whiteman asked her, "If Mr. Seligman offered you your job back with backpay, would you take it?" Younce replied, "No, I don't want to work there anymore. I don't even want to be around here anymore." Whiteman rejoined, "You know you could get your backpay without taking your job back," and Younce simply said, "Fine!" Some time after this discussion, Whiteman called Alterman and advised him that the Younces did not want their jobs back.

Meanwhile, about November 5 or 6, Susan Younce, having received the notice to quit, and her husband and three children being sick with the flu, decided to contact Respondent directly. She called Scott Seligman, son of Respondent's owner, and told him of the illness in her family. She asked him if it would be possible for her and her family to obtain a lease and remain in the apartment, to get the apartment fixed up, and to stay there as rent paying tenants. Seligman replied that there would be no problem granting her request but that she would first have to drop the unfair labor practice charges which she had filed against Respondent.[13]

About November 8, Susan Younce called Whiteman and told him that she wanted to withdraw the charges. Whiteman advised her against doing so because she had a strong case. Susan explained to Whiteman that all she wanted to do was get a lease for her apartment and that Seligman had told her that, if she dropped the charges against Respondent, she could have the lease. Whiteman stated if she wanted to withdraw the charges, she would have to do so in writing.

Following her discussion with Whiteman, Susan Younce again called Seligman and told him that she had tried to drop the charges with the Board but that Whiteman would not let her because she had too strong a case. Seligman advised her to contact the Board again and have Whiteman send her a withdrawal request form to sign. He also told her to go to Alterman's office to sign a lease for her to remain in her apartment as a rent-paying tenant.

Subsequently, Seligman, or someone from his office, contacted Alterman and told him that Susan Younce was trying to drop the unfair labor practice charges but that the Board would not permit her to do so. Alterman was than asked to meet with Susan Younce and review the situation. In accordance with his client's request, Alterman made arrangements for Kathy LaFrance, the wife of Eureka's resident manager, to transport Susan Younce to his office for a meeting to discuss the situation, said meeting to take place November 11.

On November 10 an eviction notice issued against David and Susan Younce and on November 11 she was driven to Alterman's office in accordance with arrangements made earlier by Alterman. Once in Alterman's office Younce and Alterman discussed the events of the previous week, particularly discussions which had taken place between herself and Whiteman concerning her desire to drop the charge and between herself and Seligman concerning her desire to obtain a lease and remain in the apartment with her sick family.[14] Following Younce's description of events, Alterman explained that he would need an affidavit from her regarding her attempts to withdraw the charge, that he needed this for his files, and that it was necessary for her to supply an affidavit to enable her to obtain the lease. He then asked her if she would supply such an affidavit and she agreed to do so. Alterman then asked Younce what she intended to do about the written withdrawal request which Whiteman had demanded of her and offered to compose a letter for her. She agreed to this also, whereupon Alterman dictated both an affidavit and letter which were subsequently typed in draft by one of his clericals. When the drafts were ready they were presented to Younce for review. Alterman directed Younce to look over both documents and to point out any words which she did not ordinarily use. She pointed out several such words and these were changed. He then requested that Younce read through the letter to make sure it sounded as though she had composed it, that it was in her own words. She did this, after which Alterman asked her if the documents were accurate. She said they were and they were then typed in final form. Alterman then requested Younce to

[10] On November 9 Alterman forwarded to Whiteman a confirming letter in which he offered reinstatement to Susan Younce to a job in Utica with backpay. Although Susan Younce was specifically named in this letter in two places, David Younce was not so named. Nor were "the Younces" named as such. The letter clearly indicates an offer to reinstate only Susan.

[11] The date is not clear from the record.

[12] Whiteman did not testify.

[13] Seligman did not testify.

[14] Minor differences in the testimony of Younce and Alterman concerning the particulars of this meeting, I have resolved in favor of Susan Younce whom I find, on the basis of demeanor, to have been a most convincing witness.

sign both documents. She did so and was driven home by Kathy LaFrance.

Younce credibly testified concerning this meeting in Alterman's office, "I was supposed to go there to get a lease and instead, I got these [the affidavit[15] and withdrawal letter[16]] . . . . Now I'm a little bit calm about it, but when this was taking place I was nervous and upset and I don't think I was in the right [frame of] mind to really know what I was doing. I went to [Alterman's] office for a lease and I ended up having to do all this. I felt pressured in [his] office when I wrote it for one thing, and I said, 'Yes, it is okay,' and I signed it just to get out of there." On November 12 the withdrawal of the charge in Case 7–CA–13451 was approved. The same allegations were, however, included in a charge subsequently filed by David Younce in April 1977.

The Alleged Reinstatement Offer

Respondent takes the position that the above-described set of circumstances reflects a legitimate offer of reinstatement to the Younces by means of the offer made by Alterman through Whiteman to Susan Younce. After reviewing the facts as described above, I find that Respondent did not make such a firm, unconditional offer of reinstatement, sufficiently unequivocal as to toll backpay. I arrive at this conclusion based on the following:

(1) The offer received by Susan Younce from Board Agent Whiteman was hypothetical in nature. It was delivered in the form of a question: "If Mr. Seligman offered you your job back with backpay, would you take it?" The Board has held that a hypothetical offer such as this is not a sufficient offer of reinstatement so as to toll backpay because the employee must be given sufficient time to consider an offer made in positive terms.[17] Only when a proper offer is made and is unequivocally rejected by the employer is the employee relieved of his statutory duty to reinstate.[18] In the instant case, no proper offer of reinstatement was offered to the Younces and they were therefore not bound by Susan Younce's unconsidered statement that she did not "want to work there anymore" because she had not been given sufficient opportunity to manifest an unequivocal resolve not to accept reinstatement.[19]

(2) The Younces were never offered reinstatement to the positions they held at the Eureka complex from which they were unlawfully terminated. Rather, they were offered similar, but not equivalent, jobs at Utica, a complex 30–50 miles away. The offer of a position at a different location, working for a different management, is not an offer of reinstatement sufficient to warrant the tolling of backpay. An employee who has already suffered the effects of a discriminatory discharge has no duty to assume additional hardships to reduce the employer's backpay liability.[20]

(3) Respondent chose not to deal directly with the Younces although it wrote letters directly to other discriminatees offering them their jobs back. The case law holds that an employer who chooses to offer reinstatement to discriminatorily discharged employees, through third parties rather than directly does so at his own risk and, if such indirect communication results in confusion, it is the employer who should suffer thereby, not the innocent discriminatee. This is so for two reasons. First, because but for respondent's discriminatory act the problem would never have arisen and, secondly, but for choice of agent, the confusion would never have arisen.[21]

I find, in short, that Respondent did not make, and has not made the specific, unequivocal, and unconditional offer of reinstatement necessary to toll the backpay period.[22]

The Estoppel Theory

Respondent argues that the Board and the Younces should be estopped from claiming that the offer made through Alterman via Whiteman to Susan Younce was invalid because Respondent acted reasonably and relied on the Board's agent and the Younces at the time. I have found, however, that the offer which Alterman attempted to make to Susan Younce through Whiteman, i.e., employment in Utica, was not the specific, unequivocal, and unconditional offer of reinstatement which is required in order to toll backpay. That being the case, the question of estoppel is not relevant and I recommend rejection of Respondent's theory for that reason.

The Amounts of Backpay

Respondent argues that the Younces incurred a willful loss of employment when they turned down the job at Utica, which Respondent claims is substantially equivalent employment. I have found, however, that the job in Utica never was offered to the Younces except hypothetically. Since the Utica job never was actually offered, I find no willful loss of earnings in connection with said hypothetical offer.

Respondent asserts further that the Younces did not search for substantially equivalent employment following their unlawful discharge. Respondent points out that the Younces had only intermittent, low-paying employment following their discharge "not comparable to their former positions." This is true and, if it were otherwise, if the Younces had immediately found steady, better

[15] The content of the affidavit and of Younce's description of events as they pertained to the events of the previous several days differ markedly. I credit Younce's live testimony at the hearing over the content of the affidavit, primarily based on Younce's explanation of why such differences exist. The factual description of events contained in this section of the decision are based on Susan Younce's convincing and credited testimony.

[16] Where the content of Younce's live testimony differs from that of the withdrawal letter, composed by Alterman and signed by Younce, I credit Younce's live testimony.

[17] *Dobbs Houses*, 182 NLRB 675 (1970).

[18] *W. C. McQuaide, Inc.*, 239 NLRB 671 (1978), affd. 617 F.2d 349 (3d Cir. 1980).

[19] *Dobbs*, supra. *Don Pizzolato, Inc.*, 249 NLRB 953 (1980); *J. E. Plastics Mfg. Corp.*, 131 NLRB 299 (1961).

[20] *M. J. McCarthy Motor Sales Co.*, 147 NLRB 605 (1964).

[21] *Lipman Bros.*, 164 NLRB 850 (1967); *Rafaire Refrigeration Corp.*, 207 NLRB 523 (1973); *W. C. McQuaide, Inc.*, supra, 239 NLRB 671, affd. 617 F.2d 349.

[22] *Chromalloy American Corp.*, 263 NLRB 244 (1982).

paying jobs than they had while working for Respondent, they would not be seeking backpay through the instant process and I would not be writing this decision. However, it is Respondent who placed them in their predicament and there is no evidence in the record to show that the Younces turned down high-paying jobs in favor of the lower paying employment which they accepted. On the contrary, the record indicates through the backpay specification and additional testimony that following their unlawful discharges the Younces obtained employment with approximately 20 different employers between them and unsuccessfully sought employment with many others. The record reflects no willful loss of employment with regard to these jobs. Inasmuch as the law requires only a reasonable effort to find employment, I find that the record reflects that the Younces met that burden during the period following their discharge by Respondent.

Respondent correctly points out in its brief that during the pertinent period between 1976 and 1983 there were numerous ads in the Detroit newspapers for caretaker couples but that the Younces did not avail themselves of the opportunities presented by applying for these positions. Since they did not do so, Respondent argues that they did not make reasonable search for equivalent employment. All this is true as far as it goes. However, there is no requirement that a discriminatee consult the newspaper classified ads to seek employment. Nor is there evidence that the Younces were qualified for any of the jobs advertised nor, if qualified, would have been hired.[23]

Moreover, let us consider Respondent's argument in light of the particular circumstances of the instant case. The Younces participated in certain protected activities while employed by Respondent. Respondent not only unlawfully terminated them from engaging in these activities but undertook to dispossess them from their apartment as a part of the discriminatory retaliation against them. This was at a time when David Younce and the children were seriously ill. Susan Younce testified credibly that she did not look for a similar position at the time because she "didn't want to get involved in that." By this statement, it seems quite clear that Susan Younce meant that having been placed in the position by Respondent of being put out in the street with her family solely because she chose to engage in protected concerted activity, she was not about to make the same mistake again. I find that under the circumstances the Younces acted reasonably in seeking employment other than as a caretaker couple. Moreover, where does the Act say that once an employee is discriminatorily terminated from a particular job, that he must remain in that specific type of employment in perpetuity. Indeed he need not necessarily do so.[24] To make such a finding in the instant case would reward Respondent for its discriminatory act and punish the Younces by keeping them from exercising their freedom of choice of employment which all other individuals who are not discriminatees are free to exercise. I find that the Younces acted reasonably in searching for alternative types of employment following their unlawful discharge by Respondent.

Respondent argues that by moving out of the Detroit area Susan Younce made herself unavailable for work because she no longer had babysitters on whom she could rely while she went to work. This argument appears to beg the question since before she was unlawfully discharged she had an apartment provided free of charge at the site of her employment so that she could both mind her children, easily find babysitters, and earn a wage at the same time. Respondent is not relieved of the requirement of paying Susan Younce backpay because she did not manage to duplicate the situation ante. Moreover, a discriminatee is free to seek job opportunities in other areas than the one where the discriminatory discharge took place and still be entitled to backpay.[25]

Respondent argues that Susan Younce was periodically unavailable for work for medical reasons. Respondent relies on a National Labor Relations Board backpay form[26] which Susan Younce filled out in July 1981. On this form Younce noted that she left her job at Shield's Restaurant in February 1979 due to surgery and left her job at Dorchester Nursing Center for 2 months in 1981 also due to surgery. There being no testimony in the record to counter the documentary evidence offered by Respondent, proper deductions should be made for the periods of illness noted.[27]

Finally, Respondent claims that in the aforementioned form[28] Susan Younce admitted that she was not in the job market between November 1977 and May 1978 because during that period she lived nearly 20–25 miles from town, her car broke down, and there was no local employment. However, case law[29] indicates that loss of interim employment due to lack of transportation through no fault of the discriminatee does not amount to a willful loss of employment and is not a basis for reducing backpay. Similarly, during certain periods of time where Susan Younce had available to her only split shift work at a great distance from her home, which required a great deal of time going back and forth, and the cost of transportation and of hiring a babysitter was greater than the remuneration received for holding down that job, I find Susan Younce's decision to quit her job a reasonable one and not such as to reflect a willful loss of employment.[30] Indeed, inasmuch as she had neither transporta-

[23] *Amshu Associates*, 234 NLRB 791 (1978).

[24] "As a general proposition, entitlement to backpay does not turn on a showing that the discharged employee sought precisely the same type of interim employment as that from which he was discharged." *Avon Convalescent Center*, 219 NLRB 1210 (1975), revd. in pertinent part 549 F.2d 1080 (6th Cir. 1977).

[25] *Champa Linen Service Co.*, 222 NLRB 940 (1976); *Robert Haws Co.*, 161 NLRB 299 (1966).

[26] R. Exh. 5, par. 17.

[27] Inasmuch as Susan Younce earned more at Shield's Restaurant in 1 month than she would have earned at Respondent's during the entire first quarter of 1979, backpay due for this period is unaffected by her absence due to illness.

[28] Par. 20.

[29] *Fort Lock Corp.*, 233 NLRB 78 (1977).

[30] *Richard W. Kaase Co.*, 162 NLRB 1320 (1967).

tion nor babysitting problems prior to her unlawful discharge by Respondent, I see no basis for diminishing the backpay due her to the benefit of Respondent because of personal difficulties totally ascribable to Respondent's unfair labor practices.

In short, I have found no reasonable basis for diminishing the amount of backpay due, based on Respondent's claim that the discriminatees failed to meet their obligation to seek out and hold interim employment. I do find a basis for diminishing the total amount due to the incapaciting illness of Susan Younce.

In accordance with the above reasoning I find the backpay due David and Susan Younce to be as follows:

David Younce

Calender Quarter	*Gross Backpay*	*Interim Earnings*	*Net Backpay*
1976-4	$1084.87[31]	-	$1084.87
1977-1	1174.95[32]	-	1174.95
1977-2	1651.92[33]	$215.25	1436.67
1977-3	1651.92	-	1651.92
1977-4	1651.92	-	1651.92
1978-1	1651.92	-	1651.92
1978-2	1651.92	1726.00	-
1978-3	1651.92	1726.00	-
1978-4	1651.92	350.00	1301.92
1979-1	1651.92	-	1651.92
1979-2	1651.92	400.00	1251.92
1979-3	1651.92	-	1651.92
1979-4	1651.92	-	1651.92
1980-1	1651.92	-	1651.92
1980-2	1651.92	-	1651.92
1980-3	1651.92	539.16	1112.76
1980-4	1651.92	2767.36	-
1981-1	1651.92	3949.00	-
1981-2	1651.92	3949.00	-
1981-3	1651.92	3949.00	-
1981-4	1651.92	3949.00	-
1982-1	1651.92	4051.32	-
1982-2	1651.92	4051.32	-
1982-3	1651.92	4051.32	-
1982-4	1651.92	934.92	717.00

David Younce—Continued

Calender Quarter	*Gross Backpay*	*Interim Earnings*	*Net Backpay*
1983-1	1651.92	-	1651.92
TOTAL			22,947.37[34]

Susan Younce

Calender Quarter	*Gross Backpay*	*Interim Earnings*	*Net Backpay*
1976-4	$300.07[35]	$24.20	$275.87
1977-1	324.99	510.75	-
1977-2	324.99	-	324.99
1977-3	324.99	-	324.99
1977-4	324.99[36]	18.23	306.76
1978-1	324.99[37]	33.93	291.06
1978-2	324.99[38]	-	324.99
1978-3	324.99	-	324.99
1978-4	324.99	72.87	252.12
1979-1	324.99	434.54	-
1979-2	324.99	1140.86	-
1979-3	324.99	1711.29	-
1979-4	324.99	1711.29	-
1980-1	324.99	-	324.99
1980-2	324.99	516.46	-
1980-3	324.99	-	324.99
1980-4	324.99	164.31	160.68
1981-1	324.99	532.80	-
1981-2	108.33[39]	34.13	74.20
1981-3	324.99	543.95	-
1981-4	324.99	371.46	-
1982-1	324.99	-	324.99
1982-2	324.99	888.73	-
1982-3	324.99	-	324.99
1982-4	324.99	-	324.99
1983-1	324.99	-	324.99
TOTAL			4,610.59[40]

The Notice

Inasmuch as I have found that Respondent never made a proper offer of reinstatement to David or Susan Younce, its motion to revise the notice is denied with respect to these two discriminatees. With respect to Respondent's motion to revise the notice with regard to the offer of reinstatement to Clarence Goold,[41] Larry Davis, Rickey Davis, Charles Davis, Mark Rushing, Harold Dodson, and Madeline Dodson, the motion is granted to the extent reflected in the notice attached hereto.[42]

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[43]

[31] The $180.76 biweekly pay times 26 equals $4699.76 annual wage divided by 12 equals $391.65 per month wage times $2.77 monthly period equals $1084.87 for the quarter. Since the Younces remained in their apartment throughout this period without paying rent, rental benefits are not included.

[32] The $391.65 per month wages times 3 equals $1174.95 quarterly backpay.

[33] The $1174.95 quarterly backpay plus $476.97 (3 times monthly apartment benefit, $158.99 equals $1651.92. The Younces were evicted in March according to the credited testimony of David Younce.

[34] Total net backpay due David Younce as of the end of the first quarter 1983. Backpay continues to run thereafter inasmuch as no proper offer of reinstatement has been made by Respondent to David Younce.

[35] The $108.33 monthly pay times $2.77 months.

[36] Contrary to Respondent's position, I find, for reasons stated supra, that Susan Younce did not sustain a willful loss of interim employment during this period.

[37] Ibid.

[38] Ibid.

[39] Two months out of work due to surgery.

[40] Total net backpay due Susan Younce as of the end of the first quarter 1983. Backpay continues to run thereafter inasmuch as no proper offer of reinstatement has been made.

[41] Clarence Goold is not entitled to reinstatement.

[42] Cf. *Charles H. McCauley Associates*, 266 NLRB 649 (1983).

[43] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ORDER

The Respondent, Seligman & Associates, Inc., Detroit, Michigan, its officers, agents, successors, and assigns shall pay to David Younce and Susan Younce, in accordance with the above computations the sums of $22,947.37 and $4610.59, respectively.[44] Interest is to be computed in the manner prescribed in *Florida Steel Corp.*, 231 NLRB 651 (1977) (see also *Isis Plumbing*, 138 NLRB 716 (1962).) There should be deducted from the amount due any tax withholding required by Federal and state law.

The attached notice as Appendix A has been amended to reflect that Respondent has offered reinstatement to certain discriminatees and has entered into a settlement agreement to make them whole for the losses incurred by them due to Respondent's unlawful acts. The amended notice is to be posted in lieu of the original notice under the same conditions required by the Board in its original order.[45]

[44] Computed through the first quarter 1983. Backpay continues to run.
[45] 240 NLRB 110 at 111. See fn. 42.

Montgomery Ward & Company, Incorporated *and* Joseph F. Steele. Case 32–CA–2797

14 December 1984

DECISION AND ORDER

BY MEMBERS ZIMMERMAN, HUNTER, AND DENNIS

On 8 October 1981 Administrative Law Judge David G. Heilbrun issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed a reply brief. On 16 December 1982 the National Labor Relations Board remanded the proceeding to the judge for additional findings of fact and credibility resolutions. On 24 May 1983 the judge issued the attached supplemental decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed a brief in support of the supplemental decision.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision, the supplemental decision, and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

The judge found that the Respondent's investigatory interview of Joseph Steele on 23 May 1980[1] was conducted in accord with the principles set forth in *NLRB v. J. Weingarten*, 420 U.S. 251 (1975), and did not violate Section 8(a)(1). We disagree.

Many of the facts concerning the Respondent's 23 May interview of Steele were undisputed. The parties disagreed, however, on certain key issues.[2] Certain of these issues were the subject of the Board's remand order. A compilation of the credited evidence follows.

On 23 May Work Supervisor Joe Beggs took Steele, an 11-year warehouse employee of the Respondent, to one of the Respondent's offices.[3] There Security and Safety Manager Roger Peterson and Chief Investigator Melvin Lee asked Steele to sign a "Consent to Interview" form.[4] Steele signed the document. Peterson then interrogated Steele about the alleged theft of company property.

Early in the interview Steele asked that his "work supervisor" be allowed into the interview.[5] Peterson denied Steele's request, stating that he could not see anyone and that a tape recording[6] of the interview would serve as his protection.[7]

Peterson continued to interrogate Steele for more than 2 hours. During the interview, Steele was accused of stealing property from the warehouse. Steele denied the charge. As the interrogation continued, the Respondent made several references to possible police involvement. At some point the Respondent handed Steele a merchandise catalog and told him to leaf through it. As he did so, Peterson noted certain items contained on pages at which Steele hesitated. Peterson then presented Steele with the list of merchandise, stating that Steele's hesitation demonstrated that he had stolen the listed items.

Peterson totaled the costs for the listed items and told Steele that, if he admitted his guilt and paid for the items totaling $170.66, he might save his job. Steele signed a statement admitting his guilt and agreed to pay for the items. Steele was sent home. On the following workday, Steele presented the Respondent with a check for $170.66. He was then discharged. Contrary to the judge, we find the Respondent denied Steele his *Weingarten* rights and, consequently, violated Section 8(a)(1).

The Supreme Court's *Weingarten* decision sets forth several basic principles relevant to the instant case. First, *Weingarten* applies to investigatory interviews that an employee reasonably believes

[1] All dates refer to 1980 unless otherwise stated.

[2] Steele was the only person to testify at the hearing. The remainder of the record is documentary evidence, including Steele's pretrial affidavit and two grievance letters he submitted to the Respondent. Discrepancies between Steele's testimony and the documents required credibility resolutions.

[3] The parties substantially agree about what transpired during the interview. The dispute centers on the interpretation of the "facts" and their legal implications.

[4] The form provided:

> I agree that representatives at Montgomery Ward & Co., Inc., may interview me, commencing from the time designated below [11:37 a.m.] on matters relating to company business.
>
> It is fully understood that I am free to leave this interview at any time I so desire.

[5] In his original decision, the judge limited his analysis to the finding that Steele had asked to be represented by a "supervisor," within the meaning of Sec. 2(11) of the Act, and the conclusion that a request for such a person was insufficient to invoke *Weingarten* protections. Because we believed the Respondent's reply to Steele's request to be crucial, we remanded the case to the judge for appropriate findings.

[6] At the hearing the Respondent conceded that part of the interview was taped. Counsel for the Respondent, however, stated that the tape was lost.

[7] We would have preferred that the judge provided us a more precise statement of the Respondent's reply to Steele's request than is contained in the supplemental decision. The judge, however, did specifically find that the Respondent replied "in a general sense any device that could record and thus perpetuate spoken words would be representative of the exchange then underway and intended to be continued." In addition, the judge specifically found in his original decision, and implicitly found in the supplemental decision, that Steele's grievance letters most accurately recited the 23 May events. In each of these letters, as well as in his oral testimony and pretrial affidavit, Steele stated that his request met with a denial, the statement that he could not see anyone, and that the tape recording would serve as his protection. Accordingly, we specifically credit Steele's testimony concerning the Respondent's reply to his request.

may result in his or her discipline.[8] Such an interview occurred here. Secondly, the employee subjected to the interview must request representation. Third, when presented with a request, the employer must either grant the request, present the employee with the option of continuing the interview unrepresented or forgoing the interview altogether, or deny the request and terminate the interview. The second and third principles require examination here.

As stated above, Steele requested the presence of his "work supervisor" at the interview. The Respondent denied his request, stating that he could not see anyone and that a tape recorder would serve as his protection. The judge found that, because a supervisor is not a representative within the meaning of *Weingarten*, Steele's request was "sterile" and insufficient to invoke the *Weingarten* protections. The judge erred in analyzing the efficacy of Steele's request without reference to the Respondent's reply.

In determining whether an employee's request is sufficient to invoke *Weingarten* protections, the Board has held generally that the request must be sufficient to put the employer on notice of the employee's desire for representation. *Southwestern Bell Telephone Co.*, 227 NLRB 1223 (1977). The Board has also held, however, that when an employee requests a representative who is unavailable, the employer can deny the request and is not required to postpone the interview, secure an alternative representative, or otherwise take steps to accommodate the employee's specific request. The Board has held that in such circumstances the employee has the right and, indeed, the obligation to request an alternative representative in order to invoke the *Weingarten* protections. *Coca-Cola Bottling Co. of Los Angeles*, 227 NLRB 1276 (1977).

Applying these concepts, we assume for purposes of this decision that the person Steele requested as a representative was a statutory supervisor and ineligible to serve as a *Weingarten* representative. Nevertheless, we find that Steele's request put the Respondent on notice that he desired representation. That the Respondent knew of Steele's desire for representation is reflected by the response that Steele could see no one and that the recording would serve as his representative.[9] The Respondent's reply was preemptive and effectively prohibited Steele from making a further request for representation. Accordingly, Steele was precluded from exercising an employee right, recognized in *Coca-Cola*, to request an alternative representative after the employer lawfully denies an initial request for a particular representative. In effect, the Respondent told Steele that no matter who he requested as a representative, he would have to be content with a tape recording of the interview. In short, we find that Steele's request, in light of the Respondent's preemptive denial, was sufficient to invoke the *Weingarten* protections.

The Respondent failed to exercise any of the legitimate options available to it after denying Steele's request for representation. Instead, the Respondent subjected Steele to a 2-hour interrogation replete with threats of police involvement and job loss that trained security officers conducted using sophisticated interrogation techniques.[10] In the interview, the Respondent succeeded in obtaining a signed "confession" and Steele's agreement to pay for allegedly stolen items, apparently in exchange for an implied promise to consider letting Steele keep his job. With the "confession" in hand, the Respondent terminated Steele after accepting his payment. Thus, the Respondent blatantly violated the *Weingarten* protections.

THE REMEDY

In *Taracorp, Inc.*, 273 NLRB 221 (1984), the Board established the appropriate remedial scheme for violations of Section 8(a)(1) arising out of unlawful *Weingarten* interviews. In that decision, the Board held that a make-whole remedy is inappropriate and that the proper remedy is that normally prescribed for violations of Section 8(a)(1). Accordingly, we shall order the Respondent to cease and desist from the activity found unlawful herein and take certain affirmative actions designed to effectuate the policies of the Act.

[8] Member Hunter disassociates himself from any implication that unrepresented employees enjoy *Weingarten* rights. Member Hunter notes that the employees in question in *Weingarten* were part of a unit represented by a union. For the reasons set forth in his concurring and dissenting position in *Materials Research Corp.*, 262 NLRB 1010, 1021 (1982). Member Hunter would not expand these rights to cover unrepresented employees. In the present case, Member Hunter agrees that employee Steele is entitled to the *Weingarten* protections since at the time of the investigatory interview, Steele was a member of a bargaining unit represented by a union.

[9] The Board has held on several occasions that it is not the prerogative of the employer to determine whether an employee needs representation at a *Weingarten* interview. See *Lennox Industries*, 244 NLRB 607, 608 (1979), and cases cited therein at fn. 6.

[10] In his supplemental decision, the judge sought to establish that Steele was not actually coerced during the interview. The absence of actual coercion is wholly irrelevant in the context of *Weingarten*. Accordingly, we do not find it necessary to pass on the judge's finding that the interview was noncoercive. We do, however, specifically disavow any implication in the supplemental decision that Steele's signing the "Consent to Interview" form waived his *Weingarten* rights or otherwise indicated that Steele participated in the interview voluntarily. See *Montgomery Ward & Co.*, 254 NLRB 826, 831 (1981).

ORDER

The National Labor Relations Board orders that the Respondent, Montgomery Ward & Company, Incorporated, San Leandro, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Requiring that employees participate in interviews or meetings when the employees have reasonable grounds to believe that the matters to be discussed may result in their being disciplined and where representation at those interviews or meetings has been denied.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Post at its San Leandro, California facility copies of the attached notice marked "Appendix."[11] Copies of the notice, on forms provided by the Regional Director for Region 32, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[11] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT require that employees participate in interviews or meetings when the employees have reasonable grounds to believe that the matters to be discussed may result in their being disciplined and where representation at those interviews or meetings has been denied.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

MONTGOMERY WARD & COMPANY, INCORPORATED

DECISION

STATEMENT OF THE CASE

DAVID G. HEILBRUN, Administrative Law Judge. This case was heard at Oakland, California, on July 23, 1981, based on a complaint alleging that Montgomery Ward & Company, Incorporated (Respondent) violated Section 8(a)(1) of the Act by denying the request of Joseph F. Steele for "the presence of a representative" during an investigatory interview conducted May 23, 1980, as to which there was reasonable cause to believe that disciplinary action against Steele would result, and thereafter on May 29, 1980, discharging him in consequence.

On the entire record, my observation of the only witness called, and consideration of posthearing briefs, I make the following

FINDINGS OF FACT AND RESULTANT CONCLUSION OF LAW

Steele was employed as a warehousemen by Respondent for 11 years, and was a member of the bargaining unit represented by Warehouse, Mail Order and Retail Employees Union, Local No. 853, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.[1] In late morning of May 23, 1980, his immediate supervisor Joe Beggs advised Steele to go with him to an office about 300 feet or more from his normal work place.[2] During the approximate course of 5 minutes while walking there Steele repeatedly asked Beggs why he was being brought in and who the "Mr. Sweet" was that he was expected to see. The question was begged off on the basis of Beggs lacking helpful knowledge. On arrival at the office Steele was presented to Security and Safety Manager Roger Peterson and Chief Investigator Malvin Lee, the former of whom proceeded to interrogate Steele about warehouse thievery. This followed the initial act of obtaining Steele's signature on a "Consent to Interview" document reading:

> I agree that representatives at Montgomery Ward & Co., Inc., may interview me, commencing from the

[1] Respondent operates retail department stores nationally and in the course and conduct of its business operations derives gross revenues in excess of $500,000. Its office and place of business in San Leandro, California, is the only facility here involved, and as to this location Respondent annually purchases and receives goods or services valued in excess of $5000 which originated outside California. On these admitted facts I find that Respondent is an employer engaged in commerce within the meaning of Sec. 2(6) and (7) of the Act, and otherwise that Teamsters Local 853, named more fully above, is a labor organization within the meaning of Sec. 2(5) of the Act.

[2] All dates and named months hereafter are in 1980, unless shown otherwise.

> time designated below [11:37 a.m.] on matters relating to company business.
>
> It is fully understood that I am free to leave this interview at any time I so desire.

The interview lasted nearly 2 hours with repeated accusations of Steele's having stolen things, and his at first resolutely denying it. Ultimately, the merchandise catalogue was handed to Steele with a request that he leaf through it. He did so and on pausing at certain pages Peterson aggressively insinuated that this signified guilt as to items on such a particular page. Slowly, Steele passively conceded that his pauses did not associate to stolen items, though secretly repudiating it in his own mind. A short list of apparel and consumer goods was then prepared with attendant dollar value totaling to $170.66, and Steele signed it below an introductory statement admitting to appropriation of what was marked. A second document was signed 15 minutes later in which Steel printed out his supposed actions in more detail, stating remorse and a desire to make restitution. He was thereupon suspended by Peterson and, on return to the premises on May 29, he paid Respondent $170.66 and was promptly terminated on the basis of a management decision which Peterson said was not made by him.

Steele testified to various matters that superimpose on this chronolgy. He recalled that when the episode commenced Peterson elaborated on the "Consent to Interview" by saying that it authorized use of a tape recorder which would be Steele's "protection." In fact, the interview was not taped. Additionally, Steel twice tried to leave during the interview, but on both occasions was dissuaded when Peterson stated that to do so would lead to police involvement and possible arrest. Steele testified that he thrice asked "to have somebody present at the interview," but this approach was consistently denied by Peterson, who kept alluding to a tape recording as Steele's "protection and my representative."

Following his termination Steele caused certain documents to be sent to Respondent. A grievance statement dated June 5 set forth Steele's version of background as including that the interview experience was emotionally distressing to him, and caused him to ask "if I could see one (1) of my work supervisors, to find out what was going on." In a later document dated July 1, rebuttting an employer grievance response, Steele emphasized how he had "asked (more than once) to see one of my supervisors in order to find out what was going on." In this document Steele added that to him his request *had meant* seeing a "shop steward." Steele's steward then was Glen Erspamer, a person he had helped win office in the Local Union by his vote. Other than this Steele had not participated in union affairs during the 11 years of his membership, nor was he even acquainted with any business agent.

This case invokes *NLRB v. J. Weingarten*, 420 U.S. 251 (1975). Of its progeny *Southwestern Bell Telephone Co.*, 227 NLRB 1223 (1977), is most nearly in point where an employee request "to have someone there that could explain to me what was happening" evoked a supervisory response that "if the Union were called in it would be out of their hands and there would be nothing they could do to protect the employees' jobs." In such context I find from probative evidence that Steele did not make an effective request for representation within the doctrine or intendment of *Weingarten*. I believe the testimony of Steele is so unreliable as to be valueless. He carried an unpersuasive demeanor while testifying, and on a more objective basis was evasive and contradictory in what he advanced from the witness stand. His offerings may be characterized as "generally confused," a condition expressly noted by the Board in approving rejection of uncontradicted testimony merely on the basis of demeanor observation. *Plasterers Local 32 (McCrory & Co.)*, 223 NLRB 486 (1976). See also *Teamsters Local 959 (Northland Maintenance)*, 248 NLRB 693 (1980). I believe Steele's testimony was utterly contrived, a conclusion made even more compelling on noting the admission that he was made aware of entitlement to a vague "someone" at the interview only after it was over when "people came up and told me."

The truth about Steele's critical utterances is found exclusively in documentation originating from him shortly after the episode. Such nearly contemporaneous writings are properly a source of fact, particularly when oral testimony is discreditable and the prior signed or adopted statements containing a substantially different version were made in spontaneity and candor. See *Snaider Syrup Corp.*, 220 NLRB 238 (1975); Cf. *Kern's Bakeries*, 227 NLRB 1329 (1977). Further, I reject Steele's hyperbolized claim of harboring fear and intimidation during the interview, noting that no objective showing was made about such being inculcated and that by Steele's own description the "shop steward" routinely intervened during interrogations of employees Miles, Sanders, and Lyons.

I thus find Steele's only request for guidance or assistance was that Beggs, his "work supervisor," appear and participate in the interview. This specifically contrasts with *Southwestern Bell*, in which an unartfully voiced request for representation was parried with express supervisory reference to whether it was tactically wise to involve "the Union" in an institutional sense.[3] The focus on Beggs meant a sterile request under *Weingarten*, for its carefully structured precepts contemplate only that pertinent representation by a labor organization or its

[3] The General Counsel argues *Anchortank, Inc.*, 239 NLRB 430 (1978), and *Crown Zellerbach, Inc.*, 239 NLRB 1124 (1978), in asserting that *Weingarten* rights are to be liberally construed in the "lone employee" situation. Both cases are distinguishable. The context of *Anchortank* was that material events occurred prior to a union's certification, thus leaving employees without a statutory representative at the significant point in time. This was found not to impair an employee's right to "some measure of protection when faced with a confrontation with the employer which might result in adverse action." Having divined this "primary concern" in *Weingarten*, the Board held in *Anchortank* that a valid request in fulfillment of Sec. 7 rights could involve either a representative of the union not as yet certified "or simply that of [a] fellow employee." The course of this rationale makes ineffectual. *Crown Zellerbach* is similarly unavailing, for there the issue was simply how to dovetail *Weingarten* rights with the new representative status of a freshly certified union, as to which the parties had "no customary practice or procedure . . . relating to discipline of employees." In such a case the utilization of a principal advocate for the just-successful union was confirmed, and the General Counsel's rather esoteric argument that the interviewed employee's knowing assent to witnessing by this competent fellow employee of rank-and-file persuasion still failed to fulfill *Weingarten* was rejected.

counterpart might contribute to the fulfillment of rights under Section 7 of the Act.[4] Accordingly, I render a conclusion of law that Respondent has not violated the Act as alleged, and issue the following recommended

[Recommended Order for dismissal omitted from publication.]

[4] Respondent's decision not to call Peterson as a witness is immaterial when a prima facie case has not been made out. Further, my holding makes it unnecessary to reach the alternative theory of waiver which was briefed by both parties. This theory associates with use of the Consent to Interview form, a technique also found in *Montgomery Ward & Co.*, 254 NLRB 826 (1981). In view of the immateriality, no treatment is required of *Montgomery Ward*, supra.

SUPPLEMENTAL DECISION

DAVID G. HEILBRUN, Administrative Law Judge. On December 16, 1982, the Board issued its Order remanding this matter "for the purpose of preparing and issuing a Supplemental Decision setting forth findings of fact and resolutions of credibility concerning Respondent's statements including the precise nature of Respondent's denial of Joseph F. Steele's request that his work supervisor be allowed to be present to assist him during the interview of Steele conducted by Respondent on May 23, 1980." The Board pointed to subsumed questions, which it termed "unclear . . . and potentially crucial," of "whether Steele was coerced into continuing with the interview after his request for aid was denied and what response was given to Steele, if any, beyond denial of his request that a work supervisor be present." Methodology used in reaching further determinations pursuant to the Order chiefly includes review and comparison of documentary evidence, further scrutiny of testimony as given by sole witness Steele, and reflection on the demeanor characteristics exhibited as he testified on July 23, 1981, in terms of any overall semblance of plausibility. This approach has, in turn, been associated to the several lines of analysis set forth in the Board's Order. Thus, an integration was formulated to render the new findings of fact and conclusions of law that are now required to support a further recommended Order.

In more closely accessing the particulars of Steele's concededly investigatory interview, it is first noteworthy that the grievance letter dated June 5, 1980 (appended to a grievance form dated June 6, 1980), was the first spontaneous description by Steele of what he had experienced 2 weeks earlier. This letter was the work of an unnamed friend, who exhibited considerable skill in written composition. On its face the letter is suitably organized, contains a thrust beyond merely stating the contractually based grievance, and has an impressive rhetorical quality. It is also true that a detailed version of the investigatory interview is set forth, and Steele both had expressly adopted it at the time and reaffirmed it when he testified.

With respect to the questions about which the Board solicits more precise factual findings, the first is whether coercion was present as the investigatory interview unfolded. Here Steele's adopted grievance letter of June 5, 1980, traces his original entry to the room in which the episode occurred and the approximate 1-1/2-hour period to follow. However, it is immediately evident that a description akin to what my first decision termed "hyperbolized" perceptions is offered as reality of the situation. Thus, this "Grievance Background" commences with a reference to the "confront[ation]" by two or three men; however, Steele's testimony on such points reveals no recollection that Chief Investigator Lee ever spoke at all during the entire interview, and that a third man did not appear until a later point when the merchandise catalogue was brought into the process. As to taping of the investigatory interview, an evidentiary point that balances Respondent's counsel's stating how "at least a part of the interview" was recorded is Steele's recollection that to his own knowledge the tape recorder was not turned on and operating.[1]

The continued description is of a flood of accusations[2] and Steele's growing distress as he experienced feelings of restriction and fear of police involvement. A further direct reference in the grievance letter of June 5, 1980, is to Steele's spoken request for his work supervisor[3] and the response by the interrogator that he could not see "anyone," with the additional comment that the tape recorder would serve as his representative. Given that Supervisor Beggs had civilly escorted Steele to the interview room,[4] that Steele could not name a second union steward for his work location, that his signed "response" (dated July 1, 1980) to the Employer's "grievance rebuttal" alludes to asking for "one of my supervisors . . . more then [sic] once," and that he termed his desire as that of wishing to have the interview process softened with a "friendly face," I find that Steele clearly and repeatedly termed his request for assistance as to be that of a supervisor and from this Respondent's representatives routinely rejected this as an inappropriate intrusion on the security function by saying that nobody of that capacity was to complicate the interview, and that in a general sense any device that could record and thus per-

[1] This assertion is one of several in which Steele's veracity is in doubt, for his investigatory affidavit plainly refers to the tape having been "turned on."

[2] The exact reference is to "rapid fire questions from all directions"; however, this overwise disturbing scenario is at total odds with Lee's being shown as making no utterances at all and the absence of any reference to remarks by the third unknown person.

[3] This is the most salient point as to which Steele is discredited, for his contradictory testimony was not satisfactorily explained nor did his demeanor when denying that a work supervisor had been requested by him display an interest in truth on the point.

[4] No finding is extant of whether Beggs is a supervisor within the meaning of Sec. 2(11) of the Act or, as the Board pointed out could be the case, merely a "regular employee [carrying] such a title." While there is little which is indicative of Beggs' actual functioning, what is known is that as a subordinate Steele was paid an $8.59 hourly rate as a receiving clerk plus generally working 3 hours weekly overtime, that Beggs authoritatively left his work area to walk an employee on what amounted to an approximate 10-minute passage of time for his own round trip, and that Steele showed some apprehension over whether or not he was being called in because of "mistakes I may have made as a new employee in the Receiving Department." Such indications are that Beggs actually responsibly directed others in a manner more than routine, and requiring use of independent judgment in such fulfillment. The Board's experience with this Employer shows it to be sufficiently structured that, when all involved persons allude to a "work supervisor" in this type of facility, the incumbent is by all odds a statutory supervisor. On this basis I now find Beggs to have possessed that status at material times. Cf. *Montgomery Ward & Co.*, 217 NLRB 165, 166 (1975).

petuate spoken words would be representative of the exchange then underway and intended to be continued.

I find that no coercion was present in regard to Steele's continuation with the interview, in part because at its very outset he signed a statement which plainly affirmed his understanding of being truly able "to leave . . . at any time."[5] Steele's grievance rebuttal response dated July 1, 1980, seeks to neutralize the significance of this understanding in its point No. 6; however, none of the five subpoints does more than reiterate what a summoned employee would ordinarily expect. On the question of police involvement, the last assertion of such point No. 6 refers to police notification, but without any showing that it was more than routine reference whenever theft is the subject matter of discussion. This is another example of inconsistency in Steele as a source of facts, for his earlier grievance letter of June 5, 1980, and his investigatory affidavit both state that he was told of potentially being "take[n]" to the police.[6]

In sum, I find that Steele experienced a firm, appropriate coaxing out of guilt, that the consequences of his apparent conduct were referred to only in a balanced manner, and that his contention after the episode ended that he had really felt rooted in place throughout and unable to exercise the simple free will of walking from the room is but a contrived afterthought which was fostered out of an unworthy attempt to avoid the plain consequences of his acts. I am satisfied that these disordered thoughts arose later on May 23, 1980, when Steele was visited at home by two fellow employees, and the entire matter of a sweeping security crackdown based on implications the day before was discussed among these three persons in a context laden with surmise, chagrin, and a grasping for exoneration.

The Board's remand also alluded to the "legal" issue of Respondent's being put on notice of an employee's desire for representation, with *Columbus Foundries*, 229 NLRB 34 (1977), and *Illinois Bell Telephone Co.*, 251 NLRB 932 (1980), cited as among the progeny of *Weingarten*. In *Columbus Foundries* the individual seeking to intervene during an investigatory interview was a union committeeman, while in *Illinois Bell* a fellow employee of the interviewee was turned away even though the actual union steward had instructed that such a person be called on if necessary when, as was the case, there was no access to this same union steward because of differing work shifts. On these bases I consider both *Columbus Foundries* and *Illinois Bell* distinguishable and without relevance to the issue of what puts an employer on meaningful notice that appropriate representation is desired before an employee submits to an investigatory interview. With the facts here being that Steele's only request was for a work supervisor, the fuller credibility resolution above has no impact on such collateral "legal" issue.

Accordingly, I reaffirm my earlier conclusion of law that Respondent has not violated the Act as alleged, and again recommend that the Board dismiss the complaint in its entirety.

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[5] An identical "Consent to Interview" document was involved in *Montgomery Ward & Co.*, 254 NLRB 826 (1981), and there analyzed only in terms of whether it constituted a waiver of *Weingarten* rights. Of three interviewees which that case treated, all of whom signed the writing before individual interview with auto service center security and safety personnel, one (Kamin) made no request for representation whatsoever, yet proceeded to list $1300 in cash and merchandise as his response to the management official's request for details of what he was "responsible for stealing." Further, when the process was over and admitted to in a signed statement, the employee implicated another individual on being asked about his knowledge of any additional engagement in theft. The implicated person, along with another, both made clear and unequivocal requests for *union* representation subsequent to signing the Consents to Interview there, and the coercive circumstances found to have existed during these respective interviews did not in any manner relate to this document itself.

[6] Steele's oral testimony varies still more in its reference to "police action and stuff like that," which is the explanation in terms other than his being taken to the police. I note that the final documents signed by Steele when the interview terminated emphasized how "possible prosecution" was not precluded or limited, and believe from this that a definite susceptibility toward suggestiveness has clouded Steele's ability to truly recall just what was said to him on the point. These circumstances emphatically contrast with a person undergoing interview being told that police would be "waiting [at] home" should he leave, or countering the plain request for a union representative to assist by saying that instead the police would be called. *Montgomery Ward*, supra at 829–830.

New Galax Mirror Corporation *and* United Furniture Workers of America, AFL–CIO. Case 5–CA–13923

14 December 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS ZIMMERMAN AND DENNIS

On 5 April 1983 Administrative Law Judge James L. Rose issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed a brief in response to the Respondent's exceptions.[1]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions, and to adopt the recommended Order as modified.

The issues in this case arose in the wake of a 2 September to 27 November 1981[3] economic strike by the Respondent's production and maintenance employees. The Respondent refused to reinstate former strikers Danny Anders, Larry Phipps, and Virgil Roberts because each of them had allegedly engaged in serious misconduct during the strike. The complaint alleged, and the judge found, that the refusals to reinstate violated Section 8(a)(3) and (1) of the Act. For reasons stated below, we find that the Respondent violated the Act only by its refusal to recall Phipps.

1. Danny Anders

On 16 October Supervisor Combs reported to Edward Burcham, the Respondent's president, that paint and etching acid had been spilled on Combs' car the night before. Later that month, Combs told Burcham that charges had been filed with the sheriff's department accusing Anders of participating in the vandalizing of Combs' car. He also reported that the sheriff's department was investigating the charges and had issued an arrest warrant for Anders. The Respondent relied on the foregoing in refusing to reinstate Anders when the strike ended. The case involving Anders was subsequently nol prossed and he returned to work on 18 January 1982.

Another incident took place during the strike which the judge found comparable to that involving Anders. Specifically, striking employee David Mosier charged nonstriking employee Georgia Sexton with trying to hit him with her car. Burcham was aware of the incident, Sexton having explained to him that she was only parking her car and not attempting to run Mosier over. No arrest warrant was issued for Sexton and the charges against her were dismissed. The Respondent took no disciplinary action against her.

The judge found that the Respondent had an "honest belief" that Anders had participated in vandalizing Combs' car. The judge also found, however, that the Respondent had similar cause to believe that Sexton had attempted to hit Mosier with her car. The judge concluded that although the Respondent's "honest belief" that Anders had participated in vandalism would have justified his suspension or discharge, the Respondent's failure to penalize Sexton for similar conduct demonstrated disparate disciplinary treatment between striker and nonstriker. Consequently, the refusal to reinstate Anders was discriminatory conduct in violation of Section 8(a)(3). The judge used the same disparate treatment rationale in partial support of his 8(a)(3) findings with respect to alleged discriminatees Phipps and Roberts.

We agree with the judge that the Respondent had an "honest belief" in Anders' participation in the vandalization of Combs' car at the time it refused to reinstate Anders and such misconduct excedes the protections of the Act. See *Clear Pine Mouldings*, 268 NLRB 1044 (1984). Contrary to the judge, however, we find no disparate treatment or condonation of Sexton's alleged misconduct. At the time the strike ended, Burcham knew that charges had been filed against Anders for participating in the vandalization of Combs' car, an arrest warrant had been issued, and Combs' car in fact had been damaged. Burcham had no corresponding knowledge with respect to the charges filed against Sexton. Mosier had not been injured, no arrest warrant had been issued for Sexton, and Burcham had Sexton's countervailing explanation for the incident. In sum, Burcham had less conflicting and more convincing evidence of Anders' culpability for the offense charged. This distinction in the known circumstances of each incident justified the Respondent's failure to discipline Sexton.

In light of the foregoing, we find that the General Counsel has not proved that the Respondent employed disparate treatment with respect to the alleged misconduct of striker Anders. Accordingly,

[1] We deny the General Counsel's motion to strike the Respondent's exceptions 4 and 5.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[3] All dates are in 1981 unless otherwise stated.

we find that the Respondent lawfully refused to reinstate Anders on 27 November. Furthermore, having found error in the judge's disparate treatment rationale, we must examine the validity of other grounds stated by the judge for finding unlawful the refusal to recall Phipps and Roberts.

2. Larry Phipps

During the morning of 16 November, firecrackers were exploding in and about the plant. Edward Burcham, the Respondent's president, observed Phipps and Fred Privette, a nonemployee picket, standing close to the front door of the plant. Burcham saw Phipps, with a cigarette in one hand, make a motion with the other. Burcham then heard a firecracker explode and saw paper and smoke close to Phipps' feet.

The judge credited the testimony of Privette and another eyewitness that Phipps did not throw the firecracker. He noted that Burcham did not testify that he saw Phipps throw a firecracker and observed that it was unlikely that if Phipps had thrown one it would have fallen at his feet. Because the Respondent's belief that Phipps had engaged in misconduct was mistaken, albeit in good faith held, we find that the Respondent violated Section 8(a)(3) and (1) of the Act by failing to reinstate him.[4]

3. Virgil Roberts

On 16 November, Supervisor Gregory Bartlett was looking through a second story window of the plant and saw Roberts, who was standing close to the front door of the plant, light a bottle rocket[5] and bend over. When Bartlett reached the first floor seconds later, he saw debris and smoke.

The judge found that Roberts had thrown a bottle rocket through the front door. He also found, however, that there was no evidence that the rocket had caused any damage to company property or to any person. Citing *Seminole Asphalt Refining*, 207 NLRB 167 (1973), enf. denied in pertinent part 497 F.2d 247 (5th Cir. 1974), the judge concluded that Robert's misconduct was not serious enough to preclude reinstatement. We disagree.

In *Seminole Asphalt*, the Board reversed the administrative law judge and ordered the respondent to reinstate two employees who had flung a cherry bomb onto plant premises during an unfair labor practice strike. The Board found that the cherry bomb had not damaged person or property and concluded that such misconduct when considered against the Respondent's unfair labor practices, particularly the discriminatory layoff that provoked the strike, was not so flagrant as to disqualify the alleged discriminatees for reinstatement. Unlike *Seminole Asphalt*, there is no allegation that the Respondent in this case committed any unfair labor practices.[6] The strike was an economic one. In addition, the bottle rocket was flung into the plant during manufacturing operations. At the time the rocket exploded, the Respondent's employees were handling mirrors and glass products. Even a slight explosion could have caused significant damage and disruption. That this did not occur was fortunate, but not dispositive of the reinstatement question. The potential for bodily injury and property damage was present.[7] Accordingly, we find that the Respondent lawfully refused to reinstate Roberts.[8]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, New Galax Mirror Corporation, Galax, Virginia, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraphs 2(a) and (b).

"(a) Offer Larry Phipps immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed and make him whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest.

"(b) Remove from its files any reference to the unlawful discharge of Larry Phipps and notify him in writing that this has been done and that evidence of the unlawful discharge will not be used against him in any way."

2. Substitute the attached notice for that of the administrative law judge.

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[4] *Rubin Bros. Footwear*, 99 NLRB 610 (1952). We express no opinion about whether Phipps would have been disqualified from reinstatement had he engaged in the alleged conduct.

[5] A bottle rocket is a firecracker launched from a bottle.

[6] In any event, Chairman Dotson and Member Hunter note their view, set forth in *Clear Pine Mouldings*, supra, that the Board should not balance an employer's unfair labor practices against a striker's misconduct in deciding the striker's entitlement to reinstatement.

[7] "The test of coercion and intimidation is not whether the misconduct proves effective. The test is whether the misconduct is such that, under the circumstances existing, it may reasonably tend to coerce or intimidate . . . ." *Operating Engineers Local 542 v. NLRB*, 328 F.2d 850, 852–853 (3d Cir. 1964).

[8] For the reasons stated by the judge in his decision, Member Zimmerman would find that Roberts' alleged misconduct was not serious enough to disqualify him from reinstatement.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT discharge or otherwise discriminate against you for engaging in a strike, picketing, or other activity protected by Section 7 of the National Labor Relations Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer Larry Phipps immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed and WE WILL make him whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest.

WE WILL notify him that we have removed from our files any reference to his discharge and that the discharge will not be used against him in any way.

NEW GALAX MIRROR CORPORATION

DECISION

STATEMENT OF THE CASE

JAMES L. ROSE, Administrative Law Judge. This matter was tried before me on January 12 and 13, 1983, at Galax, Virginia, on the General Counsel's complaint which alleged that the Respondent suspended, then discharged, three economic strikers in violation of Section 8(a)(1) and (3) of the National Labor Relations Act, 29 U.S.C. § 151 et seq.

The Respondent generally denied it committed any unfair labor practices, and affirmatively alleges that Larry Phipps and Virgil Roberts were terminated because "of their violent strike misconduct." The Respondent further contends it had a good-faith belief that Danny Anders was guilty of the strike-related misconduct but, on learning that such misconduct could not be established, subsequently reinstated him.

On the record as a whole, including my observation of the witnesses, briefs, and arguments of counsel, I make the following

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. JURISDICTION

The Respondent is engaged in the manufacture of mirrors and fabrication of glass. It annually receives directly from points outside the State of Virginia goods, products, and materials valued in excess of $50,000. It annually ships directly to points outside the State of Virginia finished products valued in excess of $50,000. The Respondent admits, and I find, that it is an employer engaged in interstate commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The Charging Party, United Furniture Workers of America, AFL–CIO (the Union) is admitted to be, and I find is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Facts*

On April 2, 1981,[1] the Union was certified as the bargaining representative for a unit of the Respondent's production and maintenance employees. Thereafter, apparently, the parties entered into negotiations but were unable to reach agreement on a contract. On September 2, a strike was called with about 50 to 55 of the unit employees participating. On November 27, the strike ended with the Union making an unconditional offer to the Respondent for the employees to return to work. The Respondent reinstated all the strikers except Larry Phipps, Virgil Roberts, and Danny Anders. Anders was recalled about January 18, 1982.

Involved in this case is the alleged vandalism of a supervisor's automobile on October 15; the setting off of firecrackers and bottle rockets on November 16, some of which exploded inside the plant; and on an unknown date, the alleged attempt of a nonstriking employee to hit a striker with her car when entering the plant parking area.

As indicated above, the Respondent contends it did not recall Anders because Edward Burcham, Respondent's president, had reason to believe he was one of the individuals who participated in vandalizing a supervisor's automobile on October 15; and Phipps and Virgil Roberts were not reinstated because they had been observed lighting a firecracker and/or a bottle rocket on November 16. Burcham testified to these events.

He also testified learning that striker David Mosier had charged Georgia Sexton (an employee hired during the strike) with trying to hit him with her car on her way to work one morning. Sexton was not suspended be-

[1] All dates are in 1981 unless otherwise indicated.

cause, "I did not consider that the charge against her as jeopardizing the company running its business, or the safety of employees." Although stating that Sexton mentioned this event to him on the day it occurred, Burcham did not say whether she admitted or denied it. Nor is it known whether this conversation was before or after Mosier made his complaint to the police.

B. *Analysis and Concluding Findings*

In *Rubin Bros. Footwear*,[2] the Board established how the burden of proof would be allocated in cases where an employer discharges or refuses to reinstate a striking employee because of alleged misconduct.[3] In essence, the General Counsel has an initial burden of showing that the discharge of the employee arose out of his having engaged in protected activity (e.g., strike) at which time the burden shifts to the Respondent to show that it had an "honest belief" that the individual had engaged in misconduct. The burden then shifts back to the General Counsel to prove that the employee did not in fact engage in the misconduct. Finally, if proven, the particular act of impropriety must be evaluated to determine whether the employee's protected rights should be subordinated "in order to vindicate the broader interests of society as a whole."[4]

In determining whether a strike's conduct is so serious as to warrant discharge, or denial of reinstatement once the strike is concluded, all the circumstances must be considered. The evaluation begins with noting that strikers, because of the nature of strikes, many times do things which, while not to be condoned, nevertheless cannot be considered sufficient to justify denying them protection of the Act.[5] Further, as the Board has said, "Each striker's eligibility for reinstatement must be judged solely on incidents in which the striker in question is alleged to have participated. Unauthorized acts of violence on the part of individual strikers are not chargeable to other union members in the absence of proof that identifies them as participating in such violence."[6]

In distinguishing between "a trivial rough incident or a moment of animal exhuberance"[7] and one sufficiently egregious so as to deny an employee the continued protection of the Act, the Board distinguishes basically between acts of annoyance as opposed to actual physical violence on people or property. Thus inserting 22 nails point up in an expansion crack of a roadway leading to the plant gate was found to be sufficient to deny reinstatement,[8] as was threatening a nonstriker while actually physically assaulting another which gave credibility and immediacy to the threat.[9] On the other hand, just abusive language directed to nonstrikers is not sufficient to deny reinstatement,[10] nor is throwing gravel or eggs[11] nor even is a threat of arson on a nonstriker's historic home.[12]

In short, passive behavior of strikers is not required; however, there is a limit to permissible activity. That limit is acts of physical violence upon people or property. And even though termination of a striker may be prompted by an honest belief that he engaged in misconduct, such does not relieve the Respondent from liability if the act of misconduct is disproven or shown not to be serious.[13] Finally, irrespective of whether a particular proven act of misconduct might be sufficiently egregious, an employer is not permitted to have different rules of behavior for strikers and nonstrikers. Different treatment of strikers and nonstrikers is discriminatory and "inherently destructive" of employee rights.[14] Thus where both strikers and nonstrikers participated in rock throwing, the employer was found to have unlawfully discharged a striker when it did not discipline or discharge the nonstrikers who engaged in the same activity.[15]

At issue here then is whether the Respondent had an honest belief that Anders, Phipps, and Roberts engaged in, respectively, vandilizing a supervisor's car and setting off firecrackers; whether the Respondent's honest belief has been rebutted by facts showing that Anders, Phipps, or Roberts did not do so; whether the acts they engaged in were sufficiently egregious to deny them continued protection of the Act; and whether similar acts of misconduct by nonstrikers were condoned, thus establishing discriminatory treatment of strikers.

1. Danny Anders

Burcham testified that on October 16 one of his supervisors, Clarion Combs, told him that the night before someone had put paint and etching acid on Combs' car. Thereafter, in late October, Burcham was told by Combs that the sheriff's department was investigating Anders with regard to that matter and that a warrant for his arrest had been issued. Anders was accused of having been the driver—letting off and later picking up those who actually painted the windshield. Burcham testified then that since the charges placed against Anders "was a direct threat to the continuing operation of the business," when the Union made the unconditional offer for employees to return to work, he decided that Anders should not be allowed to return.

The case against Anders was set to be tried on January 18 but a few days prior to that Burcham was informed "that the case had come up in court and that the case

[2] 99 NLRB 610 (1952).
[3] Cited with approval in *NLRB v. Burnup & Sims*, 379 U.S. 21 (1964).
[4] *W. C. McQuaide, Inc.*, 220 NLRB 593 (1975).
[5] E.g., *National Packing Co.*, 147 NLRB 446 (1964), remanded 352 F.2d 482 (10th Cir. 1965), enfd. denied on other grounds 377 F.2d 800 (10th Cir. 1967).
[6] *Coronet Casuals*, 207 NLRB 304, 305 (1973), where an additional factor considered in determining whether the particular act of misconduct was sufficient to deny reinstatement was the company's unfair labor practices which had provoked the strike. Here the General Counsel assumes that the strike was economic with the Charging Party contending that it was caused by the Respondent's unfair labor practices. Since I conclude the conduct proven is insignificant without consideration of any unfair labor practices the Respondent may have committed before the strike, I need not decide this issue.
[7] *Milk Wagon Drivers Union v. Meadowmoor Dairies*, 312 U.S. 287, 293 (1941).
[8] *Borman's Inc.*, 199 NLRB 1250 (1972).
[9] *W. C. McQuaide, Inc.*, supra.
[10] *W. C. McQuaide, Inc.*, supra.
[11] *Coronet Casuals*, supra.
[12] *A. Duie Pyle*, 263 NLRB 744 (1982).
[13] E.g., *American Cyanamid Corp.*, 239 NLRB 440 (1978).
[14] *NLRB v. Great Dane Trailers*, 388 U.S. 26 (1967).
[15] *Garrett Railroad Car & Equipment*, 255 NLRB 620 (1981).

had been ruled nol prosse [sic] and so for this reason a decision had to be made on Danny Anders, and he was allowed to return to work, and he did return to work on January 18."

Jerry Davis, a deputy sheriff at the time, testified that he investigated the incident with regard to the Combs car. He filed the charge against Anders; however, after he quit the sheriff's department there had been no followup investigation, and the case was not prosecuted.

Although Anders was present during the course of this testimony, he was not called by the General Counsel. Thus the Respondent's evidence with regard to this matter was unrebutted, including a statement given by Anders to the effect that he did drop off and later pick up two individuals in the late evening of October 15.

The first question is whether Burcham had an honest belief that Anders in fact had participated in an act of vandalism on a supervisor's car. I believe he did, based on the information he received. This belief was corroborated by the testimony of Davis, and has not been rebutted. Since the Respondent does not have the burden of proving participation in the act, but only of showing an honest belief of involvement, and since property damage is an egregious act of misconduct, I conclude that the Respondent would have been justified in discharging or suspending Anders.

However, it is clear that Burcham treated Anders differently than he treated nonstriking employee Sexton, who it was alleged, attempted to hit a striker with her automobile. If anything, the allegation against Sexton was more serious than that against Anders inasmuch as it involved potential physical injury. Although the evidence with regard to the Sexton matter is sketchy, from the record it is apparent that Burcham did not consider the allegation against Sexton to be of significance primarily because her act was directed against strikers and not against individuals who were continuing to work, supervisors, or company property. As to Sexton, he testified, "it happened outside the work area, and I did not compare it with what Danny Anders was charged with." The charge against Anders, he felt, "was a direct threat against the company operating its business, since it was directed at a supervisor and other employees that were working during the time of the strike." There is no evidence that Burcham attempted to verify or refute Mosier's claim.

From Burcham's testimony it is apparent that the same general type of activity believed to have been engaged in by Anders was of no concern to him when engaged in by a nonstriker. Thus, at a minimum, the act allegedly engaged in by a nonstriker was condoned.

I conclude that the refusal to reinstate Anders was discriminatory in that the Respondent treated him differently than it treated a nonstriker for substantially the same type of misconduct. The Respondent offered no justification for treating the strikers and nonstrikers differently. Accordingly, I conclude that by refusing to reinstate Anders under the circumstances of this case, the Respondent violated Section 8(a)(1) and (3) of the Act.

2. Jerry Phipps

Burcham testified that for about 1-1/2 hours on the morning of November 16 firecrackers were exploded both outside the plant and inside. At one point Burcham was involved in a discussion with the driver of a linen truck on the East Grayson Street side of the plant. At that time he observed Phipps and Fred Privette, member of the Union but an employee of another company, standing near the front door of the plant. Burcham testified he observed Phipps with a cigarette in his hand (which Phipps admits was probable) and he saw Phipps make a moving motion with his hand. Burcham then heard a firecracker explode and saw paper and smoke at Phipps' feet. Although he did not see Phipps light the firecracker, he nevertheless concluded that Phipps did so. Burcham had Phipps charged with the crime of "discharging firecrackers in the City of Galax." Phipps denied having lit the firecracker in question or indeed any firecracker on November 16.

Vera Copeland, a witness for the General Counsel, stated that she saw a bottle rocket go through Privette's legs and explode just in front of Phipps. Privette testified to this same general effect. And this was the reason Phipps was terminated.[16]

The overwhelming, and I think generally credible, testimony in this matter is that Phipps did not light the firecracker or bottle rocket which Burcham assumed that he had. And I make this finding notwithstanding that a state court may have concluded the contrary. The testimony of an eyewitness, and Phipps' credible denial, are more persuasive than the conclusion reached by Burcham based on circumstantial evidence. Indeed, it seems unlikely that Phipps would have lit a firecracker and dropped it at his own feet.

Though Burcham's observation may have been sufficient to establish an "honest belief," I conclude the General Counsel has rebutted it.

Beyond that I do not believe that just setting off a firecracker is sufficiently serious to justify denying one the protection of the Act. While Burcham testified that there were many firecrackers going off some of which went inside the plant, thus jeopardizing the safety of employees and disrupting the business operation, even if Phipps set off one firecracker outside the plant, the explosions inside could not be imputed to him.[17]

Finally, as with Anders, I conclude that by refusing Phipps reinstatement, the Respondent treated him disparately from nonstriker Sexton. For these reasons, I conclude that by refusing to reinstate Phipps, the Respondent violated Section 8(a)(1) and (3) of the Act.

3. Virgil Roberts

Gregory Bartlett, a supervisor for the Respondent, testified that on the morning of November 16, about 10

[16] Burcham also testified it was reported to him that Phipps threw an egg at Rodney Brown and called Brown a "nigger." Phipps denied having done either, a denial not rebutted by the Respondent. Even so, such matters are generally considered insignificant. In any event, it was the firecracker incident on which Burcham relied to justify his refusal to reinstate Phipps.

[17] *American Cyanamid Co.*, supra.

bottle rockets were exploded inside the plant on the Oldtowne Street side where he was working. He further testified that out a second floor window he saw Virgil Roberts light a bottle rocket, while standing about 3 feet from a door to the plant, and then bend over. Bartlett further testified that a few seconds following this observation he heard an explosion. When he got to the first floor he saw debris and smoke.

Bartlett reported this to Burcham and also made out a charge against Roberts for having discharged fireworkers inside the city limits of Galax. As with Phipps, Roberts was tried in the General District Court with an appeal to the circuit court. He was found guilty as charged.

Roberts denied that he lit the bottle rocket as did his father and brother. Both testified that they were on the Oldtowne side of the building about the time in question and both testified that they only heard one explosion that morning and Roberts was not responsible for it.

Carrie Luffoon, also a witness for the General Counsel, testified that she heard one explosion on the Oldtowne side of the building that morning. On hearing it, she turned and saw Roberts about 3 or 4 feet from the plant entrance. She said that she did not think he could have lit the bottle rocket or firecracker. This testimony is substantially at variance with that of Robert's brother and father, both of whom placed him at the corner of the street about 40 to 50 feet from the door.

Given Bartlett's generally credible testimony that he in fact observed Roberts lighting a bottle rocket along with Luffoon's placement of Roberts near the vicinity of the door I conclude that in fact Roberts did light a bottle rocket on the morning of November 16. I discredit his testimony and that of his brother and his father to the extent that such testimony suggests he did not participate in this event.

Nevertheless, I conclude that lighting a bottle rocket, even if it went into the plant, was not a sufficient act of misconduct so as to justify the Respondent in terminating Roberts. There is no evidence of damage to company property or to any person. Indeed, there is no evidence that the firecrackers and bottle rockets were sufficiently powerful to do more than fizz and make a noise. The one which went off at Phipps' feet caused him no harm. Thus, I do not believe that causing a firecracker or bottle rocket to explode on company property was sufficiently egregious to cause an employee to lose the protective mantle of the Act.[18]

No doubt when firecrackers of this type go off they are unsettling. But this does not mean that such activity rises to the level of misconduct which can cost an individual his job.

I find that the Respondent had reasonable cause to believe that Roberts in fact had lit a bottle rocket which was exploded in the plant; and the General Counsel did not carry his burden of rebutting this belief. Nevertheless, I conclude that setting off a bottle rocket was not sufficiently serious to justify the Respondent discharging him.

Further, as with Anders and Phipps, I conclude that the Respondent, having condoned misconduct on the part of a nonstriker, discriminated against Roberts because he was a striker. For these reasons the Respondent violated Section 8(a)(1) and (3) of the Act.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES ON COMMERCE

The activities of the Respondent set forth above, occurring in connection with its business, have close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow thereof within the meaning of Section 2(6) and (7) of the Act.

V. THE REMEDY

Having found that the Respondent unlawfully refused to reinstate Danny Anders until January 18, 1982, and discharged Virgil Roberts and Larry Phipps, I shall recommend that it cease and desist therefrom, and take certain affirmative action including offering Phipps and Roberts immediate and full reinstatement to their jobs or, if those jobs no longer exist, to substantially equivalent positions of employment without prejudice to their seniority or other rights and benefits, and make them and Danny Anders whole for any loss of wages or other benefits they may have suffered as a result of the discrimination against them in acordance with the formula set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as provided for in *Florida Steel Corp.*, 231 NLRB 651 (1977).[19]

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[20]

ORDER

The Respondent, New Galax Mirror Corporation, Galax, Virginia, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to reinstate, discharging, suspending, or otherwise discriminating against employees because they

[18] *Seminole Asphalt Refining*, 207 NLRB 167 (1973), where the Board reversed the administrative law judge and held that "throwing of cherry bombs onto the plant premises" was not sufficiently serious, given the employer's unfair labor practices and the fact that no damage was done to persons or property.

In citing this case, counsel for the General Counsel stated that the cherry bombs had been thrown "into the employer's plant." Counsel for the Respondent, in a postbrief letter (objected to by counsel for the General Counsel) contested this reading of the case, stating "no fireworks were thrown into the interior of a plant." Apparently counsel is arguing that "plant premises" in the decision refers to the land and "plant" in the General Counsel's brief means the building. Even if such a distinction is appropriate such does not render *Seminole Asphalt* inapposite. The cherry bombs were thrown onto company property where employees had occasion to be during the course of their work.

[19] See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962).

[20] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

engage in a strike, picketing, or other activity protected by Section 7 of the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action deemed necessary to effectuate the policies of the Act.

(a) Offer immediate and unconditional reinstatement to Virgil Roberts and Larry Phipps to their former jobs or, if those jobs no longer exist, to substantially equivalent positions of employment and make them and Danny Anders whole for any losses they may have suffered as a result of the discrimination against them in accordance with the remedy section set forth above.

(b) Remove from its files any reference to the unlawful discharges of Danny Anders, Larry Phipps, and Virgil Roberts on November 27, 1981, and notify them in writing that this has been done and that the discharges will not be used against them in any way.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its Galax, Virginia facility copies of the attached notice marked "Appendix."[21] Copies of the notice, on forms provided by the Regional Director for Region 5, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

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[21] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Barbara George, Inc. t/a Barbara George Collection *and* Teamsters' Union Local No. 469, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Petitioner. Case 22–RC–8945

14 December 1984

DECISION ON REVIEW AND DIRECTION

BY CHAIRMAN DOTSON AND MEMBERS ZIMMERMAN AND HUNTER

Upon a petition filed under Section 9(c) of the National Labor Relations Act, a hearing was held before a hearing officer of the National Labor Relations Board. On 3 April 1984, the Acting Regional Director for Region 22 issued a Decision and Direction of Election in which he found appropriate the petitioned-for bargaining unit consisting exclusively of warehouse employees employed by the Employer at its Edison, New Jersey facility. Thereafter, in accordance with Section 102.67 of the National Labor Relations Board Rules and Regulations, a stay of election and a request for review of the Acting Regional Director's Decision and Direction of Election was filed by the Employer, contending that the Acting Regional Director departed from officially reported Board precedent by refusing to find that the employees working in the Employer's warehouse, order processing, and merchandising areas constitute the smallest appropriate unit for representation purposes.

On 1 May 1984, the National Labor Relations Board granted the motion to stay the election as well as the request for review as to the appropriateness of the unit.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the entire record in this case, including the brief of the Employer, and makes the following findings.

The Employer is engaged in the mail order and retail sale of giftware, fashions, and jewelry. The one-story facility is divided into three geographical work areas, designated for purposes of the hearing as areas A, B, and C. Area A contains the order processing and customer service employees, area B the warehouse employees, and area C the merchandising and accounting employees. Approximately 38 employees work at the facility. The Petitioner has requested a unit of 13 warehouse employees at the Employer's Edison facility.

The Employer contends that the smallest appropriate unit would consist of employees working in all three areas. Because of the functional integration of the Employer's business, the Employer argues that an employee performing a job in one area necessarily assists employees in other areas in the performance of their respective functions.

In determining whether the requisite community of interest is present among the proposed unit of employees, the Board considers whether there is uniform control of labor relations; interchange of jobs; similarity of skills; common conditions of employment; common supervision; operational integration; bargaining history; and geographical proximity.[1] Where at least some of these criteria are met, a unit which encompasses all employees at one location may be found appropriate.

All the employees here work in the same building. Although there is open access between areas A and C, the warehouse area is separated by a wall and a hallway. Access from area B to areas A and C is through a doorway or through the lunchroom. All employees punch the same timeclock and have the same hours of work, share a common bulletin board and lunchroom, and are paid biweekly on an hourly basis. Uniform wage levels are set throughout the Company. All employees enjoy the same holidays, vacation and sick day benefits, pension, insurances, and company discount policy. They are all subject to the same rules of conduct and disciplinary procedures. Moreover, the Employer has stated in its company handbook that it expects each of its employees to be versatile enough "to perform a variety of jobs, from administrative to light physical in nature."

Orders come in by mail or by telephone. A warehouse employee brings all mail orders to area A, the order processing area, where they are stamped with a number and separated according to the method of payment involved. Certain accounting and inventory information is recorded before an order processing employee prepares a picking ticket which the warehouse employees use to pick and ship a customer's order. The warehouse supervisor or his designee picks up the picking tickets and takes them to the warehouse. Employees there retrieve the merchandise. If questions arise about a particular order, the employee in area B would go back to an employee in area A for clarification. After the merchandise is picked, it is taken to warehouse packers who pack and ship the order. An area C employee, Dawn Smith, actually picks special orders from Area B. At the end of the day a warehouse employee takes these picking tickets to the file room in area B.

Area B employees also receive merchandise from suppliers. Diane Lebovitz, merchandise manager

[1] *Sears, Roebuck & Co.*, 191 NLRB 442 (1971).

for area C, regularly gives instructions to area B employees working in merchandise receiving, telling them what to receive and what to reject and when to open packages. The suppliers' merchandise forms are given to the area C supervisor who gives them to Cheryl Bonbar, a clerk, who compares them with back orders and makes a list of which back orders can be filled. The clerk then takes this list to Georgiana Booth, an employee in area A, who decides how many back orders can be released. Booth then gives these back orders to the clerk or Lebovitz who takes them to the warehouse supervisor for picking.

Kevin Kulpa, an area B employee, does work for just about every area in the Company. He picks up some deliveries for the merchandising department, area C. He also works for the order processing department, area A, to deliver purchase orders. He handles inside mail from each one of the divisions within the Company, as well as handling the bank deposits for the accounting department.

Dawn Smith, an area C employee, is shared with area B. She regularly picks orders in the warehouse and handles special orders and defects. Lois Accomando, primarily an area C order processing employee, works in area C in merchandise assembly and as a fashion packer. She also works in merchandising, area A, preparing item lists.

As many as nine order processing employees have gone to area B to work for varying lengths of time. At least one area B employee was sent to area A to perform work on at least 10 different occasions during the past year.

Because of the Employer's policy of training personnel to perform a variety of functions, it has been possible for several employees to transfer permanently from one area to another. For example, three order processing employees have transferred to merchandising, one warehouse employee has transferred to order processing, and one former employee transferred from order processing to the warehouse area.

Based on the foregoing, it is clear that there are many occasions and opportunities for employees working in the various areas to interact with each other face to face and by telephone. Contact among employees in the three areas is occasioned by discrepancies in paperwork, shortages of inventory, back orders, identification and location of items to be shipped, expediting of orders, and corrections of inventory control records. Thus, employees working in the three areas regularly confer with one another as a routine part of their jobs. Additionally, several employees have been borrowed from one department and used in another department when necessary to achieve a smooth operation. Moreover, some employees have transferred permanently from one area of the center to another. Finally, as indicated, fringe benefits and working conditions are the same for all employees.

When these factors are viewed collectively we find a compelling basis for finding that the warehouse employees do not have a community of interest sufficiently distinct and separate from other employees to warrant their placement in a separate unit. We conclude that the smallest appropriate unit is that consisting of employees working in the warehouse, order processing, and merchandising areas. In reaching this conclusion we rely on the highly integrated nature of the Employer's business, the fact that all employees participate equally and fully in this process, the high degree of interaction among employees, and the lack of distinction among employees as to wages, benefits, terms and conditions of employment, and levels of skills.[2]

Accordingly, we shall remand the case to the Regional Director in order that he may, in the event the Petitioner demonstrates to him within 10 days that it has an adequate showing of interest in the broader unit found appropriate herein, conduct an election in accordance with his Decision and Direction of Election, as modified herein,[3] except that the eligibility date shall be that immediately preceding the date below.

DIRECTION

This case is remanded to the Regional Director for Region 22 for the purpose of conducting an election pursuant to his Decision and Direction of Election, as modified herein, subject to the Petitioner's presentation of an adequate showing of interest among the employees in the appropriate unit. The eligibility date shall be the payroll period immediately preceding the date of issuance.[4]

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[2] See *American Parts System*, 254 NLRB 901 (1981); *Avon Products*, 250 NLRB 1479 (1980); *Industrial Supplies Co.*, 237 NLRB 189 (1978); *Scholastic Magazines*, 192 NLRB 461 (1971).

[3] As the unit found appropriate is broader than that requested, the Petitioner may withdraw its petition without prejudice upon written notice to the Regional Director within 10 days from the date of this Decision on Review and Direction.

[4] To ensure that all eligible voters have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. *Excelsior Underwear*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969). Accordingly, it is directed that an eligibility list containing the names and addresses of all the eligible voters must be filed by the Employer with the Regional Director within 7 days from the date of this Decision on Review. The Regional Director shall make the list available to all parties to the election. No extension of time to file this list shall be granted by the Regional Director except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election if proper objections are filed.

Lomasney Combustion, Inc. *and* Local 201, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of Dutchess and Ulster Counties, New York. Case 3–CA–10813

14 December 1984

DECISION AND ORDER

BY MEMBERS ZIMMERMAN, HUNTER, AND DENNIS

On 29 June 1983 Administrative Law Judge Karl H. Buschmann issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Lomasney Combustion, Inc., Poughkeepsie, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

MEMBER HUNTER, dissenting.

I cannot agree with my colleagues' adoption of the judge's conclusion that the Respondent violated Section 8(a)(1) by promoting a decertification petition among its employees. In my judgment, the evidence falls far short of establishing such a conclusion. Therefore, because the Respondent's alleged improper conduct with respect to the petition is the only issue before us, I would dismiss the complaint in its entirety.

The judge relies on a loose aggregation of events occurring in fall 1981 to establish a pattern of promotion and active support of the decertification petition: some remarks made by the Respondent's president, an informal conversation between the Respondent's vice president and an employee, and certain actions on the part of the Respondent's supervisor. On evaluation of those events, I fail to see any indication that the Respondent involved itself in the petition process to the degree necessary to support a violation.

The judge focuses on the remarks of James Lomasney, the Respondent's owner and president, to a group of his employees in October 1981 as the initial step in a campaign conceived and promoted by the Respondent to decertify the Union. What the Respondent's president actually said, quite simply, was that in the burdensome economic circumstances then prevailing, he did not feel that the presence of the Union was beneficial to the Respondent or to the employees. I view this as a statement of legitimate economic considerations protected by Section 8(c). It is an outrageous strain on reason to accept as fact that these remarks were, in effect, a "kick-off" for the Respondent's promotion of the decertification petition, especially when the Respondent made no mention of decertifying the Union. The credited evidence patently shows that the petition was conceived by employee Simpson with no active assistance from the Respondent, and that he alone circulated the petition in late November 1981, at least a month after the president's remarks. On the record before us, I fail to see a connection between these two events which would remotely suggest that the Respondent sponsored the petition.

The next event in the pattern of promotion deduced by the judge is the "interrogation" of employee Hoysradt by David Lomasney, the Respondent's vice president. At approximately the time of circulation of the petition, the vice president informally asked Hoysradt how he thought the petition would fare. Hoysradt responded that the employee who circulated the petition "would look like an ass." While the vice president's bland contribution to this repartee indicates that the Respondent had knowledge at that time of the existence of the petition, I see nothing in the context of this short, inane conversation which manifests the Respondent's promotion and sponsorship of the petition.

It is apparent that in the judge's view the activities of Supervisor Hoffman form the essence of the Respondent's promotional and facilitating conduct. I will emphasize here, since the judge did not, that Hoffman acted *at the request of* employee Simpson,

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] In the absence of exceptions we adopt pro forma the judge's finding that Respondent Vice President David Lomasney's interrogation of employee Timothy Hoysradt as to the feasibility of circulating a decertification petition did not violate Sec. 8(a)(1).

We find no merit in our dissenting colleague's attempt to isolate and minimize the component events in the Respondent's unlawful assistance of a decertification petition effort. In particular, we find that Supervisor Hoffman's signing of the petition was the critical factor supporting the finding of a violation. There is no factual or legal basis for our colleague's belief that employees would not reasonably regard such conduct as a manifestation of the Respondent's support for the petition.

who was initiating and intended to circulate the petition at the time. When Simpson asked for editorial help, Hoffman drafted the wording of the petition and later supplied him with the mailing address of the Board's Resident Office in Albany. It is well established that conduct of this kind is mere ministerial assistance and clearly not violative. See, e.g., *Washington Street Foundry*, 268 NLRB 338 (1983); *Cummins Component Plant*, 259 NLRB 456, 461 (1981); *Consolidated Rebuilders*, 171 NLRB 1415, 1417 (1968). The factual situation in *Cummins Component*, supra, is quite relevant to the present case. While the Board did find a violation based on the respondent's assistance in circulating a decertification petition, it adopted the administrative law judge's dismissal of the allegation that respondent's supervisor provided illegal assistance to an employee by giving her the Board's telephone number and by directing her in the filling out of a decertification petition form. This was merely ministerial aid given at the employee's request. I do not see any significant distinction between the supervisor's legitimate activity in that case and Hoffman's conduct here.

Finally, we are left with the appearance of Hoffman's signature on the decertification petition as it circulated among some of the employees. It is fair to conclude from the judge's decision that this was the only aspect of Hoffman's conduct of which the other employees, besides Simpson, were aware. I would not find this meager circumstance a sound basis for finding a violation. There must be other, more convincing evidence that Hoffman was campaigning for the petition on the Respondent's behalf and that the other employees knew about and were influenced by such campaigning. As the record presently stands, it is conceivable that Hoffman's signing the petition was motivated by his personal attitude toward the Union distinct from any desire to represent the Respondent's views. Without more, the signature does not provide a fair basis to infer that the Respondent was sponsoring the petition.

In a case before the Second Circuit Court of Appeals, *NLRB v. Monroe Tube Co.*, 545 F.2d 1320 (2d Cir. 1976), the court reviewed a situation similar to the instant case: an employer's allegedly illegal solicitation of an assistance to its employees in securing withdrawal of union authorization cards. The court denied enforcement of the Board's decision and order which found a violation of Section 8(a)(1). That denial was based on the court's reasoning that an employer's conduct in this kind of situation is not a violation per se; it must be judged in light of the relevant circumstances, especially other illegal activity on the employer's part. *NLRB v. Monroe Tube Co.*, supra at 1325–28.

In the present case I fear that my colleagues are taking the same per se approach discredited by the Second Circuit Court. The Respondent is not alleged to have engaged in other unlawful conduct. And the judge's conglomeration of irrelevant and insubstantial circumstances simply does not establish sufficient evidence to sustain a violation. Since the judge's 8(a)(5) finding depends on the validity of the finding of illegal promotion and assistance, I would dismiss the complaint in its entirety.

DECISION

KARL H. BUSCHMANN, Administrative Law Judge. This case was tried before on me on January 27 and 28, 1983, in Poughkeepsie, New York. The complaint, dated July 28, 1982, as subsequently amended, is based on a charge filed on December 28, 1981, by the Union. The complaint raises the principal issues of whether the Respondent, Lomasney Combustion, Inc., initiated or supported a decertification petition in violation of Section 8(a)(1) of the National Labor Relations Act (the Act) and whether it withdrew its recognition of the Union and refused to bargain with it in violation of Section 8(a)(5) of the Act. Respondent filed timely answers to the complaint and its amendments, admitting some of the jurisdictional aspects of the complaint and denying the commission of any unfair labor practices.

On the entire record, including my observation of the demeanor of the witnesses, and after consideration of the briefs filed by the General Counsel and the Company, I make the following

FINDINGS OF FACT

Respondent, Lomasney Combustion, Inc., is a New York corporation located at 366 Mill Street in Poughkeepsie, New York, where it is engaged in industrial heating and cooling service and installation. The Company is admittedly an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

The Union, Local 201, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of Dutchess and Ulster Counties, New York, is admittedly a labor organization within the meaning of Section 2(5) of the Act. On November 17, 1980, the Union was certified as the exclusive bargaining representative of Respondent's employees in a unit defined as follows:

> All full-time and regular part-time employees engaged in the sales, installation and servicing of heating and air conditioning units including all welders, electricians, plumbers, steamfitters, servicemen, sheetmetal workers, carpenters, laborers, shop repairmen and helpers employed by the Respondent at its Poughkeepsie, New York facility; excluding all office clerical employees and all professional employees and supervisors as defined in the Act.

Bargaining commenced in January 1981. After additional bargaining sessions thereafter, the parties met for the last time on November 17, 1980. Although the parties had agreed at that meeting to schedule additional sessions after the Thanksgiving holiday, the Union's repeated efforts in December to schedule another meeting were unsuccessful. The Company merely informed the Union that it was "going for a decertification" of the Union.[1] A decertification petition was circulated among Respondent's employees on November 23, 1981, by James Simpson, an employee of the Company. The petition, dated November 23, 1981, contains the names of 11 of Respondent's approximately 15 employees[2] and states as follows:

> Dear Sir:
>
> The men who have signed below are employees of Lomasney Combustion, Inc. who no longer wish to be represented by Local 201 of the United Association of The Plumbing and Pipefitting Industry of the United States and Canada.

Prior—about a month and a half—to circulating the petition for decertification on November 23, 1981, James Simpson approached James Lomasney, the owner and president of the Respondent, with a personal problem. Stating that his wife was ill and needed a major operation, Simpson expressed concern about the medical insurance coverage for his wife and asked Lomasney whether he would increase the health insurance. Lomasney replied that the Blue Cross-Blue Shield policy, then in effect, was the best policy he could get and that he could not increase such benefits to the employees while negotiating with the Union. Simpson then inquired if he could get the Union out and decertify it. Lomasney said, yes; but stated that he could not coerce the employees into writing a letter, and that he would have to be on his own. "Afterwards, [Simpson] thought about it and decided [he] wanted the union out if it was possible to vote them out and get them out. [He] would have to be the one to do it." (Tr. 209.)

In October, Kevin Lomasney, the president's son who was employed as a laborer, told the assembled group of employees in a meeting that the Company could not afford the Union and that his father would burn the place down before he would ever sign anything.[3] James Lomasney, the president, and David Lomasney, vice president and also a son of James, were not present when Kevin made that remark at the beginning of the meeting; but James subsequently said to his employees that he did not want the Union because the economic times were not right for it and that it would be beneficial for the employees if they were not represented by a union.[4]

Several weeks later, at Thanksgiving time, Vice President David Lomasney approached employee Timothy Hoysradt and said that one of the members of the Company intended to circulate a petition to have the Union removed from negotiations. He asked Hoysradt how he felt it would go, to which Hoysradt replied, "The would look like an ass."[5]

Nevertheless, James Simpson discussed the Union's decertification with Clinton Hoffman, Respondent's coordinator and admitted supervisor, after work one evening prior to November 23. He requested Hoffman's assistance in the wording of a decertification petition. Hoffman drafted the language. Simpson, after typing it at home, signed it and circulated it among the employees on the morning of November 23. In Kevin Lomasney's presence, Simpson asked each of the approximately 10 employees to sign the petition. When employees Hoysradt and van DeWater refused, Simpson warned that they better think about it. Kevin Lomasney made similar comments stating that everyone should seriously consider signing it. Under these circumstances Simpson obtained a total of 11 signatures. Among them, as fifth from the top, was Clinton Hoffman, who also provided Simpson with the correct mailing address of the Board's Office in Albany, New York. Simspon mailed the petition to the NLRB and had a copy of it placed in his personnel file at the Company by David Lomasney.

Justifying its failure to meet and bargain with the Union in December 1981 and thereafter, because of its busy season and because it refused to deal with people who make false accusations, Respondent denied any reliance on the decertification petition for its failure to bargain and submits that it was not involved in any way with the decertification petition. The General Counsel, however, argues that in several ways, Respondent was deeply involved in the decertification. First, the antiunion remarks by David and James Lomasney, made prior to the circulation of the petition, indicated to the employees that Respondent was behind the petition; second, Simpson and Kevin Lomasney appeared to the employees to act as Respondent's agent in their involvement with the petition and, third, the assistance by supervisor Hoffman in the preparation of the petition and his signature on it promoted the petition.

The law is clear, Section 8(a)(1) of the Act makes it unlawful for an employer to instigate or promote a decertification petition. *NLRB v. Birmingham Publishing Co.*, 262 F.2d 2 (5th Cir. 1958); *Marriott In-Flite Services*, 258 NLRB 755, 768–769 (1981), enfd. 729 F.2d 1441 (2d Cir. 1983); *Craftool Mfg. Co.*, 229 NLRB 634 (1977). While I disagree with the General Counsel that Simpson had a special relationship with the Lomasney family so as to qualify him as a supervisor or an agent of Respondent, I agree that Respondent was more than a neutral

[1] Respondent has denied its refusal to resume bargaining with the Union. Yet the record shows that the parties have not met since the November 18 session and that the Union had placed telephone calls to Respondent's office.

[2] The Regional Director dismissed the decertification petition on August 13, 1982.

[3] Timothy Hoysradt, a witness and former employee, testified about Kevin Lomasney's remark. Although several of Respondent's witnesses generally denied that the Union had ever been mentioned at the meeting, I credit Hoysradt's forthright testimony. Moreover, David Lomasney conceded that his brother had "shot his mouth off" on occasion about the Union.

[4] However, since only one witness out of several who heard the remarks recalled a specific promise of benefits, I have not credited that testimony.

[5] Hoysradt's testimony about this episode was not denied by the Respondent.

employer who passively assisted the decertification drive when requested to do so. James Lomasney in his remarks to the employees at the October meeting expressed his union animus and created the impression that it would be to the employees' advantage to avoid the Union. Moreover, David Lomasney's interrogation of Hoysradt shortly before the petition was circulated, conveyed to the employees the impression that Respondent had advance knowledge of the petition, had approved of the decertification, and had supported the effort. Finally, Hoffman's active assistance in drafting the petition, signing it, and of providing the address of the Board's office to Simpson was a clear signal to the employees that Respondent had approved and supported the decertification drive. As correctly observed by the General Counsel, Respondent's conduct, particularly when considered in its entirety, unlawfully interfered with the employees' rights guaranteed by Section 7 of the Act, and tainted the decertification so as to render it void.

However, I disagree with the General Counsel in the following areas: First the record does not contain any indicia of Kevin Lomasney's supervisory status nor his agency relationship with the Respondent, other than his filiation with James Lomasney. Since the record does not show that the latter was aware of Kevin's conduct at the meeting when he threatened the employees, Respondent had no duty to disavow those comments. The mere fact that Kevin was James Lomasney's son, without a further showing that Respondent had implicitly accepted his conduct or was at least aware of his conduct and thereafter failed to disavow it, or that he enjoyed a privileged status by reason of his filial relationship, does not establish an agency relationship necessary to support a finding of a violation of Section 8(a)(1) of the Act. Second, David Lomasney's interrogation of Hoysradt, apart from its unlawful effect on the decertification petition, did not amount to an independent violation of Section 8(a)(1) of the Act, since the surrounding circumstances lacked the required coercive atmosphere. Third, the record does not support a finding that Simpson who initiated the petition was a supervisor or an agent of the Respondent, as alleged in the complaint. He possessed none of the indicia of a supervisor. The limited authority to hire day laborers on specific jobs and on rare occasions was not peculiar to his status at the Company, and it certainly had no relevance to the Respondent's relationship with the bargaining unit. Respondent may have had more than the normal interest in Simpson, because he as a youngster, had been a foster child in the Lomasney home for several years, and because Simpson was the most senior mechanic in the employ of Respondent. For example, Simpson parked his trailer on property leased from Lomasney, and on occasion performed personal service for Lomasney. Simpson may also have received more lenient treatment from his employer after several acts of misconduct on the job. In any case, it is not only difficult to gauge the extent to which Simpson received special treatment in a relatively small family enterprise such as Respondent but also whether his relationship with the Lomasneys was perceived by other employees as sufficiently unique so as to characterize it as an agency relationship; suffice it to say that on this record I cannot find that Simpson acted as Respondent's agent in circulating the petition.

Nevertheless, Respondent's conduct, as already described, sufficed to taint the petition and render it void. Moreover, it is clear that Respondent relied on the decertification effort, in which it played a significant part in order to avoid bargaining with the Union. It is clear that absent special circumstances which are not present here, a union's representative status is presumed to continue during the first year following certification. Thereafter, an employer may lawfully withdraw recognition but only on a demonstration of a well grounded, good-faith belief that the Union's majority support no longer exists. Respondent has not made the required showing here. Significantly, Respondent cannot hope to avoid his duty to bargain by relying on the decertification effort in which it had unlawfully participated. Nor can Respondent escape its responsibility in reaction to the Union's protected ability in filing a charge with the NLRB. See *Marriott In-Flite Services*, supra.

CONCLUSIONS OF LAW

1. Lomasney Combustion, Inc. is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Local 201, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of Dutchess and Ulster Counties, New York, is and has been a labor organization within the meaning of Section 2(5) of the Act.

3. All full-time and regular part-time employees engaged in the sales, installation, and servicing of heating and air conditioning units including all welders, electricians, plumbers, steamfitters, servicemen, sheetmetal workers, carpenters, laborers, shop repairmen, and helpers employed by Respondent at its Poughkeepsie, New York facility; excluding all office clerical employees and all professional employees and supervisors as defined in the Act, constitute a unit appropriate for the purpose of collective bargaining within the meaning of of the Act.

4. By support, sponsoring, and participating among its employees a petition to decertify the Union, Respondent coerced its employees in the exercise of these rights guaranteed by Section 7 of the Act and thereby violated Section 8(a)(1) of the Act.

5. By failing and refusing to recognize and bargain with the Union as the exclusive bargaining representative of the employees in the unit described above, Respondent violated Section 8(a)(5) of the Act.

6. The violations are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

7. Respondent has not otherwise violated the Act.

THE REMEDY

Having found that Respondent engaged in unfair labor practices within the meaning of Section 8(a)(1) and (5) of the Act, my recommended order will require Respondent to cease and desist therefrom and to take such affirmative action as will effectuate the purposes of the Act, including the resumption of bargaining with the Union.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[6]

ORDER

The Respondent, Lomasney Combustion, Inc., Poughkeepsie, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing or failing to meet and bargain in good faith with the Union as the exclusive representative of the employees in the following bargaining unit:

> All full-time and regular part-time employees engaged in the sales, installation and servicing of heating and air conditioning units including all welders, electricians, plumbers, steamfiftters, servicemen, sheetmetal workers, carpenters, laborers, shop repairmen and helpers employed by the Respondent at its Poughkeepsie, New York facility; excluding all office clerical employees and all professional employees and supervisor as defined in the Act.

(b) Participating, encouraging, assisting, or sponsoring any efforts by employees to decertify the Union as their exclusive bargaining representative in order to avoid its obligation to recognize and bargain with the Union.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action designed to effectuate the policies of the Act.

(a) On request, bargain collectively and in good faith with the Union as the exclusive representative of the employees in the above-described unit with respect to wages, hours, and other terms and conditions of employment and, on request, embody in a signed agreement any final understanding reached by the parties.

(b) Post at its facilities in Poughkeepsie, New York, copies of the attached notice marked "Appendix."[7] Copies of the notice, on forms provided by the Regional Director for Region 3, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse or fail to meet and bargain in good faith with the Union as the exclusive representative of our employees in the following bargaining unit:

> All full-time and regular part-time employees engaged in the sales, installation and servicing of heating and air conditioning units including all welders, electricians, plumbers, steamfitters, servicemen, sheetmetal workers, carpenters, laborers, shop repairmen and helpers employed by the Respondent at its Poughkeepsie, New York facility; excluding all office clerical employees and all professional employees and supervisors as defined in the Act.

WE WILL NOT participate, encourage, assist, or sponsor any efforts by employees to decertify the Union as the exclusive bargaining representative.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, on request, meet and bargain in good faith with the Union as the exclusive bargaining representative of the employees in the above-described unit with respect to wages, hours, and other terms and conditions of employment, and on request, embody in a signed agreement any final understanding reached by the parties.

LOMASNEY COMBUSTION, INC.

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[6] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[7] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Honaker Mills, Division of Top Form Mills, Inc. *and* **International Ladies Garment Workers Union, Upper South Department, AFL–CIO.** Case 5–CA–11305

14 December 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS ZIMMERMAN AND DENNIS

On 12 May 1981 Administrative Law Judge Joel A. Harmatz issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed a brief in response to the Respondent's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] and to adopt the recommended Order.

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings. Nor do we find merit in the Respondent's contention that, because the judge generally discredited the Respondent's witnesses and credited the General Counsel's witnesses, his credibility resolutions are erroneous or attended by bias or prejudice. *NLRB v. Pittsburgh Steamship Co.*, 337 U.S. 656 (1949). Likewise, we find no merit in the Respondent's further contention that the judge demonstrated bias when, in an off-the-record discussion prior to hearing, he expressed an opinion regarding the ultimate merits of the case. In this respect, even assuming the incident occurred as alleged, we note that the Respondent did not object on the record to the alleged discussion and did not comply with our procedures for requesting disqualification of a judge. Sec. 102.37, Rules and Regulations of the National Labor Relations Board. See *Sanford Home for Adults*, 253 NLRB 1132 fn. 1 (1981), enfd. 669 F.2d 35 (2d Cir. 1981); *Canal Electric Co.*, 245 NLRB 1090 fn. 2 (1979). Indeed, upon careful examination of the judge's decision and the entire record in this proceeding, we are satisfied that the Respondent was accorded a full and fair hearing and that its allegations of bias and prejudice are without merit.

[2] We agree with the ultimate conclusion reached by the judge that the strike-related misconduct here found does not rise to a level which would warrant depriving the Union of its collective-bargaining status. In so holding, we find it unnecessary to pass on the observations made by the judge in his discussion of *Laura Modes Co.*, 144 NLRB 1592 (1963), and its progeny, particularly those set forth in the first four paragraphs of the "Concluding Analysis" section of his decision. Indeed, because the conduct here in question does not rise to a level which would otherwise warrant invoking the *Laura Modes* doctrine, we need not, nor do we, pass on the applicability of that doctrine to postelection misconduct by a union generally.

Chairman Dotson agrees that the conduct attributed to the Union is not of such a character as to warrant revocation of its certification and thus he would not deprive the employees of their elected collective-bargaining representative. However, picket line misconduct engaged in by union agents Bill Dennison and Connie Brown is serious enough that he would not require the Respondent to bargain with Dennison and Brown in matters related to terms and conditions of employment for the Respondent's employees.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Honaker Mills, Division of Top Form Mills, Inc., Honaker, Virginia, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

DECISION

STATEMENT OF THE CASE

JOEL A. HARMATZ, Administrative Law Judge. This proceeding derives from an original unfair labor practice charge filed on August 15, 1979, and a complaint issued on September 27, 1979, alleging that Honaker Mills, Division of Top Form Mills, Inc.[1] (Respondent) violated Section 8(a)(5) and (1) of the Act by refusing to meet and bargain in good faith with the Charging Party pursuant to a National Labor Relations Board certification issued on June 6, 1979, designating said Union as exclusive collective-bargaining representative in an appropriate unit. Said complaint further alleged that a strike, which commenced about July 24, 1979, in which certain employees in the aforesaid unit participated, was caused and prolonged by the aforesaid unfair labor practice, and hence was an unfair labor practice strike.

Evidence of the Union's majority herein stems from an underlying representation proceeding. Thus, pursuant to an election petition filed on June 21, 1978, in Case 5-RC-10511, seeking a unit of production and maintenance employees at the Employer's Honaker, Virginia plant, an election was conducted on August 18, 1978. The tally showed that of approximately 207 eligible voters, there was 1 void ballot, with 124 valid ballots cast for representation by the Charging Party and 72 against. There were five challenged ballots which were insufficient to affect the results. Thereafter, the Employer filed timely objections to the election. On September 29, 1978, the Acting Regional Director for Region 5 issued a "Report on Objections and Notice of Hearing" in which certain objections were overruled, and others deemed to have raised material issues of fact warranting an evidentiary hearing. Pursuant to notice, a hearing on objections was conducted before Hearing Officer John M. Glynn on October 18 and December 19, 1978. Thereafter, on February 2, 1979, the aforesaid hearing officer issued his report, recommending that all remaining objections be overruled in their entirety, and that a certification of representative be issued. The Employer filed timely exceptions thereto, and on June 6, 1979, the Board issued a "Decision and Certification of Representative," adopting the hearing officer's findings and recommendations and certifying the Charging Party as the exclusive representative.

[1] The name of Respondent appears as amended at the hearing. It is of no small interest that Respondent objected to this correction on grounds that its due process right to personal service was offended inasmuch as the original papers in this proceeding named "Honaker Mills Corporation" as Respondent.

In its original answer, Respondent denied that any unfair labor practices were committed, setting forth affirmative defense to the effect that the election conducted by the National Labor Relations Board in Case 5–RC–10511 was invalid and, accordingly, the Union had not been designated by a majority of Respondent's employees in a "free and untrammeled" election.

With the issues so framed, on November 26, 1979, the General Counsel filed a "Motion for Summary Judgment" on grounds that Respondent should not be permitted to litigate in this proceeding issues previously considered by the Board in the prior representation proceedings and therefore requesting the Board to continue the proceeding before it and to grant summary judgment and conclude as a matter of law that Respondent had violated Section 8(a)(5) and (1) of the Act.

On December 4, 1979, the Board issued an "Order Transferring Proceedings to the Board and Notice to Show Cause," as to why it should not grant the relief requested by the General Counsel.

Thereafter, Respondent filed an amended answer to the complaint, dated December 21, 1979, which for the first time, raised the following:

> Respondent sets forth affirmatively that the union has committed numerous coercive acts of violence and intimidation against respondent and its supervisors and employees. These coercive acts include, but are not limited to, engaging in mass picketing so as to block ingress and egress to respondent's plant, blocking the right-of-way, intimidating and threatening employees, scattering nails in front of respondent's plant, throwing paint and acid and scratching with sharp objects and tire slashing of the cars of non-striking employees, and other coercive acts too numerous to mention. Due to an atmosphere of fear and coercion generated by the unlawful conduct, the respondent submits that the union is unfit to represent the employees of the respondent and that it is not entitled to the benefit of a bargaining order and that the certification should be revoked. The respondent further submits that the union should be denied the right to invoke the Board's statutory processes in aid of its demand for recognition until an appropriate time when the employees are able to demonstrate their desires in an atmosphere free from coercion, and the union proves its majority among those employees through a new election.[2]

Also on December 21, 1979, Respondent incorporated the above in its response to the Notice to Show Cause, urging that a hearing is required on "newly discovered or previously unavailable evidence."

By order dated March 6, 1980, the Board denied the General Counsel's Motion for Summary Judgment and remanded said proceeding to the Regional Director for Region 5 for further appropriate action. In doing so, the Board concluded that issues of fact existed with respect to (1) allegations that the strike was caused and prolonged by Respondent's unfair labor practices, and (2) assertions by Respondent that the Charging Party is unfit to represent Respondent's employees in view of mass picketing and numerous acts of violence and intimidation which occurred in the course of said strike.[3]

Pursuant to the foregoing, a hearing in this matter was conducted before me in Lebanon, Virginia, on August 21 and October 6, 7, 8, and 9, 1980. Following close of the hearing, briefs were filed on behalf of the General Counsel and Respondent.[4]

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[2] In its original answer dated October 5, 1979, Respondent denied par. 8 of the complaint which alleged as follows:

> On or about July 24, 1979, certain employees in the unit described above in paragraph 5 ceased work concertedly and commenced a strike against Respondent.

[3] In its posthearing brief, Respondent argues that the Board denial of summary judgment requires collateral review herein of all issues going to the validity of the election and the Union's certification, including alleged preelection conduct on the part of the Union and alleged procedural unfairness committed by the Board in the investigation of the Employer's objections to the election. There is no merit in this view. Said issues were in a summary fashion rejected by the Board in adopting the hearing officer's report on objections in Case 5-RC-10511. See G.C. Exh. 2. The present effort on Respondent's part to relitigate these preelection matters is unsupported by a showing of previously unavailable or newly discovered evidence. See *Pittsburgh Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941), and Rules and Regulations of the National Labor Relations Board, Secs. 102.67(f) and 102.69(c). Nor is there merit in Respondent's contention that the Board implicitly paved the way for redetermination of these issues in directing a hearing and denying the General Counsel's Motion for Summary Judgment. It is true that the Board in directing a hearing in this unfair labor practice proceeding, states as follows:

> The Board has duly considered the matter and is of the opinion that there are issues of fact, *including* the nature of the strike and whether violence was in fact committed, which may best be resolved at a hearing conducted before an administrative law judge. [Emphasis added.]

Contrary to Respondent, that direction by the Board fails to sanction new findings on matters disposed of with finality in the underlying representation case. The Board's direction of a hearing was preceded by explicit reference confined to Respondent's contentions based on the Charging Party's alleged improprieties during the course of the strike which began on July 24, 1979, a date well after the election and a month after certification of the Union by the National Labor Relations Board. The language utilized by the Board in denying summary judgment and defining the scope of this hearing, at best, from Respondent's point of view, was tailored to issues concerning "the nature of the strike" and "whether violence was in fact committed," and beyond that only such matters as would be supported by newly discovered and previously unavailable evidence. Absent specific direction from the Board, it would be ulture vires were I to enlarge the proceeding in a manner contravening *Pittsburgh Glass v. NLRB*, supra, and the Board's own Rules.

[4] The General Counsel, in its posthearing brief, for the first time announced that he was seeking *partial* reimbursement to the Board and the Union for reasonable counsel fees, salaries, witness fees, transcript and record costs, printing costs, and other costs and expenses to be determined at the compliance stage. Thereafter, Respondent filed a supplemental brief with respect to this limited remedial matter. By telegram dated February 9, 1981, the General Counsel opposed Respondent's request to file an answering brief on the following grounds:

> 1. The Board's rules and regulations do not provide for the filing of answering briefs before the Administrative Law Judge.
>
> The Administrative Law Judge indicated at the hearing that he would consider a partial reimbursement remedy if the Respondent relied on frivolous defenses, and
>
> 3. Respondent's request for permission to file an answering brief was submitted 18 days after the closing date for the receipt of posthearing briefs.

It is my opinion that ordinary conceptions of fairness demand in this instance that Respondent's election to respond be upheld. Firstly, receipt of Respondent's answering brief has not unduly delayed resolution of the merits of this proceeding. Furthermore the General Counsel, though well aware of the positions taken by Respondent, which it now claims to have

Continued

On the foregoing, and the entire record in this proceeding,[5] including the posthearing brief, and the opportunity to observe directly the demeanor of the witnesses while testifying, I make the following

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

Respondent Honaker Mills, Division of Top Form Mills, Inc. is a New York corporation engaged in the manufacture of women's and children's apparel at its Honaker, Virginia plant. During the 12 months preceding issuance of the complaint, a representative period, Respondent sold and shipped in interstate commerce goods and services valued in excess of $50,000 to customers located outside the Commonwealth of Virginia.

The complaint alleges, the answer, with stipulations entered at the hearing, admits, and I find that Respondent is and has been at all times material herein an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The complaint alleges, the Respondent stipulated at the hearing, and it is found that International Ladies Garment Workers Union, Upper South Department, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Issues*

1. Whether Respondent unlawfully refused to bargain in violation of Section 8(a)(5) and (1) of the Act by withholding recognition and failing to bargain with the Union as the certified representative of production and maintenance employees at its Honaker plant.

2. Whether a strike, which commenced on July 24, 1979, caused and prolonged by said refusal to bargain, constitutes an unfair labor practice strike.

3. If paragraph 1, above, is answered in the affirmative, were acts of violence and coercion committed in the course of the aforesaid strike to a degree sufficient to find that the Union is unfit to hold the status of exclusive statutory representative in accordance with *Laura Modes*, 144 NLRB 1592 (1963), and related cases.

B. *Concluding Findings*

1. The refusal to bargain

Following designation of the Union by a majority of the employees in the appropriate unit on August 18, 1978, the Union was certified as exclusive statutory representative on June 6, 1979.

By mailgram dated June 20, 1979,[6] the Union notified the Respondent as follows:

> Pursuant to the National Labor Relations Board's certification I hereby request that you contact me so that we can set a date to negotiate a contact [sic] in behalf of the employees at Honaker Mills.
>
> If we do not hear from you by Friday, June 29, 1979 I will assume that your lack of communication indicates an unwillingness to negotiate and we will be forced to take appropriate action.[7]

By letter dated June 26, 1979, Respondent, through Plant Manager Joe Hooker, informed the Union as follows:

> I have received your mailgram of 6–20–79 and have forwarded it to appropriate Company Officials and Company counsel. However, it may not be possible for you to receive a reply to your request by the June 29, deadline which you mentioned.[8]

As of July 24, a month had lapsed since the Union's request. Apart from Hooker's letter of June 26, the Company's posture was one of silence. On July 24, a strike commenced at the Honaker plant. Thereafter, while still declining to offer a further response to the Union, Respondent by letter dated July 31, 1979, explained its position to *employees* in the following terms:

> As you know the Union has called a strike because Honaker Mills has refused to bargain with it. The reason we have refused to bargain is that we believe the National Labor Relations Board Regional Office determination was wrong and that the Honaker employees are entitled to a fair and proper vote free from union threats and union harassment. The only way we can appeal and get review of this in Washington is to refuse to bargain. We think we deserve our day in court on the issue.[9]

At no time since the Union's request of June 20 has Respondent communicated its position directly to the

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been frivolously maintained, did not at any time prior to the close of the hearing or under circumstances affording notice of its intentions raise the claim for extraordinary relief. While it is true that very early in the hearing I cautioned counsel, pointing out that delays on the basis of frivolous contentions would not be tolerated, while alluding to the possibility of a partial remedy pursuant to *Tiidee Products*, 194 NLRB 1234 (1972), in the interest of protecting the integrity of the proceeding, said reference by me was couched in terms of warning, which, considering the time and circumstance in which that statement was made, would not necessarily have been construed by Respondent as giving rise to extant issue. The issue belatedly raised by the General Counsel calls for extraordinary relief on a partial basis, lacking direct support in precedent and, hence, Respondent has been permitted to address the question.

[5] The record herein has been reopened to receive into evidence stipulated testimony of Cecille Vest. This segment of Vest's testimony was actually afforded before me on October 7, 1980. However, through error of the reporting service, the testimony of the latter was erased prior to inclusion in the official transcript. By motion dated January 5, 1981, the General Counsel sought to reopen the record to receive as Jt. Exh. 1, the agreement of the parties as to the testimony in question. Based thereon, I reopened the record and received Jt. Exh. 1. However, while rulings are accurately reflected therein, further comments attributed to me are deleted as they fail to reflect context fully and are not verbatim reconstructions.

[6] All dates refer to 1979 unless indicated otherwise.

[7] See G.C. Exh. 3.

[8] See G.C. Exh. 4.

[9] See G.C. Exh. 5.

Union or otherwise expressed a willingness to negotiate and bargain.

Prior to the aforesaid refusal to bargain, all issues going to the validity of the certification based on the Union's alleged objectionable conduct during the preelection period had been overruled in Case 5–RC–10511. With respect to those issues, no effort has been made in this proceeding to elicit evidence of misconduct on the part of the Union prior to the aforesaid election which was newly discovered or previously unavailable and which would require the Board to reexamine the certification issue in the underlying representation proceeding.

Nevertheless, Respondent seeks dismissal of the 8(a)(5) allegation on the basis of a discrepancy in the Board's description of the appropriate unit appearing in the Certification of Representative issued on June 6, 1979. By way of background, it is noted that the election conducted herein was pursuant to a Stipulation for Certification Upon Consent Election, wherein the parties agreed that the following constituted the appropriate unit:

> All production and maintenance employees employed at the Employer's Honaker, Virginia location; but excluding office clerical employees, technicians, sales people, professional employees, guards and supervisors as defined in the Act.

Said unit description appeared in that exact form in the notices of election, pursuant to which employees cast their ballots in the election held on August 18, 1978. Further, in both the Report on Objections and the hearing officer's report, the appropriate unit was described in those precise terms. However, on June 6, 1979, when the Board adopted the hearing officer's findings and recommendations and certified the Union, it defined the following as the appropriate unit:

> All production and maintenance employees employed at the Employer's Honaker, Virginia location; but excluding office employees, guards and supervisors as defined in the Act.

Further, the complaint issued by the Regional Director on September 27, 1979, repeated this erroneous description of the unit.

Respondent contends that the omission of the excluded categories of "technicians, sales people, professional employees" constitutes a fatal flaw in this proceeding. On this ground, Respondent seeks to negate the obvious choice made by its employees pursuant to statutory procedures.

With respect to the erroneous definition of the unit it was not until August 12, 1980, that the Regional Director for Region 5 sought Board amendment of the certification to include the omitted exclusions. Thereafter, on August 21, 1980, at the instant hearing Respondent, in seeking dismissal on this ground, was sharply critical of the General Counsel's failure to act with greater dispatch in this regard as stated by Attorney Spelfogel on behalf on Respondent:

> We would like to move to dismiss the complaint in this case on the grounds that there is a defective certification. The underlying representation proceeding certification is significantly different from the bargaining unit which the parties stipulated to—significantly different from the bargaining unit in which an election was held.
>
> This discrepancy has been a matter of public knowledge for at least eight months, when in opposition to a motion for Summary Judgment, the respondent expressly stated in its papers these facts.
>
> The Regional Director has acknowledged the discrepancy and finds the discrepancy so significant that it feels obliged to make a Special Motion to the National Labor Relations Board in Washington to amend and change the Certification.
>
> We have opposed that request to the National Labor Relations Board and this morning, just before the opening of this hearing, I was advised by the Executive Secretary in Washington that the Board would entertain briefs and arguments on the question and take the matter under advisement.
>
> Under the circumstances, I think the admission by the Regional Director that the matter is so significant to warrant the unusual request to amend at this late date—some eight months after this matter was brought to his attention at the opening hearing, and the fact that there is this discrepancy, we submit that the complaint should be dismissed, that the respondent cannot be ordered to bargain in a unit which is significantly different from the unit in which the election was held.

At this juncture, I note that it is difficult to subscribe to the view of Spelfogel that the matter was previously raised in the response to show cause so as to alert others as to the defect. Indeed, the cryptic reference to the matter in that document hardly matches the clarity and single-mindedness with which Respondent's position was articulated to me at the hearing and in a formal motion to dismiss, dated September 4, 1980, which recited as follows:

> The Respondent moves that the complaint in Case No. 5–CA–11305 be dismissed on the ground that the charge and complaint are contingent upon an erroneous certification of the bargaining unit by the National Labor Relations Board.

Respondent's response to the Board's Notice to Show Cause was a six-page document enumerating a variety of grounds on which summary judgment should be denied. The only reference therein to a controversy with respect to the unit was expressed as follows:

> Respondent states that the entity named in the charge and complaint is not a corporate entity subject to process, nor is the unit set forth in the complaint an appropriate unit or a unit stipulated to by respondent. The Board is not precluded from reexamining representation issues where there is newly discovered or previously unavailable evidence or sufficiently changed circumstances or where the

> parties do not object. *City Motor Co., Inc.*, 214 NLRB No. 38 (1974). Moreover, a bargaining order may not be enforced in an inappropriate unit, *NLRB v. Metropolitan Petroleum Co.*, 506 F.2d 616 (CA 1, 1974), and to the extent that the election stipulation is ambiguous, there is no meeting of the minds so as to require a remand in order to give the parties another chance to stipulate to an appropriate unit. *Buckley Southland Oil*, 210 NLRB No. 145 (1974). An examination of the stipulated unit and the unit cited in the complaint reveal such discrepancies warranting remand and/or a hearing. In addition, as previously stated, the respondent states that "Honaker Mills Corporation" is not an entity subject to service of process and specifically controverts any contrary allegations in the complaint.

As should be apparent from the foregoing, the reference to the unit discrepancy was not highlighted, but intertwined with another line of argument pertaining to the complaint's misidentification of Respondent.[10] In addition, while Respondent at the time was seeking to avoid summary judgment, and did state that "An examination of the stipulated unit and the unit cited in the complaint reveal such discrepancies warranting remand and/or a hearing." definition of the nature of the error was not articulated. Indeed, the quoted statement itself is misleading as to the exact basis for the challenge to the unit insofar as Respondent urges "remand and/or a hearing." For as Respondent has consistently maintained before me, the discrepancy of which it speaks would obviate further hearing and warrant outright dismissal. No such claim was made to the Board, though if substantial, such would be the only appropriate disposition. The instant motion is unaided by Respondent's assertion that the "discrepancy has been a matter of public knowledge for at least eight months" prior to the effort by the General Counsel to rectify the error.[11]

In any event, on October 3, 1980, the Board granted the Regional Director's request to amend the certification, but declined to address itself to the motion to dismiss. In support of the latter, Respondent now claims that, because the faulty certification was in effect both at the time of the Union's June 20 demand for negotiations and at the time of the alleged refusal to bargain, no 8(a)(5) violation can be found based on Respondent's conduct at that time.

However, the above contention is unsupported by evidence that said inadvertence created confusion, misunderstanding, or uncertainty as to the scope of the Union's demand. Indeed, were such a claim made it would be difficult to honor, in the circumstances, as genuinely maintained. For on July 31 Respondent, during the first week of the strike, conveyed to its employees the justification for its refusal to confer recognition. That expression was clear-cut, lacking in open endedness, and related exclusively to the disposition of Respondent's objections by the National Labor Relations Board Regional Office. The message afforded employees was unambiguous and hardly susceptible to an interpretation suggesting that the extant unit description presented any problem.[12] Furthermore, every indication on this record confirms that the election was conducted pursuant to consent of the parties concerning the appropriate scope of the unit as well as excluded categories and nothing appears in their subsequent conduct suggesting a shift in position inconsistent with the unit set forth in the preelection stipulation, the notice of election, the Report on Objections, and the hearing officer's report.

This proceeding arises under authority of remedial legislation designed by Congress to vindicate public rights. The Board's error, if objectively viewed by those with only slight acquaintance with Board practices, procedures, and policies, would readily be ascribed to editorial oversight or perhaps even typographical miscue. Could there have been any other possible explanation? None is offered by Respondent, nor is one suggested from my own imagination.

Although Respondent speaks in terms of its being penalized by the subsequent correction of this error, this would have been true had it adopted a course of action in direct reliance on the Board's error.[13] However, on the face of the history of this proceeding, it would be ludicrous to assume that recognition would have been conferred were it not for the erroneous unit description. Objective fact attests, beyond peradventure, to the multitude of issues raised by Respondent in contesting the validity of the certification. It is difficult to imagine that these separate and independent matters would have been scuttled had the unit description been accurately transcribed at every turn. But more compelling is the fact that Respondent elected not to communicate with the Union in response to the latter's demand for recognition and took a strike in two plants rather than seek clarification of any extant ambiguity which it apparently claims to have influenced its course of action.

The employees in this case had designated the Union in a secret-ballot election. The National Labor Relations Board reviewed the Union's conduct during the preelection period and in effect concluded that said election was conducted in an atmosphere devoid of coercive influences. At the time of the certification, I infer, on the total record, that Respondent was fully mindful that the unit discrepancy was inadvertent, that the Union was not seeking representation of sales, technical, and professional employees, that the Board was not seeking sua sponte to compel such representation, and that the Union's demand merely entailed assertion of representational interests within the confines of the employee grouping which provided the overwhelming mandate at the polls. To find otherwise would defy reality. Accordingly, I find no merit in Respondent's claim that the inadvertent

[10] The General Counsel's characterization of the reference as "oblique" conforms with my view. See G.C. Exh. 1(u), p. 2.

[11] One possible explanation for the delay is offered by Respondent itself:

> . . . a reasonable inference may be drawn that the General Counsel noticed the mistake in certification during his final pretrial preparation, and immediately asked the Regional Director to request the amendment. [See R. Br. p. 37 fn. 6.]

[12] See G.C. Exh. 5.

[13] See, e.g. *American Broadcasting Co.*, 134 NLRB 1458 (1961).

omission of sales, technical, and professional classifications from the exclusionary section of the unit definition furnished a defense to its conduct beginning in June 1979, and thereafter continuing through a 4-month strike, and this unfair labor practice proceeding.[14]

Based on the foregoing, I find that since June 6, 1979, the Union has represented a majority of Respondent's employees in the appropriate unit and by refusing to recognize and negotiate with the Union in such capacity, Respondent has since June 20, 1979, violated Section 8(a)(1) and (5) of the Act.

2. The strike and its nature

Following the aforesaid refusal to bargain, employees on July 24, 1979, commenced a strike against Respondent. The complaint alleged that Honaker employees participating therein were unfair labor practice strikers, because the strike was caused and prolonged by Respondent's unlawful refusal to bargain. The strike ended in mid-November 1979, and the parties stipulated at the hearing that all strikers who sought reinstatement were reinstated to their former positions upon cessation of their individual strike action. As alleged in the complaint it is concluded, based on the credible testimony of William Dennison[15] and the entire record, that the sole cause of the strike from inception to terminus was Respondent's refusal to recognize the Union. Hence, I find that it was an unfair labor practice strike at all times material.

3. The *Laura Modes* issue

As should be apparent, this proceeding presents a further hurdle in an organizational effort which began in December 1977. In August 1978, it seemingly culminated when in a Board election a substantial majority opted for union representation. However, litigation of the Employer's objections to the election deferred certification until June 1979. This refusal to confer recognition and bargain in 1979 has been deemed unlawful. Yet, it is now 1981, and almost 4 years after the Section 7 rights were first asserted at Honaker; the question still exists as to whether employee choice will be enforced by a Board remedy.

Ordinarily, an employer's dishonor of such a certification is speedily resolved through a summary enforcement proceeding. Here, the Board deemed such a course of action inapropriate, on the basis of assertions that "the Charging Party . . . has committed numerous coercive acts of violence and intimidation against Respondent and its supervisors and employees during a strike against the Respondent at its plant in Honaker, Virginia." This claim was viewed as raising material issues of fact under the principle set forth in *Laura Modes Co.*, 144 NLRB 1592 (1963). Prior to *Laura Modes*, the regulation of misconduct on the part of a labor organization by the Board was effected exclusively under Section 8(b)(1)(A) of the Act, and through the statutory policy of permitting employers to decline lawfully to reinstate striking employees who engaged in serious misconduct. In addition, nonadministrative relief included civil and criminal restraints and restraining orders available through the courts in the interest of maintaining peaceful and violent-free picketing. In *Laura Modes*, the conventional arsenal was augmented by a new concept whereby the Board would decline relief under Section 8(a)(5) to labor organizations which exhibit "a total disinterest in enforcing . . . representation rights through the peaceful legal process provided by the Act," but instead resort "to and/or encourage . . . the use of violent tactics to compel their grant."[16] Thus, in appropriate circumstances, notwithstanding that a pattern of violence was set in motion by an employer's own illegal conduct, no remedy is afforded to impel bargaining, but the statutory representative instead is required to again demonstrate "its majority among . . . employees to the Board's election procedures."

Prior findings herein make it clear that in the instant case the *Laura Modes* issue arises on the heels of a certification, a Board election, and a strike which began a full month after the Union's demand for recognition had gone unheeded, with Respondent failing to reply as to whether it would or would not confer recognition. Nonetheless, by direction of the Board herein, the misconduct properly attributable to the Charging Party and its agents must be balanced against the unfair labor practices which provoked the strike and its consequences, as basic to the determination of whether the results of the election will finally be enforced by Board remedy.

Before assessing the facts offered in substantiation of Respondent's contention it is necessary to point out my agreement with Respondent that misconduct, in connection with a strike and picketing at another nearby operating division of Respondent, herein called the Russell plant, is relevant to the inquiry. The latter was located in Lebanon, Virginia, about a half hour's drive from Honaker. Since 1978, the Charging Party had been actively engaged in an organizational drive at the Russell plant. In support of the effort at Honaker, the Charging Party initiated a strike at Russell on July 25, the day after the strike began at the former. The Russell picketing was part and parcel of a concerted effort in furtherance of the dispute at Honaker as evidenced by the movement of pickets on a regular basis from one location to the other, unified demonstrations and common responsibility exercised by union representatives with respect to both sites.[17] Indeed, Bill Dennison, the union organizer, charged with immediate responsibility for both picket lines, described the overall effort as a "coordinated strike . . . for the purpose of putting pressure on the Honaker plant."

Respondent attempted to substantiate its *Laura Modes* defense through almost 50 witnesses, who testified to their experiences both proximate to and away from each of the picket lines. A detectable tendency to exaggerate

[14] Cf. *H.M. Patterson & Son, Inc.*, 245 NLRB 1412 (1979), where the Board's correction of a unit description in a certification was followed by a new demand, charge, and 8(a)(5) complaint.

[15] During the period relevant to this proceeding, Dennison was an organizer for International Ladies Garment Workers Union, Upper South Department.

[16] 144 NLRB at 1596.

[17] See stipulated testimony of Cecille Vest.

was reflected on the part of certain of these witnesses. At the same time, those presented by the General Counsel seemed prone to mitigate certain aspects of the conduct under scrutiny. In any event, an overview of the facts shows that the strike continued for almost 4 months, ending in mid-November. Both plants continued to operate throughout and there is no evidence of significant disruptions in production. At no time during the strike did Respondent seek to quell untoward conduct on the part of strike participants through temporary restraining orders. In addition, no charges were filed against the Union under Section 8(b)(1)(A) of the Act. Despite the wealth of evidence adduced on behalf of Respondent, there is no direct proof that company property was violated by trespass on the part of any union official involved,[18] striker, or strike sympathizer, or that company property was vandalized or damaged in any fashion.[19] Indeed, although nonstrikers during the course of the strike crossed the picket lines from two to four times daily, it does not appear that weapons, clubs, or other paraphernalia of harm were brandished by those supporting the strike or that those continuing to work were the object of any form of physical assault. There was no clear evidence that pickets engaged in mass picketing, blocking ingress and egress at either plant. Testimony does persuasively establish that the strikers and others on the picket line expressed their displeasure at the fact that, as the strikers withheld their labor and sacrificed their earnings, others took their jobs. This often took the form of name calling, which from time to time included profanities and threats.[20] The more serious trepidations at the picket line consisted of a single incident in which a tire was flattened when a striker threw tacks under a nonstriker's vehicle, the attachment of a sticker on a vendor's vehicle, and the "tailing" of nonstrikers under conditions which, with one exception, was lacking in independent manifestation of harassment.

The most compelling evidence offered in support of the *Laura Modes* issue consists of serious offenses of anonymous origin to property visited upon nonstrikers at locations remote from the picketed sites, but occurring during the course of the strike. However, no clear credible evidence exists linking such offenses to union representatives, strikers, or their allies.

a. *Conduct at the picket lines*

(1) By nonemployee union representatives

John Downing was an organizer for the Upper South Department of the ILGWU. He was not present on a regular basis in the Honaker-Lebanon area during the strike. He was implicated in alleged misconduct by two witnesses for Respondent. Nonstriker Fayne Rhea testified that on the first day of the strike Downing, as a vehicle in which she was riding approached the picket lines, "got out in the road . . . waving his hands and hollering 'stop.'" Nothing improper is suggested by this description of Downing's conduct. Although Rhea testified vaguely that Downing "got out in the road," the vehicle in which Rhea was riding passed without incident, and her testimony does not clearly establish that Downing assumed a position on the road calculated reasonably to block Rhea's access.

The only other incident pertaining to Downing was an effort to link him circumstantially with the discovery of roofing nails in the driveway of a resident of a trailer park situated across the road from the Honaker plant. In this regard, Edna Lester, a nonemployee and the operator of the trailer park, claimed that in late July or early August she discovered roofing nails behind her car. Lester testified that about a week later she observed Downing and 10 or 12 other pickets passing through her driveway inside the trailer park. According to Lester, "I figured that they had more nails, so I . . . [followed] them." The group was in route to the Union's trailer which was located on property adjacent to the trailer park. Patsy White was another resident of the trailer park and a nonstriking Honaker employee.[21] According to Lester, she observed roofing nails in White's driveway identical to those that she had removed from her own driveway during the prior week. Lester asserted that she later observed two women in Downing's group returning through the trailer park. She claimed to have hollered to them "don't come back over my property . . . this is private property and you already threw enough nails on my property and don't come back."[22] Her testimony implies that she failed to identify those responsible for the strewing of tacks in her driveway. Although she admitted to having followed Downing and the others prior to her discovery of tacks in the driveway of White, she acknowledged that she did not observe how those tacks got there.[23] Although I have serious reservations con-

[18] There was evidence that an individual suspected as a "union representative," apparently employed by an ILGWU shop, accompanied a truckdriver from that firm to the property of Respondent. When his presence was discovered, the individual was asked to leave, and did so without incident.

[19] There was testimony that in the course of the strike, shots were fired at a water tower at the Russell plant. The evidence that damage was done to the water tower was in the form of uncorroborated hearsay. Further, testimony offered in connection with this entire incident is suspect insofar as it represents an attempt to link the incident with the strike action.

[20] Witnesses for the General Counsel testified that curse words were not used. In the total circumstances, this testimony was a bit too cleansing and, considering the emotional nature of the conduct under scrutiny herein, was regarded as inhuman and implausible.

[21] Lester testified that her daughter who lives in a different trailer but rents that trailer space from Lester was an employee of Honaker who continued to work throughout the strike. No tacks or nails were placed in her daughter's driveway.

[22] Mary Charles, a striker at Honaker, testified that certain pickets and Downing did in fact cut across the trailer park that day to attend a Hardship Committee meeting at the Union's trailer. She testified that after the meeting, as several of the pickets returned through the trailer park, Lester reached down and picked up a rock, stating, in reference to Downing, who apparently was not present, "if that black son-of-bitch comes back up through here, I'll kill him." Lester did not squarely contradict Charles in this regard.

[23] Patsy White confirmed that tacks were in her driveway on the day in question.

cerning the credibility of Lester, even assuming that the facts were as she related, her account does not persuasively implicate Downing in any misconduct. While on balance, since she was corroborated by White, I accept her testimony that nails or tacks were scattered on the driveway of the latter, the identity of the individual or individuals responsible for this act is not established, and no reasonable basis exists for imputing responsibility to an employee or nonemployee representative of the Union. It is noted that, except for this single instance, there was no repetition of any violation of the property or persons of the nonstriking employees who resided in the nearby trailer park.

Bill Dennison was the ILGWU nonemployee organizer in charge of both Honaker and Russell plants. He regularly served in the area during the strike. Dennison was implicated by Respondent in no less than 10 incidents during the 16-week period of the strike. Thus, Kenneth Sword, a truckdriver, assigned to the Russell plant, testified that beginning in early August, on two occasions, Dennison followed him on trips. There is no evidence that this occurred under menacing conditions or that a breach of the peace resulted.[24]

Rhonda Helton, a nonstriking employee at the Russell plant, was hired in August 1979. She thereafter worked regularly for the duration of the strike and crossed the picket line four times daily during the course thereof. Nonetheless, she testified to a single incident involving Dennison. Thus, she claimed that in August as she was leaving work she stopped at the intersection leading from the plant to the main road. Dennison approached her automobile as she was waiting for the traffic, put his arms on the window, and asked how long she had been working and why "was we there taking somebody else's jobs." Dennison added that they "couldn't get by with taking somebody else's job." According to Helton, Dennison, referring to the car in which Helton was a passenger, stated that the driver "didn't need a job working down there anyway with a car like that." Helton went on to testify that unidentified individuals on the picket line simultaneously were "talking about how good her car would look with flat tires and a different color." Dennison apparently did not repudiate such remarks.[25]

Fayne Rhea testified that she and her daughter Debby Grubb were reporting to work on August 31 when, as they turned off the main road into that which leads to the factory, Dennison "reached out and hit the left front fender of her daughter's car." No damage resulted, and while, presumably, the hand or arm of Dennison came in to contact with the car, the degree of force he employed was undefined.

Charlotte Foleno, during the strike, was office manager at the Honaker plant. She testified that it was her practice to cross the picket line several times daily and that on one such occasion, she stopped at the stop sign at the intersection leading to the plant. Dennison and Diane Harris, another nonemployee union agent, were standing in the road. Foleno claims that she motioned for them to move, but that Dennison and Harris failed to respond. Foleno was able to pass the car without hitting the latter or the oncoming vehicle. Foleno further testified that, as she passed, Harris called her a "bitch." Beyond that, it is noted that Foleno's testimony does not, with certainty, establish that Dennison and Harris actually blocked passage of her vehicle.

Honaker Plant Manager Jerry Couch testified that on August 22 he observed Bill Dennison taking pictures of the plant. Couch attempted to describe the objects photographed in the following terms: "From where I was standing, it looked like . . . the factory and possibly some of the vhicles that was parked in the parking lot." The conjecture of Couch as to whether photographs were taken of vehicles, was deemed speculative and unreliable. Further, there is no evidence that striking or nonstriking employees were present at the time of this early morning incident.

The most serious incident involving picket line misconduct on the part of Dennison was admitted by the latter. James Wolford was not employed by Respondent, but by Kwik Kafe Company. Apparently, Wolford crossed the picket line regularly during the strike to vend refreshments to employees at the Russell and Honaker plants. He testified that in late August, as he was passing through the picket line in route to the Russell plant, "they . . . wanted to put a sticker on the truck." Wolford claims that he shook his head "no" and continued. On leaving the plant, as Wolford pulled to the stop sign, Dennison walked behind the truck and placed a sticker on the vehicle. When asked to remove it, Dennison refused. In consequence, Dennison was subsequently convicted in the local court of "defacing private property."

Dennison was also linked to an altercation with plant guard Will Ireson which allegedly occurred at a local eating establishment. Ireson testified that on September 30 he, together with another plant guard, went to a restaurant where Dennison and Diane Harris appeared and started "bad mouthing" the guards at the restaurant. After words were exchanged, according to Ireson, Dennison took a swing at him. Ireson's testimony was uncorroborated. Harris and Dennison denied any such incident. There is no other evidence of hostility between Dennison and plant security personnel or indeed between supporters of the strike and such individuals. Nor does it appear that Dennison, during the strike, engaged in any sort of physical altercation or assault on any person. I did not believe Ireson. At the time of the incident, Ireson was 6 foot, 6 inches tall and weighed 230 pounds. Dennison, on the other hand, was of moderate size and was described by Ireson as small. He stood about 5 feet, 8 inches tall and weighed about 160 pounds. The guard allegedly in Ireson's presence at the time was described as weighing 110 pounds but, as Ireson's account goes, Dennison laid no challenge to the smaller man.

In addition to the above, I find that Dennison, in what appears to have been an August press conference, articulated to a reporter for the "Bluefield Daily Telegram"

[24] Sword also testified that Connie Hopson, a striker and member of the organizing committee at the Russell plant, followed him under similar otherwise tranquil conditions on two other occasions.

[25] I credit Helton who was not employed by Respondent at the time of the instant hearing.

words to the effect that "the Company would have a hard time hiring scabs."

Considering the duration of the strike and the testimony of a credible nature indicative of Dennison's role therein, convincing evidence does not warrant a conclusion that he contributed directly to any overall pattern of violence and intimidation.

Connie Brown was a nonemployee union organizer who, though primarily involved in the picketing at Honaker, also participated regularly at Russell. Several of Respondent's witnesses identified her as having engaged in picket line misconduct. Thus, Pat Price, a nonstriker at the Honaker plant, related that on the first day of the strike, as she turned off the main road, "Connie Brown jumped out in front of me and was hollering stop, Pat." Price claims that she had to put on her brakes to keep from hitting her. To me Brown's action on that occasion quite possibly was no more than a temporary, instantaneous effort to gain attention. Ethel Herndon, another nonstriking employee, testified that on July 30, at the Honaker picket line, Connie Brown stated as follows, "Why, you dirty low down scab . . . you had better work while you can . . . . we are closing that god damn place down."[26] Priscilla Dell testified to an incident occurring at the Honaker picket line after she had applied for a job. According to Dell, she was asked by a picket if she had obtained a job and responded in the affirmative. Dell went on to testify that Brown then asked her not to cross the picket line. However, when Dell said she would, according to Dell, Brown stated "if you do, we will throw this car down the hill."[27]

Diane Harris was a nonemployee union organizer who had primary responsibility at the Honaker picket line. Harris was a former employee of Honaker Mills, but was terminated on December 11, 1978. Prior to her termination, Harris was chairlady of the steering committee, an organization of employees committed to the support of the Union.[28] Charlotte Perkins was a nonstriking employee at the Honaker plant. Her brother Edgar Phillips testified that Diane Harris in late August asked if he was Perkins' brother. When he responded that he was, Harris allegedly said, "Why don't you go down to the plant and . . . tell Charlotte to get her god damned ass out of there she don't below [sic] in there."[29] Jane Smith was hired at the Honaker plant during the strike. Spencer Burke was her boyfriend. Burke had purchased a "Corvette sport car" for Smith which was the object of vandalism on Thursday, September 7. Burke claims to have witnessed the incident and to have identified Connie Brown and Diane Harris as the individuals responsible.[30] Smith and Burke pressed charges against the latter. The matter never came for trial. Subsequently, however, after Smith had terminated her employment at Honaker, the couple confronted Diane Harris and others at a night club in Bristol, Virginia. Smith and Burke testified that the Harris party followed them 4 to 5 miles, cutting off Smith's car twice. Harris testified that her group did in fact encounter Smith and Burke at the night club, but that they entered the club as Smith and Burke were leaving and remained there until the early hours of the morning. Harris denied following Smith and Burke on that occasion. I did not regard Smith and Burke as credible witnesses. The version offered by Harris is viewed as the more truthful.

Cecille Vest was the last of the nonemployee organizers to be implicated in misconduct. Thus, Audrey Gilbert, a nonstriking employee at the Russell plant, testified that on two occasions in August as she was leaving the plant, Cecille Vest, "set and blocked me for about 2 minutes," while pickets in Vest's car "snickered and laughed" and called Gilbert names. After this, according to Gilbert, Vest simply returned to her parking space. Vest testified to a single incident in which she backed out of her parking space onto the road as Gilbert was exiting from the plant. According to Vest, on observing Gilbert coming down the road, she pulled back into the lot as quickly as she could shift gears to allow her to pass. I was inclined to believe Vest. Gilbert did not impress me as a trustworthy witness. Her attempt to attribute identical conduct and scenario on two separate occasions was viewed as suspect. I prefer the testimony of Vest.

(2) Conduct attributed to identified strikers alleged to be employee agents of the Union

From the advent of the union activity at the two plants, various committees were established by the Union in aid of its objectives at those sites. At the Honaker plant, an employee organization committee was first established in 1977. Apparently in September 1978, following the election, a steering committee was elected composed of Honaker employees with Diane Harris as its chairlady. At the outset of the strike on July 24 at Honaker, picket captains were designated and also during the strike, a hardship committee was established. In addition, following the election, a negotiation committee composed of Honaker employees was formed.

At Russell an organizing committee was formed in August 1978. After the strike began, picket line captains were designated to police the conduct of the Russell strikers.

There is no evidence that the organization committee, steering committee, or negotiating committee functioned at the time of, or had any responsibility with respect to the picketing at Honaker. From all appearances on the record, including the credible testimony of Bill Denni-

[26] Theresa Boyd, who applied for a job during the strike at Honaker, but never worked there, testified that as she left the plant, 10 pickets crossed in front of her but dispersed as she accelerated her automobile. She claims that someone from within that group twice told her "not to come back no more." Boyd described the individual to her mother, who opined that it was "Connie Brown." It is noted in this connection that the attempt to impute said statements to Brown was predicated on uncorroborated, incompetent hearsay. It is also noted that the testimony of Boyd does not clearly establish that there was any attempt on the part of the pickets on that occasion to obstruct her access to the main highway.

[27] Brown denied stating she would "tear the hell out of this car," or using words to that effect. On balance, I am willing to give Dell the benefit of the doubt.

[28] See R. Exh. 13.

[29] A few days after this conversation, two tires were slashed on Charlotte Perkins' car. The identity of those responsible was not established on the instant record by direct evidence.

[30] This issue is treated infra as anonymous conduct occurring away from the picket line.

son, I find that the only employees with responsibility toward the conduct of the strike were the picket line captains, the hardship committee, and the organization committee at Russell. Indeed, since it does not appear that strikers on the hardship committee had any responsibility other than cushioning the impact of the strike upon those individuals allied in common cause, serious question exists as to responsibility of the Union for conduct of those so engaged. Nonetheless, the following reflects my findings with respect to conduct attributed to various employee members of these committees.

Eva Mae Reynolds, a nonstriking employee at the Russell plant, testified that on the first morning of picketing at that location as she crossed the picket line, strikers Catherine Whithed and Juanita Perkins called the nonstrikers "jaw suckers and scabs and pigs." According to Reynolds, that same afternoon, she was told by strikers Barbara Wise and Betty Fields that if she crossed the picket line "they'd throw rotten eggs in my face." Further, Reynolds claims to have been informed that because she signed a union card she could not cross the picket line. Whithed and Wise were picket captains at Russell. It is noted that the testimony of Reynolds does not isolate with clarity whether the statements were actually made by the picket captains or others in their presence. Though possible, it is difficult to believe that the statement attributed to Wise and Fields was made in chorus.

Rita Hess, a nonstriker hired at the Russell plant the day after the strike began, testified that on July 31 as she was leaving work Connie Hopkins[31] yelled at those crossing the picket line calling them "bitches . . . whores . . . job suckers . . . scabs and fags."

Hazel Street, a nonstriking employee at the Honaker plant, testified that in the course of the strike, prior to September, striker Debby Justice and her husband, who was driving the Justice automobile, harassed her while she was in her vehicle. According to Street, while she was getting gas Mr. Justice pulled into the station and swerved as if he were going to hit her. As I understand her testimony, as she left the gas station, he followed her, tailgating closely behind. She goes on to claim that Mr. Justice tried to run her off the road, and when she pulled over to let them pass the Justice car took the lead and threw its brakes on, while Debby Justice cursed Street. Charges were filed and, although the reckless driving charge was dropped, Debby Justice was found guilty and fined $25 for cursing and abuse. It is noted that Street admitted on cross-examination that, contrary to her insinuation on direct, Mr. Justice did not try to run her off the road. While willing to acept her testimony that she was followed by the Justices and cursed by Debby Justice, her characterizations of the incident beyond that are rejected. Street impressed me as prone to exaggerate and unreliable with respect to such matters.[32]

Charlotte Hensley, a nonstriker at the Russell plant, testified that in mid-September as she and other nonstrikers were returning from lunch, Sue Datsun, a striking employee, walked in front of them across the road, stopped, and said, "Hit me by God, I'm paid for." Another nonstriker, Debbie Jones, was the driver of the vehicle. Hensley's description of this incident was not corroborated. In any event, although Hensley testified that she thought that Datsun was with the union committee at Russell, I am unwilling to credit her testimony in this regard as no foundation is laid for her belief, and there is no suggestion elsewhere that Datsun played any formal role in the campaign.

Sue Wilson, a nonstriker at Russell, testified that on August 21 she drove a company car to a gas station. She claims that as she passed through the picket line, strikers Lou Huffman and Connie Hopson entered a car. As Wilson went into a gas station, Huffman and Hopson went into a "Tastee Freeze" located on property adjacent to the gas station. According to Wilson, the strikers ate, but after Wilson got gas they followed her as she returned to the factory. Wilson admitted that there was no attempt to communicate with her by either Huffman or Hopson on this occasion. Huffman was a member of the organizing committee at Russell and Hopson was a picket captain and a member of the organization committee at Russell.

(3) Conduct attributed to nonagent, but identified strikers

Nonstriker Sue Wilson further testified that on August 23 she, with her daughter, went to a nearby Montgomery Ward outlet to pick up a package. She claims to have observed striker Vaney Laney reach on a table and pick something up. Observing this and believing that Laney would come after her, Wilson went into the outlet seeking assistance. When she returned, Vaney Laney was across the road. He called her a "fat scab and a scaredy cat." Wilson indicated that she was not afraid and was not a "scaredy cat." Laney then allegedly said,"Now, I got a job over there waiting on me, even a job over you." Her daughter then returned to the car and they left without incident. Although Wilson testified that she guessed that Vaney Laney was on the union committee there is no evidence to support her surmise.[33]

Charlotte Hensley testified to a further incident at the Russell picket line involving Vaney Laney. She claims that during the course of the strike, as she was returning to the plant from lunch, Laney stepped out into the road in front of her car, yelling for Hensley to stop. She claims that she swerved to the other side of the road and ran off on the gravel to avoid Laney, but then continued on to the plant.

[31] The record indicates that Connie Hopson was a picket line captain at Russell. It is entirely possible that Hess in this instance was referring to the latter. Although the record is unclear, I am willing to give Respondent the benefit of the doubt and assume that this was the case.

[32] Debby Justice was a member of the steering committee and negotiating committee at the Honaker plant. It does not appear that she was either a member of the hardship committee or a picket captain.

[33] Although Wilson testified that Cecille Vest and Bill Dennison were in the area, she admitted on cross-examination that they were not in a position to overhear the conversation with Vaney Laney.

Shirley Brown, a nonstriking employee at Honaker, testified that a few days prior to her car being vandalized, Debbie Mays hollered to Brown as she was passing through the picket line, "You're going to get it." Debbie Mays was not an employee of the Company, but she was the sister-in-law of Joyce Mays, a strike captain.

Nonstriker Doris Stensen testified that as she was leaving the Russell plant on October 12 the traffic officer stopped her at the intersection, when Vaney Laney yelled, "You god damn bitch, go to hell." According to Stensen, Laney started to walk toward the car, and took hold of the door handle. However, when the police officer signaled that Stensen move on, she proceeded. At home, Stensen informed her husband of the incident.[34] On cross-examination, it was developed that Stensen returned to the picket line with her husband, who asked Laney why he used abusive language to Doris Stensen. As I understand her testimony, her husband wanted Laney to cross the road and fight. Laney, according to Stensen, "hid behind two women."[35] Laney's version sharply conflicts that of Stensen. As to their initial confrontation, he admits to calling Stensen a "scab," at which point Stensen called him a "son-of-a-bitch," while raising a box containing a small revolver, showing it to Laney, and stating, "I'll blow your damn head off." According to Laney, when Stensen returned to the picket line with her husband that afternoon, the latter jumped out of the car with a "T-bar," and while swinging it asked Laney, "What have you been saying to my wife?" Shortly thereafter the chief of police arrived and the incident abated. Later the matter went to court and both Stensen and Laney were found guilty of "curse and abuse." As between the uncorroborated testimony of Stensen and that of Laney, I prefer the latter's version. It seemed the more probable, and I did not believe that Laney, with a police officer present, would have grabbed the door of the nonstriker's vehicle. Furthermore, his testimony as to the second confrontation was corroborated by Connie Brown.

Arbutus Forester was a striker at the Honaker plant. Charlotte Foleno, the office manager, and Kathleen Harris, Foleno's mother, who was also the engineer at the Honaker plant, afforded mutually cooperative testimony that Forester appeared to have thrown something under Foleno's automobile as she crossed the picket line on July 31. When she arrived at the plant, Foleno discovered that a tire on the automobile had roofing nails in it. Forester, though admitting that she had nails in her possession that day, denied throwing them under the Foleno automobile. I believe the testimony of Foleno and Harris, and infer from their mutually corroborative accounts that Forester did throw nails under the vehicle that day.

Pat Price, a nonstriker at Honaker Mills, testified that on a Saturday during the course of the strike her husband was repairing her car at the plant. Only she, her husband, the security guard, and her children were at the plant that day. She claims to have observed Forester going up and down the road adjacent to the plant serveral times. Later, according to Price, the security guard found a handful of tacks in the vicinity of the plant gate. Price admitted that she did not see Forester throw the tacks. However, she offered that the tacks were not there when she came on to the plant property that morning. Forester's daughter lives on the road in question. While I have taken into account the fact that Forester did throw tacks under the Foleno automobile, I am unwilling to find on the basis of Price's testimony that she was responsible for tacks appearing on plant premises as related by Price. It is noted that Forester was not a member of any committee established to aid the organizational effort at the Honaker plant.

Charlotte Foleno testified that as she was leaving work during the course of the strike striker Debby Wilson yelled, "Hey Charlotte, you might not ought to leave here by yourself . . . you might not get back if you know what is good for you . . . you won't be out running around by yourself."[36]

(4) Picket line conduct attributed to the unidentified

With respect to conduct originating at the picket line, it is noted that the record indicates that in addition to strikers the picket line was manned by others, including relatives, children and friends of strikers. Thus, some of the evidence offered in this respect, could conceivably have originated with nonstriking sympathizers. For example, while uncontradicted testimony establishes that there were no striking male employees at the Honaker picket lines,[37] Charlotte Foleno testified that in the course of the strike when she went to lunch she was followed by "two boys." Though Foleno was the office manager at the Honaker plant, she could not identify them. According to Foleno they simply followed her to the restaurant, sat down across from her, and when Foleno left, the boys returned to the picket line.

In addition, nonstriker Loretta Cooke, an employee at Russell, testified that as she was crossing the picket line and engaging in a conversation with Cecille Vest concerning the identity of newly hired employees in the plant someone from the picket line stated that they knew where Cooke lived. Doris Stensen claimed that on July 26, a woman on the picket line told her that if she "knew what was good for my health, I'd better stay home the next day."[38]

[34] Stensen's mother-in-law Juanita Pickett, a supervisor at the Russell plant, was in the car with her. Pickett did not testify.

[35] Stensen denied that her husband had a tire iron at the time, and she also denied placing a handgun on the dashboard in the course of the incident and threatening to shoot Laney's brains out. However, she admitted that a firearm was kept at all times in an open box on the seat of her automobile. My disbelief of Stensen is so strong as to warrant rejection of her further testimony that on July 26 someone on the picket line verbally threatened her.

[36] Although Foleno testified that Connie Brown was on the picket line that day, no foundation was laid tending to support a finding that Brown would have heard the remarks attributed to Wilson.

[37] See testimony of Connie Brown.

[38] Bill Dennison was placed on the picket line at the time, but only through prejudicially leading examination by Respondent's counsel. Any implications that Dennison condoned this conduct is weakened further by the absence of any foundation whatsoever which would reasonably warrant an inference that he would have overheard the comment. Dennison denied that any such threat was made in his presence.

Sue Wilson testified that on August 17 she left work early only to have 12 to 14 pickets gather "around" her car, calling her names, and waving their signs at her.[39]

Respondent called several witnesses who testified as to coercive language originating at the Honaker picket line. Thus, according to James Wolford, an employee of a vendor which sold refreshments to employees of Honaker, someone from the picket line called "do you value your life" as he passed. Pat Price testified that on July 24 someone in a crowd of 30 to 35 on the picket line hollered that they "was going to beat my ass . . . and they'd meet me up the road."[40] Jane Smith, who worked briefly during the strike at Honaker, testified that when she put her application in with the Company during the strike Connie Brown and another girl from the picket line were explaining the reason for the strike. While this was going on a girl on the other side of the picket line came over to the passenger's side of the window and said, "You'd better not go to work if you know what is good for you."[41]

(b) *Anonymous offenses to persons and property occurring away from the picket line*

The most serious of the offenses registered on this record pertained to conduct occurring at locations removed from the picketing. Thus, nonstrikers were subject to anonymous telephone calls of a threatening nature and damage to their automobiles. Although there was testimony as to shootings, in this respect, the evidence was either viewed as incredible or as devoid of convincing link with the labor dispute. As for property damage, it appears that in late July, a rash of such incidents occurred in connection with vehicles parked at the homes of nonstrikers. Thus, Rita Fields, a nonstriker at Honaker, testified that on July 31, paint stripper was placed on her car causing discoloration and damage. An offer of proof was entered to the effect that Fatema Rush, a nonstriker at the Russell plant, would testify that also on July 31 her right rear tire was slashed.[42] In a similar incident, Helen Russell, a nonstriker at the Russell plant, testified that in late July a tire was slashed on her husband's automobile. Also Mildred Hubbard, a nonstriker at Russell, testified that within that same time frame a tire was slashed on her car. Another Honaker nonstriker, Sandra Wallace, testified that in late July acid was thrown on her car. Finally, Barbara Warden, a nonstriker at the Russell plant, related that in late July a tire was flattened on her car and the word "union" was scratched on its surface, and Audrey Gilbert, a nonstriker at the Russell plant, testified that at some point in the strike, tacks were thrown in her driveway, causing three flat tires.[43]

Hazel Street, a nonstriker at Honaker, testified that in September, at approximately 2 a.m., the windshields were broken in her husband's car, her son's car, and her car. She further testified that having been awakened by the crash she and her husband identified two vehicles leaving the scene, namely, a blue car with a white stripe and a pickup truck of undisclosed color. Street testified that they obtained the tag number off of the pickup which was traced to a "Larry Hagey." No evidence is cited by Respondent linking Larry Hagey with the pickets or the strike at either location. An independent canvassing of the record fails to confirm any such connection. Respondent's Exhibit 22 has not been overlooked. Thus, this document was prepared by Jerry Couch, plant manager at Honaker and is a listing of union representatives and pickets whom he observed as being on the picket line during the course of the strike, together with a description of their vehicles and tag numbers. Included on that list is a Betty *Hagey*. Although it appears that Hagy was listed as having a maroon "P. U.," a description which I assume to be pickup, her name is spelled differently from that which appears in the official stenographic transcript for Mr. Hagey, and there is no independent evidence suggesting a relationship between the two. In the circumstances to link Larry Hagey with the picketing at either plant would be an act of raw speculation. Finally, it is noted that though the incident was reported to state police, no charges were levied against any individual in connection therewith.

Charlotte Perkins, a nonstriking employee at Honaker, testified that on August 22 a few days after Diane Harris inveighed on her brother, Edgar Phillips, to dissuade Perkins from crossing the picket line, she had two tires slashed on her automobile. Shirley Brown, also a nonstriker at Honaker, testified that on September 21, after the sister of a picket captain at Honaker had warned that

[39] This occurred when Wilson had stopped her car at the intersection to the main highway and her testimony fails to convince that her access was physically blocked by the pickets.

[40] Although Connie Brown and Diane Harris were named as present on the occasion in question and also Diane Harris was identified as having engaged in name calling, there was no evidence that Harris or Brown were in a position to overhear the above threat.

[41] Although Connie Brown was presumably on the other side of the car, and Smith testified that she said nothing after the remark was made, the scenario is not developed to the point of permitting clear inference that Connie Brown overheard the threat. In any event, I have grave misgivings as to the credibility of Jane Smith and am unwilling to accept her uncorroborated testimony. Although Smith testified that her sister-in-law was present at the time, the latter did not testify. Spencer Burke, Smith's boyfriend, testified to another occasion in which he was crossing the Honaker picket line and told "we'll get you" by an unidentified picket. Burke was an incredible witness, whose uncorroborated testimony is rejected.

[42] The offer of proof indicates that when Rush, together with her husband, took the tire to the plant on August 1, Vaney Laney volunteered, "It wasn't a knife, it was an ice pick." Laney denied making such a statement. Rush's husband did not testify. Laney indicated that he did have a conversation with the husband of Rush, when the latter brought the tire to the plant, but that said conversation was limited to an inquiry as to whether Laney knew who had damaged the tire, and Rush's expression of pique at having lost a day's work and wages in consequence of the slashing. I credit Laney.

[43] I did not regard Audrey Gilbert as a particularly credible witness. However, I am willing to accept that her car was damaged during the strike. Another aspect of her testimony is rejected. Thus, she claimed that on the evening of July 29, four shotgun pellets struck the roof of her home, leaving dents. It was my impression that in that respect Gilbert was testifying from personally held unconfirmed suspicion and deduction, rather than direct knowledge of the facts and, accordingly, her testimony was deemed unreliable. But even were her testimony to be believed, this record attests, through Respondent's witnesses, that the possession of weapons was not an unfamiliar phenomenon in this particular area, and I am not willing to conclude that simply because shots were fired at a time contemporaneous with the strike, the supporters thereof may fairly be deemed responsible. Such a conclusion would be unduly speculative.

she would get it, had the word "SCAB" spray painted on her car.

Rita Hess, a nonstriker at the Russell plant, testified that during the strike, she was awakened at approximately 1 a.m. by sounds coming from her driveway. She observed persons in her driveway preparing to cut her tires. The latter assertedly got into their car and departed when discovered. Hess testified that the automobile was a 1968 "Ford Galaxy car" and that the person on the passenger side had long, light-colored hair. Hess' testimony fails to disclose the color of that vehicle. Though she claims that her own automobile was damaged as the Galaxy left the driveway, she acknowledges that the incident was not reported to the police. Elements of Hess' testimony were viewed as suspect. The fact that Diane Harris drove a Ford Galaxy, and had shoulder length, long blonde hair would have been commonly known by nonstrikers. Although it is possible that Hess, in the middle of the night, could have picked out details suggesting the possibility that Diane Harris was involved, her testimony in this respect struck as too pat and, indeed, I have reservations concerning her description of the entire incident.

Brenda Dye, a nonstriking employee at Honaker, testified that on September 21, she discovered that her automobile had its bumper and tail lights painted red, with the work "SCAB" painted in red letters across the trunk. At the time, according to Dye, she was living with her sister. She testified that the night before, striker Betty Hagy visited her sister to borrow a "pattern" at the same residence where her automobile was damaged. She claims that on that occasion Hagy looked at her "real hard."

Bobby Hughes was not employed at either plant. However, his daughters worked at Honaker during the strike. He testified that on the last Saturday in August paint and acid was thrown on his truck, resulting in permanent damage to the vehicle. This occurred at the Hughes' residence. Hughes further testified that on a second vehicle, a broom handle or similar object was used to poke a hole in the radiator of his car while parked on the lot at the Honaker plant. This latter aspect of the testimony of Hughes is deemed incompetent, as plainly based on hearsay and personally held opinion. Scrutiny of his testimony discloses that his daughters used the car to drive to work that day, and that he discovered the radiator problem when they returned that evening, because the car was heating up. As his examination continued it became apparent that Hughes had simply deduced that the damage must have occurred at the plant. Hughes testified that his daughters did not know how the damage to the radiator occurred. Neither of his daughters was called to afford primary evidence as to their experience with the vehicle that day. Although Hughes testified that the vehicle was parked at the plant parking lot between 6:45 a.m. and 3:30 p.m. on the day in question, no foundation for his knowledge of this fact was offered.

William Ireson, a security guard, testified that while his vehicle was parked at the Russell plant his windshield was broken. At the time, Ireson claims to have been on duty and that his van was parked lengthwise within company property at the main entrance to the plant. No other incident of property damage within plant premises is disclosed by acceptable proof herein. The record does not include a photograph of the alleged damage done to Ireson's vehicle, and he failed to identify the date of this incident. Ireson as heretofore indicated was regarded as an unreliable witness. My mistrust is sufficiently deep to discredit the entirety of his testimony to the extent uncorroborated.[44]

Serious question exists as to credibility of testimony surrounding damage to an automobile of Jane Smith. The latter, for a brief period in September, crossed the picket line to work at Honaker.[45] Smith owned a "Corvette" automobile which was purchased for her by her boyfriend Spencer Burke Jr. On Thursday, September 7, in the middle of the night, the air was let out of two of her tires, there were cuts in the body of the car around the taillights, the hood was warped apparently due to being forced, the passenger door had been kicked and had a large scratch in it, and the carburetor had been filled with soap powder. In consequence of this incident warrants were sworn out agaisnt Connie Brown and Diane Harris.[46] The only evidence linking these nonemployee, union representatives with the incident appears in the testimony of Spencer Burke.

The vandalism occurred at the home of Smith in Richlands, Virginia, approximately a one-half hour drive from the Honaker plant, Smith testified that she first noticed the damage to the car the next morning when she woke up to go to work. According to Smith, she left the car that evening at approximately 11:30 p.m. before going to bed. Smith and Burke testified that that evening, Burke, together with a friend, were rehabilitating a second car owned by Burke which Smith intended to use in driving back and forth from the plant. The repair work was to be done at a garage in Swords Creek, which is located between Honaker and Richlands.

Burke, who at times material, had his license revoked, and who did not live at the same residence of Smith, testified that at approximately 2 or 2:30 a.m. as he and his friend were returning the second car to Smith, they turned down the hill leading to Jane Smith's home and observed that the hood was up on the "Corvette," the interior light was on, and two people "were in it." He

[44] Also noteworthy is the testimony of Phillip Lawson, cocounsel for Respondent, that several months before July 24, there were rumors that a strike was possible. As the rumors emerged, according to Lawson, he met with Jerry Couch and Fayne Farmer, a management official at Russell. Both were informed by Lawson to photograph property damage including "tire slashings, windshield—whatever happened," and to take a statement from the person affected and a photograph of the situation. Although Lawson testified that there were photographs in addition to those that were placed in evidence by Respondent, there is no indication that such a photograph was taken of the Ireson windshield, nor is there explanation as to why no such photograph was placed in evidence. The failure of Ireson to identify the date of the incident suggests that no report was made as per Lawson's instructions.

[45] I have heretofore discredited testimony that Smith had been warned by someone on the picket line that she had better not go to work if she knew what was good for her.

[46] Although the charges were scheduled for court hearing on several occasions, they were not pressed. An alleged eyewitness, who ostensively would have corroborated Burke in identifying Brown and Harris, declined to testify.

testified that as he had two collectors' model Smith & Wesson pistols in the car, his first instinct was to go to the "Corvette" and see if the guns had been stolen.[47] He testified that he noticed that the tires were flat, and that because the guns were in the "Corvette," he returned to the second car and without success he and his friend pursued the vandals.

A shift in Burke's testimony appeared when he was again questioned by Respondent's counsel as to what he observed when he first arrived at Smith's home that evening. The colloquy is set forth as follows:

> Mr. Lawson: Okay, I would like you to go back to where you first came up on them. How did you see him?
>
> Burke: Well, there was a street light at the house and the interior light was on in the car too and our headlights too. I got a real view of one of them and—
>
> Mr. Lawson: All right. I would like you to describe what you saw when you say you saw them in your headlights in the street.
>
> Burke: At the time, one was standing. The hood was on the car. The one in the back was huddled down about knee high to the rear right tire.
>
> As soon as we turned the corner they ran. I don't know what kind of car it was. The guy that was driving said it looked to be a green Gremlin or Pinto.[48]

In the darkness, and the quickness with which those responsible would have left the scene, Burke claims that he made a certain identification from 75–100 feet away of Brown and Harris. He claims that one was tall, husky, with long blonde hair, and the other had long, medium-length hair. He admittedly had never seen Harris before in his life.[49] The precise identification came the next day when Burke allegedly picked Harris and Brown out of the Honaker picket line. When again questioned as to how long he observed the two individuals at the car, Burke responded as follows: "When the lights turned the corner, they ran around the side of the hedge and went in the car . . . I had a pretty good look at them, especially a good look at the one on the right side of the car."

A further interesting aspect of the testimony of Burke pertains to the explanation that the second car was being repaired because Smith held concern as to the propriety of using the Corvette because of fears that it might be damaged. However, on the evening in question, the Corvette was admittedly left unlocked, with the keys and the Smith & Wesson revolvers in it, which Burke valued at $2000.

Diane Harris and Connie Brown deny being in the area on September 6 or 7 or having had anything to do with the damage of the Corvette.[50] I credit their testimony.

A further incident of anonymous conduct relates to nails thrown in Patsy White's driveway in the trailer park located across the road from the Honaker plant. White confirmed the testimony of Eva Lester that nails were discovered in her driveway.

The only evidence of personal battery in the course of the strike involved Ireson. Thus, he testified that on September 8, at approximately 12 midnight, he received a black eye while struck in the head with a rock at the Honaker plant. Ireson could throw no light on the identity of the individual that threw the rock. A somewhat strained attempt to link this incident with the Union is based on the admitted fact that Connie Brown and Diane Harris frequented the top of the hill to the rear of the plant during the day to observe trucks unloading. In this respect, Jerry Couch testified that on September 18 he observed Connie Brown and an unidentified individual on the top of the hill, and again on the following day. This, however, furnishes no basis for inferring that either they or any other agent of the Union were involved in the rock throwing incident in question.

c. *Other anonymous conduct*

Several witnesses called by Respondent testified that they were victims of anonymous phone calls during the strike. Nonstrikers Charlotte Perkins, Julia Cooke, Sally Breedlove,[51] and Rita Fields all testified that they began

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[47] Jane Smith, in recanting what she apparently had been told by Burke, made no reference to any pistols in the Corvette. Indeed, she testified that when Burke came down the hill Diane and Connie were observed, with one at the tire and the other at the end of the hood. She relates that "then they ran and Rick got out and got in the Corvette to chase them. . . . It wouldn't start . . . so he got Lawrence to take them [sic]." This phase of Smith's testimony is more consistent with a second, contradictory version afforded by Burke as to what he first observed in arriving at her house that evening.

[48] Note also that while Smith testified that Burke did not alone take up the chase in the "Corvette," because that car would not start, Burke testified that he went to the "Corvette," "took a look," and returned to the second car to begin the chase because he "didn't have no license to drive."

[49] Interestingly enough, Burke testified that on a previous occasion, when he visited the plant, Connie Brown and a bunch of pickets cursed him, with an unidentified individual hollering "We'll get you, I'll get you." Note the similarity between this incident and that which has been discredited as described by Jane Smith. However, Jane Smith does not corroborate that she was in Burke's presence when such a statement was made. Smith testified that she was with her sister-in-law when she was threatened. One wonders what Burke was doing in the vicinity of the picket line without Jane Smith, when he had no license to drive and lived quite a distance from the plant.

[50] Diane Harris admittedly changed the color of her hair, but neither the length nor style at some time during strike. Although Harris initially testified that this occurred some time between the start of the strike and her going to court on the complaint of Jane Smith, she subsequently testified that she could not recall whether this occurred before or after her first court appearance. Harris denied knowledge as to where Jane Smith lived at the time of the incident. She denied doing any damage to the car of Jane Smith on September 7, or having been with Connie Brown that morning. Brown did nothing to change her appearance. Although the change in Harris' appearance is suspicious, it fails to offset my strong disbelief of Burke and my impression that he was a thoroughly unreliable witness. To the extent that this anonymous act of vandalism is claimed to have been the work of Harris and/or Brown, I find that the credible proof does not exist substantiating any such conclusion. I would also note that the damage described here far exceeds that inflicted on property of any other nonstriker.

[51] Breedlove testified that in the first such call, though she could not identify the caller, she was referred to as a "scrawny ass." She claims that Charlotte Vance is the only person who had ever called her such a name. I am unwilling to infer on that isolated basis that Charlotte Vance, a picket captain, was responsible for the call.

receiving threatening, anonymous phone calls during the period between July 31 and early September.

In another incident, Jerry Couch, the plant manager at Honaker, testified that before employees reported for work on the morning of September 26, oil was on the pavement at the intersection leading to the Honaker plant. The oil was not absorbed until 9:30 p.m. Although Couch could not identify who was responsible for the above, he testified that Diane Harris and steering committee member Shirley Honaker were on the picket line that morning. In my opinion the evidence is insufficient to link the incident with the Union or any of its agents.

Testimony adduced by Respondent indicates that two bomb threats were made at the Honaker plant. The first occurred on August 1 at 1 p.m. Iona O'Quinn, an office employee, testified that she answered the phone and was told that a bomb was planted in the factory and set to go off at 1:45 p.m. The employees were evacuated to the parking lot where they remained outside for some 30 or 35 minutes. The threat occurred in the context of an unusual demonstration by the strikers. According to the credited testimony of Plant Manager Couch, while pickets in the past in small numbers had repaired from the intersection to the front of the plant at no time prior to August 1 had this occurred en masse. Union representative Dennison acknowledged that a press conference had been arranged previously for 1:30 p.m., on August 1, at the picket line. It appears that prior thereto a large group of pickets marched to the plant itself where they conducted a brief demonstration at times reasonably contemporaneous with the bomb threat. Connie Brown, according to Couch, was on the picket line when the bomb threat was received, but prior to that had left the picket line with another unidentified individual who did not return.

Couch testified to a second bomb threat on September 5. In this regard, Couch testified that Connie Brown was not on the picket line when the second threat was received, but that she arrived shortly thereafter.

In addition to bomb threats, two plant security guards testified that they detected separate shooting incidents in the vicinity of the Russell plant during the strike. Thus, Larry Browning testified that shortly before termination of the strike, on November 12, while he was on duty at 8 p.m. he heard three shots fired from a field directly in front of him as he was sitting in his car near the main gate to the Russell plant. He claims to have seen a muzzle flash on two such shots, and that in all 8 to 10 shots were fired, which he approximated to have struck the ground within 10 feet of him.[52] It was the sense of Browning's claim that he immediately telephoned the Lebanon police and they responded in about 3 minutes. The police neither saw anything nor found anything.

Plant guard Ireson, who previously has been deemed incredible, testified to two incidents involving shootings in the area proximate to the Russell plant. Ireson testified that in August, at dusk, when he first started working there, "three shots were fired at me from an old house on the top of the hill near the Russell plant." Ireson did not know who fired the shots but claimed that he called the police. Ireson related that the shots hit "two or three feet in front of him." He asserted that although the police officer "dug around" to try and find the bullets none were located.

Ireson testified to another occasion, when shots were fired at the Company's water tower. Although two other guards were described as on duty at the time, neither was called as a witness. Ireson declared that 10 to 12 shots were fired. While Ireson claims that the incident occurred "one evening late," he incredulously asserted that one of the security guards took a pair of binoculars to see if there were any holes in the water tank while Ireson called the police. According to Ireson, the police found holes in the water tower and also discovered "three weapons in the house" on the hill. No search of the house ensued, according to Ireson, as the police explained that a warrant would be necessary. No indication exists that Respondent attempted to secure a warrant or the identity of the occupants or owners of the house on the instant record. These omissions are somewhat curious. In addition, while untoward events during the course of the strike were to be made the subject of a report, here again Ireson could not isolate the incident as to time. I am not convinced that these shootings had anything to do with the union campaign.

d. *Concluding analysis*

To my knowledge, this is the first case in which the *Laura Modes* defense has been recognized as viable in the context of a strike for the sole objective of securing representational rights gained by employees through an election conducted under the auspices of the National Labor Relations Board. Before considering the precedent, it is noted that the injection of this issue in this type of proceeding and at this point in the course of struggle for representation collides with the general charge that questions concerning resolution be expeditiously resolved. Certainly, there is a technical legal distinction between the procedures through which the Board polices the atmosphere in which votes are cast and results determined pursuant to election petitions, and the unfair labor practice procedure through which those results are enforced by Board remedy. Nonetheless, working men and women who have struggled long and hard to secure the Section 7 right to bargain through an agent of their own choosing would naturally find it difficult to perceive of such distinction. Their confidence in the peaceful procedures of the National Labor Relations Board is hardly enhanced by delays inherent in litigation of complex issues, which might be disposed of elsewhere. This is not to say that the *Laura Modes* doctrine is un-

[52] Serious question exists as to whether this act related to the strike. The strike ended in mid-November, and despite the plethora of incidents litigated on this record, apart from the discredited testimony as to an incident occurring in Bristol, Virginia, as described by Jane Smith and Burke, the most recent incident occurring in connection with the strike at the Russell plant was on October 12 and involved the picket line confrontation involving Vaney Laney, Doris Stensen, and the latter's husband. Furthermore, no employees or pickets were present at the time of the incident described by Browning. There unquestionably would be a tendency to attribute to the strike every anonymous act of vandalism which occurred in areas proximate to the plant at times contemporaneous with the strike. Ordinary experience reflects the danger of endorsing such conjecture.

sound generally. However, the problem with that principle, when invoked to an ongoing postelection dispute over representation, is the wealth of litigation invited by standards so vague as to hinder: (1) rejection of the defense as insubstantial before hearing, (2) exclusion of time consuming trivia at hearing, and (3) distillation of an uncertain policy into legal conclusions after the record is made. For, the dimensions of this doctrine transcend qualitative assessment or rational explication. Ultimately, the result will turn upon feel and personal reaction, judgmental factors which themselves nurture the delaying influences of extended deliberation, indecision, and division within the the decision-making process. Concern exists in this quarter as to whether the statutory policy encouraging employees to utilize Board election procedures will suffer disproportionately to the gains to be realized by application of *Laura Modes* to conduct occurring after an Board election and in furtherance of a dispute limited in objective to employee efforts to enforce the choice made pursuant to the statutory scheme.

Strike violence, apart from *Laura Modes*, has always been regulated through civil, criminal, and statutory sanctions. Rather than inject the former as a further obstacle to summary enforcement of certifications under Section 8(a)(5), misconduct related thereto could be relegated to 8(b)(1)(A) proceedings, in which event, should the evidence reflect an established pattern of intimidation and violence, conventional redress could include an admonition that the fitness of the statutory representative would be subject to future review in the event of reemerging substantial misconduct.[53]

As matters now stand, however, the procedural history of this case demands that findings be made with respect to the above misconduct on the basis of extant precedent. Regrettably, this determination can only be made by reconciliation of the above findings against diverse fact patterns, with final analysis turning more on my perception of trend than logically communicated assessment of factors which, though deemed relevant, since *Laura Modes* have been the object of shifting values and dispositions more aptly described as conclusionary than elaborately rationalized.

First, the landmark case of *Laura Modes*, the bargaining order was withheld in the face of overt acts of misconduct by nonemployee union representatives in the course of an initial organizational campaign. However, unlike the instant case, a Board election was not involved, and the union established its majority on the basis of signed authorization cards. During the course of that campaign, the employer reacted with serious unfair labor practices undermining the union's majority. Indeed, on the day after the employer assembled its employees, advising them that it had no intention of meeting with or entering an agreement with the union, a union business agent, together with eight nonemployee union members invaded the plant, assaulting one of the owners of the business and jostling others. On the following day a strike began. During the course thereof, a striker pointed out a second owner of the business to four to nine unidentified individuals, who thereafter assaulted and beat the latter. The Board, while concluding that, in the circumstances, the employer's refusal to confer recognition violated Section 8(a)(5), viewed the "atmosphere of violence and intimidation" inspired by the Union as precluding the grant of an affirmative bargaining order. In doing so, the Board stated:

> [W]e cannot, in good conscience, disregard the fact that, immediately before and immediately after it filed the instant charges, the Union evidenced a total disinterest in enforcing its representation rights through the peaceful legal process provided by the Act in that it resorted to and/or encouraged the use of violent tactics to compel their grant. Our powers to effectuate the statutory policy need not, we think, be exercised so single-mindedly in aiming for remedial restortation of the *status quo ante*, that we must disregard or sanction thereby union enforcement of an employer's mandatory bargaining duty by unprovoked and irresponsible physical assualts of the nature involved here. We recognize, of course, that the employee's right to choose the Union as their representative survives the Union's misconduct. But we believe it will not prejudice the employees unduly to ask that they demonstrate their desires anew in an atmosphere free of any possible trace of coercion. . . . We conclude that, in the particular circumstances of this case, the policies of the Act and the legitimate interest of the public and the parties will best be served by denying to the Union the right to invoke our statutory processes in aid of a demand for recognition as bargaining representative of Respondent's employees unless and until it demonstrates its majority among those employees through the Board's election procedures.[54]

The newborn doctrine was again considered in *United Mineral & Chemical Corp.*, 155 NLRB 1390 (1965), where the Board, in discounting serious misconduct on the picket line during a 65-day strike, distinguished *Laura Modes*. The Board reasoned that, there, the union persisted in efforts to enforce its statutory rights through the Board processes, and further observed that the four to five incidents of serious misconduct were attributable to only two strikers, and all took place "in the heat of picket line tensions, and do not appear to be part of a plan of intimidation." Accordingly, the Board having also found that the union obtained a majority on a basis of signed authorization cards, and that the employer engaged in unfair labor practice undermining the union and evidencing a rejection of the principles of collective bargaining, entered an affirmative bargaining order. However, that order was not enforced by the Court of Appeals for the Second Circuit.[55] The court disagreed with the Board's evaluation of the misconduct, indicating disapproval of the Board's conclusion that the evidence failed to reveal that the strike misconduct was "part of a plan of intimidation." The court, after weighing such miscon-

[53] See, e.g., *Great Chinese American Sewing Co.*, 227 NLRB 1670, 1671 fn. 6 (1977).

[54] 144 NLRB at 1596.

[55] 391 NLRB 829 (2d Cir. 1968).

duct against the employer's unfair labor practices, denied enforcement of the bargaining order.

Later, the Board itself applied *Laura Modes* to picket line misconduct in *Aircraft Mantel & Fireplace Co.*, 174 NLRB 737 (1969). In that case there had been no bargaining history, but during an initial organizational campaign, the union obtained signed authorization cards from a majority. As in *Laura Modes* there was no Board election. However, a strike was called under conditions in which the employer would clearly have been apprised of the extent of the Union's representative status. Although the employer's refusal to extend recognition was not accompanied by independent unfair labor practices calculated to undermine the union's majority, an 8(a)(5) violation was found on the, since beclouded, theory that the employer was not free to assert "a genuine or sincere doubt that the Union did have majority authorization." The Board adopted the trial examiner's conclusion that redress of this 8(a)(5) violation would be withheld because of numerous acts of violence and misconduct on the picket line, including vandalism to respondent's premises, the placement of nails under vehicles entering said premises, mass picketing, threats of bodily harm, the paint bombing of the homes of nonstrikers, and the throwing of a cup of coffee by a nonemployee union representative into the face of the employer's owner. In that case, the Board affirmed the conclusion that the intimidating misconduct was part and parcel of a "plan of intimidation" unprovoked by the employer, and occurring in a context in which the employer's refusal to bargain was the sole unfair labor practice, and did not itself reflect ". . . the basis for finding antiunion animus." The trial examiner, in applying *Laura Modes* and withholding a bargaining order, stated:

> . . . I find nothing from which I would assume in the light of everything else that happened that the Union in this case had a genuine and continuing interest in having its statutory right to recognition enforced or determined by the Board's process.[56]

In *Allou Distributors*, 201 NLRB 47 (1973), *Laura Modes* was followed in the context of an established bargaining relationship. There, the employer had unlawfully induced decertification activity by promising benefits to induce withdrawals from the union and by its direct involvement in the preparation and circulation of a petition in support of decertification. In consequence of that activity, a decertification petition was filed with the National Labor Relations Board. By virtue of these unfair labor practices, the company's refusal to recognize on the basis of the doubt of the union's majority was found to be a violation of Section 8(a)(5). However, the facts also revealed that the union, during the decertification activity, was informed by an employee that he alone had remained sympathetic to the union, and that all others had signed a petition to leave the union. The next morning the union responded with six nonemployee union representatives who literally invaded the company's premises, confronting, in full view of others, employees responsible for the decertification activity and threatening them and their families with reprisals if they persisted in their efforts to withdraw from the union. In addition, one of the owners was physically assaulted by two union representatives. The conduct of the union representatives was described by the administrative law judge as ". . . the invasion of the Company's warehouse . . . by a relatively large number of union representatives, who ignored the protest of the employer, who effectively disrupted the employees' normal work activities, and who behaved as if they were in control of the premises, created a potential for violence and placed the employees in fear of physical harm and loss of employment."

In another case of overt violence by nonemployee union officials, the Board revoked a union's decertification. See *Union Nacional de Trabajadores (Carborundum Co.)*, 219 NLRB 862 (1975). In that case, though the union had been recently certified in a Board-conducted election, the violence erupted in consequence of matters unrelated to a continuing recognitional dispute or to any other unlawful conduct on the part of the employer. The Board in revoking the certification relied not only on the "brutal and unprovoked physical violence" established on the record before it but also on the basis of that particular labor organization's "extensive record of similar aggravated misconduct in other recent cases" both of which "evinced an intent to bypass the peaceful methods of collective bargaining contemplated in the Act and commonly accepted and practiced by labor organizations and employers throughout the country."[57]

The reluctance of the Board to apply *Laura Modes* to strike misconduct, where provoked by serious unfair labor practices on the part of the employer, was plainly suggested in *Grede Foundries, Inc.*, 235 NLRB 363, 364 (1978). The labor organization in that case had enjoyed an established bargaining history dating back some 15 years. The Board granted a bargaining order, stating: "[I]t is beyond peradventure that but for the Company's antecedent unfair labor practices the Union would not have engaged in a strike to protest the Company's unlawful acts, and thus would not have been in a position to commit the violations . . . which accompanied its strike." As further observed by the Board:

> [I]t was the Company that set in motion those events which ultimately resulted in the multiplicity of violations of the Act found herein, and which were begun for the express purpose of undermining the collective-bargianing process by unlawfully attempting to deny to its employees the right to representation by their collective-bargaining agent which had represented them continuously for almost two decades.

The trepidations by the union during the course of the strike in that case included mass picketing and physical obstruction of access to the plant. Threats were made by a nonemployee union representative and, in one instance, that same union representative threw a brick from the picket line, in the presence of other strikers, after which

[56] 174 NLRB at 744.

[57] 219 NLRB at 863.

a nonstriker was followed by him and other strikers with tailgating so close as to actually make contact with the bumper of the nonstriker's vehicle. It also appeared that threats of physical harm to nonstrikers and their families were continuous, property was vandalized, nonstrikers were physically assaulted, and roofing nails were scattered by nonemployee union representatives. On one occasion, the tailgating of an automobile of a nonstriker was accompanied by the use of a slingshot against it. A nonemployee union representative was identified as involved in the throwing of a board with steel spikes under the front tires of a truck crossing the picket line and in spraying an irritating substance into a car carrying nonstrikers, as well as the placement of a firecracker on the side of a nonstriker's autombile as it passed through the picket line. A nonemployee union representative was also found to have shot pellets at automobiles of nonstrikers.[58]

In applying *Laura Modes* and withholding an 8(a)(5) remedy, the administrative law judge concluded:

> . . . that this is a case in which, soon after the issuance of the complaint against the company, the Union lost interest in enforcing employee rights by lawful means and called the strike with a deliberate plan of intimidation and violence which continued for over a month and resulted in a multiplicty of violations of the Act by the Union hardly less grave than the company unfair labor practices which gave rise to the strike.

A Board panel, Chairman Fanning and Member Jenkins, with Member Murphy dissenting, reversed as to this issue. The majority agreed with the administrative law judge that five factors are relevant to consideration of whether to deny a bargaining order because of misconduct in the face of an 8(a)(5) finding. They are as follows:

1. The extent of the Union's interest in pursuing legal remedies.
2. Evidence of deliberate planning of the acts of violence and intimidation attributable to the Union.
3. Whether assaults by union advocates were provoked.
4. The duration of the Union's misconduct; and
5. The relative gravity of the Union's misconduct as opposed to that of the Company.[59]

The Board majority nonetheless disagreed with the result reached by the administrative law judge in applying these standards to the facts involved and granted the 8(a)(5) bargaining order.

In *New Fairview Hall Convalescent Homes*, 206 NLRB 688 (1973), the administrative law judge withheld a bargaining order under authority of *Laura Modes* in the face of what he considered to be "serious acts of misconduct" during a strike. He relied on the following incidents of misconduct perpetrated in the main by acknowledged union representatives:

> . . . I find and conclude that Union Representative Brown accompanied by striking employees forcibly entered the Employer's nursing home during the strike; Union Representative Brown accompanied by striking employees and others followed nonstriking employees to and from work and repeatedly threatened them with physical harm and property damage; striker Dean, also picket captain for the Union, called in a bomb scare to the nursing home during the strike; Union Representative Ciulla threatened nonstriking employee Rich with property damage; Union representatives participated in mass picketing, blocking the ingress and egress of nonstrikers and banging on cars: Union Representative Morico kicked a car and cursed at and threatened management and, thereafter, attempted to run one of the Company's representative off the road during the strike; striker Dean threw small rocks or pebbles at a supervisor's car attempting to leave the facility during the strike; strikers Mary J. Fazzino and Linder Alger assaulted a representative, nonstriker, and damaged her property; and union representatives threatened, followed and harassed management's representatives as they attempted to enter and leave the facility. And, as found *supra*, . . . even before the strike union representatives repeatedly attempted to enter the Employer's facility without permission.[60]

The Board found that the employer violated Section 8(a)(5) by rejecting the Union's demand for recognition in the face of designation by a majority through signed authorization cards and thereafter engaged in pervasive and extensive acts of coercion and restraint and interference with employee rights so as to undermine their support of the Union. The Board reversed the administrative law judge's conclusion that a bargaining order was inappropriate in the face of the aforedescribed strike misconduct. In rejecting *Laura Modes*, the Board stated as follows:

> We do not condone any picket line violence, and the processes of this Board are available to prevent its recurrence, as is evidenced by the 8(b) proceeding herein. But we also are reluctant to deprive a substantial group of employees of the benefits of collective bargaining because of the misconduct of a few miscreants. Here, looked at in perspective, there were but few instances of misconduct by a relatively small proportion of strikers, which occurred only sporadically in the context of a 4-month long strike and against the background of Respondent's frequent and recurring unfair labor practices. Viewed in that light, while recognizing that the matter is not altogether free from doubt, we have

[58] In addition to the foregoing, the Union was found not responsible for extensive damage of an anonymous nature experienced by nonstrikers with respect to their property away from the picket line. Thus, one night three nonstrikers discovered that their cars had been damaged by fire. Later, another nonstriker awoke to find the porch of her apartment on fire which resulted in an explosion and complete destruction of her apartment.

[59] See also *Livingston Shipbuilding Co.*, 244 NLRB 119 (1979).

[60] 206 NLRB at 752.

concluded that the extraordinary sanction of withholding an otherwise appropriate remedial bargaining order would not best effectuate the policies of the Act.[61]

In *Great Chinese American Sewing Co.*, 227 NLRB 1670 (1977), the Board found that strike misconduct did not reflect a sufficiently total disinterest on the part of the union in pursuing the "peaceful legal process provided by the Act . . . and hence, did not warrant withholding an otherwise appropriate remedial bargaining order." The Board indicated, however, that "a further repetition of conduct attributable to the Union in cases coming before the Board will be scrutinized with a view to withholding our remedial process."

Under the above holdings, I am not convinced that *Laura Modes* affords relief to Respondent herein. The strike herein did involve serious misconduct, but the latter for the most part was anonymous and effected away from the picket line and inferentially linked to the strike by virtue of timing and the fact that nonstrikers had been victimized. Any finding that union representatives contributed to an atmosphere of violence or intimidation is handicapped by the fact that direct evidence links their misdeeds to sporadic incidents and that which could not be viewed as extraordinary in the tense atmosphere created by a strike at two locations in the face of an employer's continued operation transpiring over a period of almost 4 months. In contrast to the anonymous conduct, the conduct of strikers and their supporters at the picket line was, for the most part, tranquil and, despite abusive language and threats, it is noted that the threats were scattered. Thus, threatening language was attributed to unidentified strikers on only four occasions,[62] by a nonemployee union representative on one occasion,[63] a picket captain on one occasion,[64] and only one instance where a threat was uttered by an identified striker.[65] Beyond the foregoing, aggravated vandalism was experienced by nonstrikers who were victimized by anonymous phone calls and damage to their automobiles. Also of unknown origin, was an oil spill and two bomb threats. At the same time, however, the property of Respondent was respected, physical assaults upon nonstrikers were absent, and there was no mass picketing foreclosing ingress and egress to the plant.

With respect to the anonymous conduct, it would be difficult to conclude that all was totally divorced from the strike action. At the same time, however, it does not necessarily follow that *every* act of vandalism sustained by a nonstriker during a lengthy strike was at the hands of strikers, union representatives, or others subject to control of the latter. Reliance on anonymous conduct to influence a hard fought representation dispute is always hazardous and may well encourage sinister behavior on the part of elements in a community that may, perhaps, oppose unionization. In any event, vandalism is often senseless and without ulterior motive, and the possibility is ever present that at least some of the malicious mischief of an anonymous nature herein was a matter of coincidence. There is also the possibility in a case such as this where relatives, friends, and children are actively engaged in support of the strikers, that forces are unleased which are beyond the knowledge and control of the union, or indeed, even the strike participants. In short, third party conduct is a dangerous predicate for application of the remedial disqualification envisioned by *Laura Modes*.

In any event, even if the third party conduct evidenced on this record by credible proof were attributable to the Union, the Board has heretofore etched its concern as to the applicability on *Laura Modes* to strike misconduct. Only once has the Board withheld remedy in connection with a recognitional strike.[66] In that case, however, there was no Board election and the refusal to bargain charges were not filed until some 5 months after the violent strike began. Furthermore, the employer had engaged in no unfair labor practices reflective of animus, and, indeed, might not even have been guilty of a refusal to bargain under the present state of law.[67] In stark contrast to *Artcraft Mantle*, the Board declined to follow *Laura Modes* in *Grede Foundries*, supra, and *Fairview Nursing Home*, supra.[68] This misconduct involved here did not measure up to the atmosphere of intimidation presented in either of the latter cases. The evident trend away from a withholding of remedial processes in consequence of strike violence is not only consistent with the fact that the "fitness" of the exclusive representative is the focal point of *Laura Modes*, but comports with results in other areas where the Board has been called upon to exercise its discretionary remedial authority. Thus, in *Union de Tronquistas Local 901 (Lock Joint Pipe Co.)*, 202 NLRB 399 (1973), the Board declined to direct a union to afford backpay to employees who sustained a loss of work as a result of strike violence. The Board stated as follows:

> The extension of backpay liability to a situation where, as here, only picket line misconduct has occurred involves important considerations going to the heart of the right to strike under Sections 7 and 13 of the Act. Those sections of the Act have been called the safety valves of labor management relations. Emotions run high among those for and those against the union. Regrettable [sic], sometimes there is violence and the threat of violence. This we deplore and in no way condone. However, adequate remedies under the Act other than backpay exist to prevent the occurrence of violence without interference with the right to strike.
>
> . . . .
>
> To do more, in our opinion, runs the risk of inhibiting the right of employees to strike to such an

[61] 206 NLRB 688, 689 (1973), affd. 520 F.2d 1316 (2d Cir. 1975). See also *General Iron Corp.*, 224 NLRB 1180 (1976).

[62] See testimony of Wolford, Stensen, Cooke, and Price.

[63] See testimony of Dell

[64] See testimony of Shirley Brown.

[65] See testimony of Foleno.

[66] *Artcraft Mantle & Fireplace Co.*, supra.

[67] See *NLRB v. Gissel Packing Co.*, 395 U.S. 298 (1969).

[68] See also *World Carpets of New York*, 188 NLRB 122 (1971); *Pacific Abrasive Supply Co.*, 182 NLRB 329, 331 (1970); *Martin Arsham Sewing Co.*, 244 NLRB 918 (1979).

extent as to substantially diminish that right. For the misconduct of a few pickets may be sufficient to find the Union in violation of Section 8(b)(1)(A) and enough to intimidate many employees . . . . Faced with this financial responsibility, few unions would be in a position to establish a picket line. In our opinion, union misconduct of this nature, while serious, does not warrant the adoption of a remedy so severe as to risk the dimunition of the right to strike, a fundamental right guaranteed by Sections 7 and 13 of the Act.

Whether the withholding of access to the remedial process of the Board under *Laura Modes* would serve to impede the statutorily protected right to strike may well be debatable. But the thinking of *Lock Joint Pipe*, may come into play more directly when one considers the impact of *Laura Modes* upon employee resort to the peaceful representation procedures of the Board. Here, for example, the employees rather than resort to other forms of pressure elected to secure union representation through those processes. Thus, the representation petition was filed in June 1978 and the election conducted in August 1978. Despite overwhelming designation of the Union, a certification of representative did not issue until June 1979. The Union demanded negotiations on June 20 and, not having been extended the courtesy of a clear expression of position by Respondent, finally struck on July 24.[69] To date, employees have not reaped any of the benefits of their freely expressed choice, and it is predictable, in the most absolute terms, that no final answer will be afforded in the near future. Although the Employer's refusal to bargain in this case did not occur in the context of collateral unfair labor practices, and itself was free from union animus, its conduct in that regard contributed to delay, prejudiced employee choice, and contributed exclusively to the determination of employees to resort to self-help. In my opinion, *Laura Modes*, if at all relevant to postelection strikes which merely seek employer compliance with a certification, should stand on no different footing than recognitional strikes provoked by egregious, pervasive, or other employer unfair labor practices precluding the conduct of a fair election. In the latter, application of *Laura Modes* has no impact upon, and does not render futile, the pursuit of representation claims through Board procedures. In the former, however, the dishonor of a certification, whether or not in good faith, also creates a volatile condition suggesting to employees that time expended in the representation proceeding was futile. The resulting unrest in either type of recognitional dispute carries the potentional for strike action with its inherent proclivity for violence. To apply *Laura Modes* to such postcertification strikes is to send a clear message to employees that patient adherence to National Labor Relations Board representation procedures has produced a nullity. At a minimum, that result ought to be reserved to unmistakably extreme, egregious conduct, which is directly traceable to the designated union. Only in such circumstances should employees, several years later, be required to climb that ladder anew.

Based on the foregoing, I am convinced that in order to preserve the integrity of the Board's election procedures, union excesses in the course of the strike to enforce a certification should be judged with no greater stringency than applied where the union's claim for representation is based on *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969), and more serious offenses to the Act by employers. Here, the misconduct attributable directly to union representatives, its agents, and the picket line was more sporadic and less drastic than the pattern which confronted the Board in *New Fairview Hall Convalescent Home*, 206 NLRB 688, enfd. sub. nom. *Donovan v. NLRB*, 520 F.2d 1316 (2d Cir. 1975). Furthermore, even if the Union be deemed vicariously responsible for the entirety of the anonymous conduct established by credible evidence herein, the totality of the misconduct would fall short of the oppressive pattern which faced the Board in *Grede Plastics*, 235 NLRB 363 (1978). In neither case was *Laura Modes* deemed controlling, and in each the Board remedied the employer's 8(a)(5) violation by affirmatively ordering the employer to recognize and bargain with the Union. A similar result is warranted here.

Conclusions of Law

1. Honaker Mills, Division of Top Form Mills, Inc. is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. International Ladies Garment Workers Union, Upper South Department, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. All production and maintenance employees employed at the employer's Honaker, Virginia location; but excluding office clerical employees, technicians, sales people, profesional employees, guards, and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. Since June 6, 1979, the above-named labor organization has been and is now the certified and exclusive representative of all employees in the aforesaid appropriate unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing, during June and July 1979 and at all times thereafter, to recognize and bargain collectively with the above-named labor organization as the exclusive bargaining representative of all employees in the appropriate unit, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

6. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

The Remedy

Having found that Respondent had engaged in and is engaging in unfair labor practices within the meaning of

[69] Although Respondent claims that the Union's delay in filing the instant 8(a)(5) charges til August 15, some 3 weeks after the strike began, evidenced a disinterest in utilizing the peaceful processes of the Board, any such view must be considered in the light of Respondent's persistent and continuing failure to afford the Union the benefit of direct communication as to whether or not it would honor the certification.

Section 8(a)(5) and (1) of the Act, it shall be recommended that it be ordered to cease and desist therefrom and, on request, to bargain collectively with the Union as exclusive representative of all employees in the appropriate unit and, if an understanding is reached, to embody such understanding in a signed agreement.

In order to assure that the employees in the appropriate unit will be accorded the services of their selected representative for the period provided by law, the initial period of certification shall be construed as beginning on the date Respondent commences bargaining in good faith with the exclusive representative in the appropriate unit. See *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962); *Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817 (1964); *Burnett Construction Co.*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965).

As indicated, the General Counsel claims extraordinary relief in the form of partial reimbursement to the Board and the Union of reasonable counsel fees, salaries, witness fees, transcript and record costs, printing cost, and other costs and expenses to be determined at the compliance stage. The relief sought by counsel for the General Counsel is limited, however, to the cost incurred with respect to only two of Respondent's defenses both of which are characterized as "frivolous attempts to avoid its bargaining obligation." The first such defense relates to the claim founded upon the erroneous description of the unit in the certification issued by the Board. The second relates to Respondent's attempt during the hearing to litigate evidence regarding an investigation by the United States Department of Labor of certain activity regulated by the Landrum-Griffin Act. This proceeding was concerned in its essential respects with Respondent's defense based on *Laura Modes*. Other matters, even if viewed as frivolous, did not burden the record beyond the de minimus. It is also a fact that Respondent's counsel, on being cautioned by me that unnecessary delays would not be countenanced, reacted thereafter in a cooperative vein, while contributing positively to the expeditious conclusion of the hearing. Accordingly, having first hand knowledge as to the manner in which this cause was litigated, it is the opinion of the undersigned that the General Counsel's request for extraordinary relief in the present circumstances would neither enhance the administrative process nor effectuate the policies of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[70]

ORDER

The Respondent, Honaker Mills, Division of Top Form Mills, Inc., Honaker, Virginia, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with International Ladies Garment Workers Union, Upper South Department, AFL–CIO, as the exclusive bargaining representatives of its employees in the following appropriate unit:

> All production and maintenance employees employed at the employer's Honaker, Virginia location; but excluding office clerical employees, technicians, sales people, professional employees, guards and supervisors as defined in the Act.

(b) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the above-named labor organization as the exclusive representative of all employees in the appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its Honaker, Virginia facility, copies of the attached notice marked "Appendix."[71] Copies of the notice, on forms provided by the Regional Director for Region 5, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[70] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[71] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
AN AGENCY OF THE UNITED STATES GOVERNMENT

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
> To form, join, or assist any union
> To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT refuse to bargain collectively concerning rates of pay, wages, hours and other terms and conditions of employment with International Ladies Garment Workers Union, AFL–CIO as the exclusive representative of the employees in the bargaining unit described below.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, on request, bargain with the above-named union, as the exclusive representative of all employees in the bargaining unit described below, with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

> All production and maintenance employees employed at the employer's Honaker, Virginia location; but excluding office clerical employees, technicians, sales people, professional employees, guards and supervisors as defined in the Act.

HONAKER MILLS, DIVISION OF TOP FORM MILLS, INC.

Central Mack Sales, Inc., Central Truck Leasing Corporation, North Carolina Coastal Motor Lines, Inc., and D. Thomas Bailey Sr. *and* International Union of Operating Engineers, Local 465, AFL–CIO, affiliated with International Union of Operating Engineers, AFL–CIO. Cases 11–CA–9325, 11–CA–9385, and 11–CA–9638

14 December 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS ZIMMERMAN AND DENNIS

On 19 March 1982 Administrative Law Judge Robert M. Schwarzbart issued the attached decision. The Respondent and the General Counsel filed exceptions and supporting briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions,[2] as modified herein, and to adopt the recommended Order.

The judge found that the Respondent violated Section 8(a)(3) and (1) of the Act by refusing to reinstate unfair labor practice striker Andrew Blalock even though he engaged in picket line misconduct. For the reasons stated in our respective opinions in *Clear Pine Mouldings*, 268 NLRB 1044 (1984), we do not agree.

Briefly, the judge found the facts to be as follows. At approximately the 5 p.m. quitting time, Blalock, who had been picketing with other employees near the Respondent's property, came though a double gate onto the Respondent's property and began cursing loudly and making gestures at employees as they left the building to reach their cars. He was observed to be holding either a stick or an iron bar. Employee Wayne Lewis came onto the premises and led Blalock back to the gate. Then Blalock "beat on" employee C. W. Pittman's car as it exited the gate and did $200 worth of damage.

The judge, applying then-current Board law, found that Blalock's conduct was not sufficiently egregious to warrant the Respondent's failure to reinstate him. In *Clear Pine Mouldings*, we held that henceforth we would apply the test the United States Court of Appeals for the Third Circuit set forth in *NLRB v. W. C. McQuaide, Inc.*,[3] and find that an employer is justified in not reinstating a striker whose "misconduct is such that, under the circumstances existing, it may reasonably tend to coerce or intimidate employees in the exercise of rights protected under the Act."[4]

We find that Blalock's conduct clearly meets this test. Blalock intentionally took a club and used it to inflict $200 damage to nonstriking employee Pittman's automobile. This conduct clearly tended to coerce or intimidate employees in the exercise of their protected right to refrain from striking. The fact that the strike was an unfair labor practice strike does not warrant a different result. In our view the Act should not protect such obviously intimidating conduct as using a weapon to damage a fellow employee's vehicle.[5] Accordingly, we modify the judge's remedy to provide that Andrew Blalock is not entitled to be made whole for any loss of earnings resulting from the Respondent's failure to reinstate him.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Central

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] In its exceptions the Respondent contends that the judge had three private conferences with the General Counsel some time during the hearing which prejudiced the Respondent. The Respondent did not, however, raise this claim of impropriety until after the judge issued his decision. In so doing, the Respondent did not comply with the requirements of Sec. 102.37 of the Board's Rules and Regulations. Accordingly, we find that the claim was not timely raised. *NLRB v. Sanford Homes for Adults*, 669 F.2d 35 (2d Cir. 1981).

Chairman Dotson finds that the private conferences raised in the Respondent's exceptions were not prohibited ex parte communications under Secs. 102.127(b), 102.129(b), and 102.130(c) of the Board's Rules and Regulations. The Respondent admits it received prior notice of the meetings and consented to them. To the extent the Respondent contends that it unwillingly permitted the third conference between the judge and counsel for the General Counsel, Chairman Dotson finds the claim to be untimely. Chairman Dotson deems the Respondent's contention to be similar to that of a request for disqualification and that the Respondent was obligated to promptly raise its objection by filing an affidavit with the judge prior to his decision.

In sec. III,A,7,e, of his decision and in the section entitled "The Remedy," the judge inadvertently failed to include Ernest Hollifield's name in the list of employees that the Respondent unlawfully laid off. We correct this error.

We agree with the judge's finding that the Respondent unlawfully refused to bargain over the effects of the sale of part of its business. We do not rely, however, on his entire rationale, but rely on his finding that Thomas Bailey Sr. and his attorney gave Union Representative Ellis the runaround and disclaimed any responsibility for bargaining with the Union.

[3] 525 F.2d 519 (3d Cir. 1977), denying enf. in part to 220 NLRB 593 (1975).

[4] Id. at 528 (quoting *Operating Engineers Local 542 v. NLRB*, 328 F.2d 850, 852–853 (3d Cir. 1964), cert. denied 379 U.S. 826).

[5] In *Clear Pine Mouldings* we found almost identical conduct by an unfair labor practice striker to be unprotected. 268 NLRB 1044 at 1047–48 and 1049 (employee Anderson).

Mack Sales, Inc., Central Truck Leasing Corporation, North Carolina Coastal Motor Lines, Inc., and D. Thomas Bailey, Sr., Raleigh, North Carolina, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

DECISION

STATEMENT OF THE CASE

ROBERT M. SCHWARZBART, Administrative Law Judge. These consolidated cases were heard on September 21 through 24, 1981, in Raleigh, North Carolina, pursuant to charges filed by International Union of Operating Engineers, Local 465, AFL–CIO, affiliated with International Union of Operating Engineers, AFL–CIO (Union), and a consolidated complaint.[1] The complaint alleges that Central Mack Sales, Inc. (Sales, Central Truck Leasing Corporation) (Leasing, North Carolina Coastal Motor Lines, Inc.) (Coastal) and D. Thomas Bailey Sr., an individual, are alter egos, and, as a single integrated employer, have violated Section 8(a)(1), (3), and (5) of the National Labor Relations Act (the Act). The Respondents, in answering the successive complaints, denied commission of unfair labor practices.

Issues

1. Whether the Respondents are a single employer within the meaning of the Act.

2. If so, whether Sales and the other Respondents, as alter egos, violated Section 8(a)(5) and (1) of the Act by unilaterally making the following changes in employees' terms and conditions of employment without prior notice to and bargaining with the Union as certified bargaining representative of such employees:

(a) Requiring that employees present physicians' excuses in order to receive sick leave benefits.

(b) Requiring employees to present physicians' notes in order to receive holiday pay when the employees were absent the day before and/or after the holiday.

(c) Modifying the attendance policy to provide for the discharge of any employee who is absent for 5 consecutive days without notifying the employer.

(d) Discontinuing the prior practice of providing employees with free coffee.

(e) Increasing the amount of continuous service an employee must have to become eligible for paid vacation.

(f) Laying off four employees when work was slack, rather than continuing the former policy on those occasions of having such employees do clean-up and maintenance work.

3. Whether the Respondents further violated Section 8(a)(5) and (1) of the Act by:

(a) Refusing to discuse with union representatives the above-described unilateral changes during negotiating sessions for a first contract.

(b) Failing to notify the Union of its decision to sell the assets of Sales before completion of that sale.

(c) Not bargaining with the Union concerning the effects on employees of its decision to sell Sales' assets.

(d) Telling employee-bargaining representatives during contract negotiations that it would not give the Union a contract.

(e) Declining to continue with contract negotiations because of the pendency of unfair labor practice charges filed against the Respondents by the Union.

4. Whether the strike that commenced on August 11, 1980,[2] was a unfair labor practice strike.

5. Whether the Respondents, in reprisal for the union sympathies of employees, violated Section 8(a)(3) and (1) of the Act by discriminatorily:

(a) Reducing the number of hours worked weekly by employees.

(b) Imposing more onerous working conditions by failing to operatively maintain and purchase soap concentrate for the steam jenny, a mechanical cleaning device.

(c) If the strike referred to in item 4, above, was an unfair labor practice strike, refusing to reinstate one unfair labor practice striker and delaying the reinstatement of eight others following an unconditional offer to return to work.

6. Whether the Respondents violated Section 8(a)(1) of the Act by threatening employees with unspecified reprisals because of their union and protected concerted activities.

All parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, and to file briefs. Briefs, submitted by the General Counsel and the Respondents, have been carefully considered.

On the entire record[3] of this case and by observation of the witnesses and their demeanor, I make the following

[1] The docket entries are as follows: In Case 11–CA–9325, the charge, first and second amended charges were filed on August 11 and 29, 1980, and April 28, 1981, respectively. The charge, first and second amended charges in Case 11–CA–9385 were filed on September 3, October 10, 1980, and April 28, 1981, respectively. The charge, first and second amended charges in Case 11–CA–9638 were filed on January 13, April 28 and May 15, 1981. The complaint in Case 11–CA–9325 issued September 18, 1980. The order consolidating Case 11–CA–9325 and 11–CA–9385 and first consolidated complaint issued October 16, 1980. The second order consolidating Cases 11–CA–9325, 11–CA–9385, and 11–CA–9638 and amendment to prior consolidated complaint issued February 27, 1981. The amended consolidated complaint in all three matters issued in final form on May 18, 1981.

[2] All dates hereinafter are 1980 unless otherwise specified.

[3] The General Counsel, by motion attached to his brief, objects to receipt of the Respondents' posthearing offer to five court records concerning offenses by Andrew Blalock, the unreinstated striker, other than File No. 80 CR 47840, the only such record the Respondents had been granted leave to obtain and introduce as their Exh. 15 after the close of the hearing. Noting that the proferred court records, beyond the one described, had not been contemplated or explained during the hearing, do not relate to the present proceeding, and exceed the ruling as to what might be submitted posthearing, no foundation has been established for their receipt. Accordingly, the General Counsel's motion is granted and only File No. 80 CR 47840 is received in evidence. The additional court records attached thereto remain only as rejected exhibits.

FINDINGS OF FACT

I. JURISDICTION: THE RESPONDENTS' STATUS AS A SINGLE EMPLOYER

The parties agree that Sales[4] and Leasing[5] both North Carolina corporations, during the 12 months prior to issuance of the second amended consolidated complaint herein, a representative period, operated facilities in Raleigh, North Carolina. In addition, Leasing had other locations in North and South Carolina. During the above period, Sales and Leasing each derived gross revenues in excess of $500,000, and each received products valued in excess of $50,000 at their Raleigh facilities from points directly outside the State of North Carolina.

On the foregoing facts I find that, during the times material herein, Sales and Leasing are employers engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

Although the Board asserted jurisdiction over Coastal in a 1975 case,[6] the Respondents deny that the jurisdictional findings are still valid at this time as Coastal, although still existing as a corporate shell, has not been operational since about September 1, 1977.[7]

The General Counsel, contrary to the Respondents, has alleged that Sales, Leasing, Coastal, and D. Thomas Bailey Sr.[8] constitute a single integrated enterprise engaged in the businesses described above from common facilities in Raleigh, North Carolina, and that they are a single employer within the meaning of Section 2(2) of the Act.

Bailey Sr. has been president of Sales since 1964 when that company was organized as a franchise retail dealer of Mack trucks. He became president of Leasing in late 1967 or early 1968, when it was organized to lease tractors and trailers to selected accounts. From their inception, continuing until the early 1970s, Bailey Sr. was the sole stockholder of both corporations.

About 1966 or 1967, Bailey and First Citizens Bank and Trust Company established Coastal as a joint venture, each owning 50 percent of the stock. Earlier, the bank had repossessed the equipment of a poultry-hauling operation following that company's default,[9] and the venture had been undertaken to keep the bank from losing money on the repossession. Coastal, however, was beset early by financial difficulties and, following a 1978 lawsuit against Bailey, his wife, Sales, Leasing, and Coastal brought by the bank on a note of indebtedness for which all were liable, Bailey became and remained the sole stockholder of Coastal. As noted, Coastal stopped operating in 1977.

In 1972, while all three corporation were still active, Bailey gave half of his shares in Sales and in Leasing to his four children, equally divided. These recipients were his sons, D. Thomas Jr., Samuel T., and James E.,[10] and a daughter, Nan Bailey Crawford. During the following year, 1973, Bailey gave the remainder of his stock in Sales and Leasing to his above-named children, again about equally divided, except that he retained a 1-percent interest in each corporation. From the time of these divestitures to the present, Bailey Sr. has continued to serve as president and board chairman of both corporations although personally owning but a small minority of their stock. He also has remained president, board chairman, and sole stockholder of Coastal.[11]

Since 1973, the officers of Sales have included Bailey Sr., as president, Sam T. Bailey, as vice president and either assistant treasurer or assistant secretary, and Gwen M. Jones, as secretary-treasurer.[12] The Sales board of directors since 1973 has included Bailey Sr., as chairman, and Bailey Jr., Samuel T. Bailey, and Gwen Jones.

The same persons also served in like capacities as officers and directors of Coastal between 1975 and 1977, and of Leasing since 1973, except that Bailey Sr. described Bailey Jr. as a director but not an officer of Leasing.[13]

In addition to the above, Bailey's daughter, Nan Bailey Crawford, presently serves as principal bookkeeper and as an officer for Sales and for Leasing,[14] and William H. Hatton, during the times material herein, was vice president and operations manager of Sales. Hatton, who is not related to the Baileys, never served as a director of any of the corporations.

Bailey Sr. testified that he is in charge of labor relations for the three corporations[15] and controls their day-to-day operations. At the hearing of this matter, Bailey Sr. reaffirmed as still true certain testimony given by him in a November 1979 deposition. There, Bailey, after tracing the history of his involvement with the three corporations and the stock conveyances to his children, avowed that, although he owned but 1-percent of Coast-

[4] Until January 7, 1981, when its assets were sold, Sales was engaged in the retail sale and repair of Mack trucks.

[5] Leasing is in the business of leasing trucks to selected customers.

[6] See *N.C. Coastal Motor Lines*, 219 NLRB 1009 (1975). There it was found that Coastal, a North Carolina corporation, was engaged in the operation of freight terminals in several States and in the interstate transportation of freight by motor carrier, and that, during a representative 12-month period, Coastal had derived gross revenues in excess of $50,000 from the interstate transportation of freight.

[7] Coastal has been continued only to wind up its affairs and for possible sale as a tax loss.

[8] D. Thomas Bailey Sr. will most frequently be referred to herein as Bailey Sr. to distinguish him from his son D. Thomas Bailey Jr., also active in the above companies.

[9] At the time, Bailey was a member of the bank's board of directors.

[10] James E. Bailey worked as parts manager.

[11] Bailey's children have never owned stock in Coastal.

[12] Bailey Sr., on whose testimony much of the discussion concerning the issue of single employer is based, identified Jones as the office bookkeeper who, prior to her departure at an unrecalled date, had held various offices in the corporations, as described.

[13] The same persons also served in like capacities as officers and directors of Coastal's dispatchers and, from the record of the present case, it is apparent that for some time he was active in Coastal's operations. Since 1977, Bailey Jr. apparently derives his principal livelihood from sources unrelated to the family enterprises. However, he has retained his positions as officer and director, returning to assist, as required.

[14] Bailey Sr. is not certain whether his daughter has ever been a director of any of the corporations.

[15] The Respondents, in their brief, argues that, in spite of this testimony, there was no common labor relations policy as drivers employed by Coastal before 1977 were subject to different terms and conditions of employment than mechanics and parts employees at Sales, while Leasing, at that time, had had no nonmanagerial employees. This assertion, however, is inapposite as the over-the-road drivers employed at Coastal had been subject to ICC regulations and as common control of labor relations at two or more corporations does not require that terms and conditions of employment at each be uniform. With central control, uniform terms can be negotiated where desired.

al and Leasing, he controlled all the stock in those corporations.[16] When asked in the deposition how he could control the stock, in view of the much larger holdings in these corporations by his progeny, Bailey Sr. replied, "I controlled it because it was my children and I controlled the stock and they would have gone along with me." Still later in the deposition, Bailey asserted that he "could have" disposed of all the stock, and reiterated his control of all the stock of Leasing and Sales. As noted, at the time of the hearing, Bailey Sr. personally owned all of Coastal's stock.

Although Coastal, in 1977, employed several mechanics, Leasing, until early 1981, had no employees. Basically, between the three corporations, all employees, including mechanics, were carried on Sales' payroll. Accordingly, Sales' mechanics serviced and provided parts for trucks owned by Leasing and Coastal. Sales also sold trucks to Coastal.

In addition to its headquarters facility in Raleigh, Leasing also had two other locations in South Carolina, one in Georgia, and various additional facilities in North Carolina. Certain Sales-employed mechanics were regularly assigned to service and provide parts for Leasing's trucks in Raleigh and at these outlying locations as well. Leasing also received truck servicing and parts from outside concerns. In addition to working on Leasing's trucks, Sales' mechanics provided truck maintenance services for the general public and only approximately 10 to 20 percent of Sales' repair services were performed for Leasing. Although Sales provided services and parts to trucks owned by Leasing and Coastal and, as noted, sold trucks to Coastal, Sales made no purchases from those companies.

Sales billed Leasing and Coastal for labor, services, and parts, but Coastal, in financial difficulty, only paid some of those bills, as determined by Bailey Sr., the chief executive officer of each corporation. Bailey Sr. testified that in January 1981 Sales was compelled to sell its assets because Coastal's continued and mounting indebtedness to Sales deprived Sales of the ability to continue to meet its obligations. As of about 1975, Coastal owed Sales approximately $300,000 for parts and services. Between 1975 and 1977, this indebtedness increased to $900,000. Nonetheless, Sales continued to perform services and to provide parts for Coastal. From 1975 to 1979, both Bailey Sr., and Leasing made loans to Sales. Bailey's personal loans to Sales totaled at least $175,000, documented by interest-bearing notes.[17] By October 1, 1979, Sales had accumulated a total indebtedness to Leasing in excess of $387,600, which sum increased to almost $392,000 by the end of the year. In spite of the continued existence of these obligations by Sales to himself and to Leasing, Bailey Sr. did not include either Leasing or himself in the affidavit listing Sales' creditors, prepared in accordance with state law in connection with the sale of Sales' assets in 1981.

[16] In that deposition, Bailey even listed the value of the shares of Sales, Leasing, and Coastal among his personal assets, years after having given them to his children.

[17] There is no showing that this indebtedness was ever repaid.

Although Coastal stopped operating in 1977, it nonetheless continued to accumulate debt. A demand note executed by Bailey Sr., as Coastal's president, to Leasing, dated October 1, 1979, reflected an obligation decently in excess of $337,000, an amount that increased to well over $582,700, evidenced by a like note executed just 1 year later.[18]

When Coastal stopped operating, it was indebted to a bank in the amount of about $400,000, evidenced by a note secured by the senior Bailey's real estate, including his home. As part of this transaction, the Baileys also mortgaged assets of Leasing to the bank. Accordingly, with the approval of Leasing's directors, Bailey Sr. and three of his children, Leasing has been making significant monthly payments on this note to the bank to avoid foreclosure.

Bailey explained that as principal officer and sole shareholder of Coastal it had been his decision to seek loans for Coastal in excess of $500,000 from Leasing, rather than from Sales, as the latter corporation had no money.

Over a period of 7 years, rather than issuing monthly notes of indebtedness, the Baileys had followed a practice of merely recording their *inter sese* loans in the books of the various corporations. These were summarized by the accountant, who usually audited the books around October 1 of each year, at which time notes were consolidated as of that date.

When, in 1981, Sales' assets were sold, its mechanics and parts employees, after a brief delay, were transferred to Leasing's payroll.[19] For mechanics who had been regularly assigned by Sales to service Leasing's trucks, this move did not entail a change in duties.

At the time of the hearing, Leasing and the remnants of Sales and Coastal were headquartered in the same Raleigh offices, using a telephone listed to Leasing. It is there that the books and records for the three companies are kept and the officers and directors meet and conduct business.[20]

In *Bryar Construction Co.*,[21] another case where a father had transferred legal ownership of a company to his children while continuing in operative control, Administrative Law Judge Ries, in his Board-approved decision, restated the rule as follows:

> In determining whether two or more businesses are sufficiently integrated so that they may be fairly treated, for jurisdictional and other purposes, as a single enterprise, the Board looks to four principal factors: (1) common management; (2) centralized control of labor relations; (3) interrelation of oper-

[18] Bailey explained that the continuing increases in Coastal's indebtedness level after 1977 was required to centralize Coastal's widely scattered equipment and to service the same before it could be sold.

[19] As Leasing had not, until then, had its own employees, a delay was required to enable printing of paychecks in Leasing's name. By the time of the hearing, Leasing had three employes on its payroll who previously had worked for Sales.

[20] Earlier, and in 1977, the three companies had been located in facilities in a different part of the Raleigh area. There, Sales and Leasing had shared offices in one building, and Coastal had operated from another across the street, under the day-to-day administration of Bailey Jr.

[21] 240 NLRB 102, 103–104 (1979).

> ations; and (4) common ownership or financial control. *Radio and Television Broadcast Technicians Local Union 1264* v. *Broadcast Service of Mobile, Inc.*, 380 U.S. 255, 256 (1965); *Sakrete of Northern California, Inc.* v. *N.L.R.B.*, 332 F.2d 902, 905, fn. 4 (9th Cir. 1964). "The Board has determined that no single criterion is controlling, although it considers the first three, which evidence operational intergration, more critical than the fourth, common ownership." *N.L.R.B.* v. *Triumph Curing Center and M. F. Lee d/b/a Lee's Sewing Company, Inc.*, 571 F.2d 462, 468 (9th Cir. 1978), enfg. 222 NLRB 627 (1976).

In the present matter, as in *Bryar Construction Co.*, supra, it is clear that Bailey Sr., as chief executive officer and board chairman of the three corporate Respondents, was actively in charge of operations, including labor relations. It was he who had invested in these companies and continued to operate and refinance them according to his own judgment. Although the Respondents in their brief point out that since 1973 Bailey's children have been the majority shareholders and directors of Sales and Leasing and, under the bylaws of each corporation, the president is subordinate to and serves at the directors' pleasure and authorization, as noted in *Bryar*, the vesting by Bailey Sr. of legal ownership of Sales and Leasing in his offspring after having obtained all the shares of those corporations "seems of scant significance in light of the plainly dominant role he played in the affairs" of the Bailey family and the corporations in question.[22] Bailey Sr. himself described his status in his 1978 deposition, years after conveyance of his shares in Leasing and Sales. There he attested to his continued control over those companies and his right to dispose of their stock. Significantly, too, in that deposition, Bailey Sr. continued to list the value of those shares among his personal assets. The financial dealings between Bailey Sr., Leasing, and Sales can hardly be considered to have been conducted at arm's length when the major obligations of Sales to Leasing and to Bailey Sr., personally, were not recorded in the statutorily required list of Sales' creditors when its assets were sold. As noted, Bailey had never released to his children ownership of his shares in Coastal.

The three corporations could not have been more interrelated financially and functionally. They dealt with each other when operative and, by virtue of their common control, extended to each other vast aggregating unsecured credit. As a result of these continuing inbred obligations, Sales could no longer continue in business, even with the extensive financial support from Leasing and Bailey Sr. Although Leasing is still operating, its assets, too, have been pledged because of the burdens placed on it by the interrelated financial difficulties of Sales, Coastal, and the Baileys. The resources of Bailey Sr. and those of the corporation are completely entwined. Even if the three concerns were not to be judged a single enterprise, during the period encompassed by the complaint, Leasing, through the agency of Bailey Sr., would be at least a joint employer of the Sales employees, and jurisdiction would attach in that manner.[23]

It also is appropriate to assert jurisdiction over Bailey Sr. as an individual alter ego to the corporate Respondents. Bailey, in effect, was the employer of the Sales employees and, when the assets of that Company were sold, he moved certain employees to Leasing's payroll. As will be shown, he is the responsible force behind the unfair labor practices to be found hereafter. From the record herein, it clearly is appropriate that the order to be issued attach to a respondent who is responsible for the infractions found to the extent that he may be capable of remedying them.[24]

Accordingly, I find that Sales, Leasing, Coastal, and Bailey Sr. constitute a single integrated employer, hereinafter referred to as the Respondent, and that this employer is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.[25]

II. THE LABOR ORGANIZATION INVOLVED

The Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Refusals to Bargain and Related Discriminatory Conduct—Facts and Conclusions*

1. The appropriate unit; majority status

The pleadings establish that on April 8, following a representation election conducted on March 31 in Case 11–RC–4835, the Union was certified as the exclusive bargaining representative of employees in the following unit:

> All parts department employees, mechanics, body and paint shop employees, cleanup steam room employees at Central Mack Sales' Raleigh, North Carolina, facility, excluding all office clerical employees, professional employees, sclesmen, guards and supervisors as defined in the Act.

The parties are in agreement that on the date of the election there were approximately 19 employees in the bargaining unit. All events herein occurred during the certification year. As it has been found above that at all times material herein Sales, Coastal, Leasing, and Bailey Sr. were a singnle integrated employer, it hereby is concluded that the duty to bargain with the Union on behalf

[22] While the record does show that certain notes were reissued annually by vote of the directors who, as close family members, had ready access to each other, key actions by Bailey Sr. proceeded without formal authorization. Accordingly, corporate minutes show no written authorization for Bailey's personal loans to Sales, for the sale of Sales' assets, and for the consolidation of Sales' indebtedness to Leasing into a single note.

[23] *Bryar Construction Co.*, supra at 104; *Quality Motels*, 194 NLRB 1035, 1037 (1972).

[24] See *Ski Craft Sales Corp.*, 237 NLRB 122 (1978); *Spiegel Trucking Co.*, 257 NLRB 230 (1981).

[25] None of the corporate Respondents has yet been dissolved and no Respondent has been placed in bankruptcy.

of employees in the above-described unit devolved upon each of them.

2. The negotiating sessions[26]

Claiborne P. Ellis, the Union's business manager, testified that before the first contract negotiating session with the Respondent following certification, he was advised by several employees that the Respondent had changed certain preexisting working conditions. Ellis was informed that the Respondent had discontinued its practice of providing free coffee for the employees, had stopped making change for employees to facilitate use of in-plant vending machines, had shortened the regularly assigned workweek, and had increased the period of continuous service required for employees to qualify for paid vacations. While Ellis did not separately communicate with the Respondent concerning these reported changes, he prepared contract proposals addressed to these modifications.[27]

The first contract negotiating session took place at the Respondent's office on June 24. The Union was represented by Ellis and employees Douglas Critcher and Jess Martindale. Present for the Respondent were Bailey Sr., his son, Vice President Sam T. Bailey, and Sales Vice President and Operations Manager William H. Hatton.[28]

Ellis began the meeting by presenting the Union's total contract proposal to Bailey Sr. Ellis declared his preference that negotiations be conducted in a professional, businesslike way. Bailey agreed, but stated that the Union could not make him do a "damn" thing and he did not know if the Union would have a contract.

In response to the Union's written proposal that the Company should continue the practice of providing free coffee to employees, Bailey Sr. replied that there would be no more free coffee; it cost too much.[29] No progress was made during the first session, or thereafter, concerning the Union's proposal that there be no change in the Company's sick leave procedures,[30] or to the Union's proposal for continuation of the policy whereby vacation leave eligibility had required less initial continuous service by the employees. The Respondent rejected the vacation proposal also on the ground that it would be too costly.

During the first session, Ellis asked Bailey Sr. to fill in blanks left in the first, second, and third steps of the proposed grievance procedure with the names of the Respondent's representatives to be involved in those stages.[31] Bailey Sr. retorted that there was no use to put anyone's name in those spaces at that point because the Union might not have a contract.

The General Counsel contends that statements by Bailey Sr. at the outset of the June 24 meeting, that the Union could not make him do a "damn" thing and he did not know if the Union would have a contract, and his later refusal during that session to fill in the names of company grievance-processing representatives on the ground that to do so served no purpose as the Union might not have a contract, were both violative of Section 8(a)(1) of the Act. As it is clear that the Act does not compel an employer to agree to any specific proposals made by a bargaining agent,[32] Bailey's initial phrase to the effect that the Union could not make him do a "damn" thing was an accurate statement of fact and is not unlawful. However, his two expressions of doubt that the Union would have a contract, and his refusal for that reason to name company representatives to participate in the grievance procedure, all were violative of Section 8(a)(1) of the Act. The Board long has recognized that statements of that kind amount to an anticipatory refusal to bargain and inculcates in employees a sense of futility about the exercise of free choice in selecting a representative for collective bargaining. Hence, the Board has held that such statements constitute unlawful interference with the exercise of Section 7 rights.[33]

On June 30, the same individuals met for the second negotiating session. On that occasion, the parties did not again discuss the asserted discontinuation of free coffee, or the Union's proposals concerning sick leave or vacation eligibility, which had been rejected by the Company during the first session. Rather, the parties continued to review the Union's complete contract proposal presented at the first meeting. On June 30, the parties discussed wages, checkoff of union dues, and seniority. However, the grievance procedure, discussed at the June 24 meet-

[26] On the matter of initial animus, employee Henry Shields Jr. testified that in March a group of about seven employees, including Shields and Troy Bullard, informed Bailey Sr. that they had decided to vote a union into the shop. Bailey had replied that that was fine. If they wanted to vote for the Union, they should do so. However, later that day, during another break taken by Shields and employee Jerry Rigsbee in the office, Bailey Sr., also present, told the men that he hoped they all knew what they were doing. It could get them in serious trouble if they did not know what they were doing. Bailey continued that the employees all could join women's lib, it did not make any difference to him. The General Counsel contends that Bailey's statement that the Union could, in effect, get the employees in serious trouble if they did not know what they were doing constituted a threat of unspecified reprisals in violation of Sec. 8(a)(1) of the Act. However, in *Kranco, Inc.*, 228 NLRB 319, 321 (1977), it was found that similar statements to employees by a supervisor did not contravene the Act's provisions but merely were permissible statements of permissible opinion. Unlike here, in *Kranco*, supra, the supervisor's remarks were phrased "crudely and profanely" and, accordingly, afforded greater potential for intimidation. Accordingly, I do not find that the statement by Bailey Sr. on that occasion was in violation of Sec. 8(a)(1) of the Act.

[27] All matters referred to above as alleged unlawful unilateral changes will be considered in separate detail below.

[28] The Respondent concedes that Hatton was a supervisor and agent of Sales within the meaning of Sec. 2(11) of the Act, but denies his authority with regard to the other Respondent corporations. Having found above that Sales, Leasing, and Coastal are alter egos, it is concluded that Hatton also was a supervisor within the meaning of the Act of the other corporations.

[29] The Union's proposal during the first session that change be made available to employees for use in the vending machines was agreed to by Hatton during the second negotiating session and is not an issue in this proceeding.

[30] The General Counsel contends that under the invoked change, employees still were allowed five paid sick days per year but that physicians' certificates were required for any day that the employees were out. They previously had not been required. The Union proposed that such certificates be submitted only after three consecutives days of absence.

[31] The grievance procedure had not been settled.

[32] See *El Rancho Market*, 235 NLRB 468, 472 (1978).

[33] *East Belden Corp.*, 239 NLRB 776, 794 (1978); *El Rancho Market*, supra. While these remarks were not separately alleged as violations in the complaint, they are closely related to matters actually alleged and were not disputed at the hearing.

ing, again was considered at the second session and Bailey then announced that he, as company president, would hear the first step of the grievance procedure.

The parties met again for a third session on July 30. In addition to those who had been present at the earlier sessions, the July 30 meeting also was attended by Leonard Duggins of the Federal Mediation and Conciliation Service and Gary Cupp, an insurance consultant retained by the Union.[34] The mediator asked the parties to go over the contract again so that he could assess their positions. As before, no company proposals were presented. Toward the end of that session, Cupp, the Union's insurance consultant, presented and explained the Union's proposals concerning health and life insurance. This part of the discussion continued for about 15 minutes toward the end of the meeting. Just before adjournment, Bailey Sr. asked Cupp, "If this union mess doesn't come through, can I buy that insurance?"[35]

3. The Respondent's refusal to continue negotiations during the pendency of unfair labor practice charges.

A fourth negotiating session was scheduled for Friday, August 8. However, on July 30, after that day's negotiating session, Ellis, acting for the Union, filed unfair labor practice charges against the Respondent in Case 11-CA-9301.[36]

Subsequently, Ellis received from the Respondent a carbon copy of the following letter, dated August 4, to mediator Duggins from Bailey Sr.:

> We are surprised to receive in the mail today from the National Labor Relations Board a charge of unfair labor practices instituted by Mr. Ellis of the International Union of Operating Engineers.
>
> Under the circumstances, we feel the meeting to be held on Friday, August 8, should be postponed until this matter had been settled.

On August 5, Ellis sent the following mailgram to Bailey Sr.:

> In reply to your letter dated August 4, 1980, we do not agree to postpone meeting scheduled for Friday. Negotiations should continue until charges have been investigated.

In reply, Ellis received the following letter, dated August 6, from Bailey Sr.:

> Our letter of August 4 is very clear, and under no circumstances will we negotiate while unfair labor practice charges are outstanding.

The Respondent's refusal to continue to meet with the Union while unfair labor practice charges were pending before the Board, a position documented by its letters of August 4 and 6, is patently unlawful.[37] Accordingly, I find that by such conduct the Respondent refused to bargain within the meaning of Section 8(a)(5) and (1) of the Act.

4. The strike and the refusal to promptly reinstate certain strikers after the unconditional offer to return to work

Ellis, following receipt of Bailey's August 6 letter, asked the bargaining unit employees to meet with him at his office. Sixteen employees attended. Ellis told the employees that Bailey had completely refused to meet. In response to their questions as to what could be done, Ellis told them that unfair labor practice charges had been filed and recommended that they wait while the Board forced Bailey back to the bargaining table. Responding to questions as to how long that process could take, Ellis told the group that it could take the Board up to a year. When employees asked what they could do to compel Bailey to return to the table, Ellis declared that their only other alternative was to take strike action. Ellis, however, stated his opposition to a strike. Nonetheless, at the urging of employee Clinton Jackson, who told the group that Bailey had much work in the shop to get out and a strike would be a good way to get him to negotiate, the 16 employees voted to stop work.

The strike began on August 11. All 18 of the employees then in the unit were on the picket line during the first day. The men carried picket signs prepared by Ellis which read "Mack truck employees/on strike/unfair/ Mr. Bailey refused to meet." The various signs bore different legends, but all referred to unfair conduct by the Respondent.

About August 25, while the strike was still in progress, the Respondent's vice president Hatton told employees on the picket line that their insurance would be canceled and that they would have to turn in their uniforms or have the costs deducted from their last paychecks. While Hatton was still at the line, he agreed to give Bailey Ellis' message that the Union was ready to resume negotiations at any time. However, Ellis did not receive a response.

On August 28, Ellis requested that Hatton ask Bailey Sr. to come out. When Bailey did so around 9:30 a.m., Ellis handed him the following letter:

> On behalf of all employees presently on strike, we are hereby making an official unconditional request to return to work Tuesday, September 2nd at 8:00 a.m.

---

[34] The Conciliation commissioner, Duggins, had come to the meeting at Ellis' request, and with Bailey's consent. Ellis explained that after no progress was made at the June 24 bargaining session, he had met with unit employees to report on the negotiations. The employees had wanted to strike at that time, but Ellis had rejected the idea before a mediator could assist in negotiations.

[35] Contrary to the General Counsel, I find that while Bailey's question as to whether he could buy that insurance if this union mess does not come through reflects a negative attitude toward the Union, unlike certain of Bailey's earlier remarks found violative herein, this comment was framed too speculatively to constitute an unlawful anticipatory refusal to bargain within the meaning of Sec. 8(a)(1) of the Act.

[36] Case 11-CA-9301, which later was withdrawn, is relevant here only with respect to the Respondent's reaction to that charge having been filed.

[37] See *Pine Manor Nursing Home*, 230 NLRB 320, 326 (1977); *Zenith Radio Corp.*, 187 NLRB 785 (1971).

The Respondent's reply was by letter dated August 28, signed by Bailey Sr. as president of Sales:

> In answer to your hand-delivered letter today, I have called our attorney and he is in court all day August 28, 1980.
>
> He and I will get together tomorrow and give an answer just as soon as possible.

By letter dated August 29, addressed to Ellis, Bailey Sr. wrote the following:

> We are denying your request as represented in your hand-delivered letter of August 28 until further consultation with our attorney.
>
> In the meantime work in the shop has dropped off so we do not have enough work for all the strikers since some have been replaced, but we can use Jack Eatmon and Kevin Cieciorka Tuesday, September 2 if they are interested.
>
> For the others we will employ as needed on a Seniority Basis.

Subsequently, however, all striking employees who desired to return to work were reinstated by the Respondent, except Andrew Blalock.[38]

Noting that the strike that began on August 11 had been precipitated by the Respondent's unlawful refusal to meet with the Union to engage in further contract negotiations while the Union's unfair labor practice charges were still pending, in the context of the Respondent's other conduct found unlawful herein,[39] in agreement with the General Counsel, I find that the strike was an unfair labor practice strike from its inception and that the strikers are unfair labor practice strikers entitled to immediate reinstatement as of September 2, the effective date of the offer to return.[40] However, offers of reinstatement were not made to the affected employees until they were separately contacted by the Respondent at later dates. Allowing 1 additional day for return from the date that the Respondent telephoned each employee with its offer to reinstate,[41] I find that backpay for the following strikers runs from September 2 to the dates shown below next to their respective names.

James Bech	Sept. 9 (reinstated)
Troy Bullard	Nov. 11 (reinstated)
Ernest Hollifield	Oct. 2 (reinstated)
Curtis Jones	Oct. 2 (reinstated)
Wayne Lewis	Sept. 9 (reinstated)
Robert Liertz	Oct. 7 (reinstated)
Troy Lindsey	Sept. 11 (reinstated)[42]
Henry Shields Jr.	Nov. 17 (declined reinstatement)

Accordingly, the Respondent violated Section 8(a)(3) and (1) of the Act by refusing to promptly reinstate the above unfair labor practice strikers in response to the Union's unconditional offer on their behalf, delivered on August 28.

5. The Respondent's refusal to reinstate Andrew Blalock

Although all others who participated in the unfair labor practice strike that began on August 11 subsequently were offered reinstatement by the Respondent at the various times shown, Bailey Sr. has refused to take back Andrew Blalock because of his picket line conduct.

Bailey Sr. testified that during the week of August 11 around the 5 p.m. quitting time, he saw Blalock, then picketing, come through the double gate onto the Respondent's property to a distance of 30 to 40 feet. Although Bailey Sr. observed the scene from a distant window, he related that he could hear Blalock cursing loudly and see him making signs at employees as they left the building to go to their cars at the end of the day. He noticed that Blalock was holding either a stick or an iron bar. As Bailey Sr. watched, he saw another employee/picket, mechanic Wayne Lewis, come onto the premises and lead Blalock back to the gate. Bailey Sr. then saw Blalock "beat on" employee C. W. Pittman's car as it exited through the gate. Pittman continued through the gate, turned around, drove back in, and went to the office where he announced that he was going to swear out a warrant against Blalock. Bailey Sr. told Pittman that if he thought it justified, he should do so.

At Blalock's May 15, 1981 trial on charges brought by Pittman, he pleaded guilty to damaging personal property, paid court costs of $60, and received a 60-day suspended sentence with 3 years probation. It also was agreed that Blalock would repair the damage to Pittman's car, estimated at approximately $200, in his shop.[43]

Citing Blalock's unauthorized encroachment on company property while serving as a picket, his cursing of nonstriking employees, and the damaging attack on Pittman's automoble and his subsequent guilty plea to criminal charges based on that attack, the Respondent con-

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[38] Respondent has based its refusal to put Blalock back to work on his conduct during the strike. This will be considered separately.

[39] Additional violations of the Act occurring before the start of the strike will be discussed below.

[40] The Union's unconditional offer on August 28 to return the employees to work as of September 2, rather than immediately, may have been influenced by *Drug Package Co.*, 228 NLRB 108, (1977), enfd. as modified 570 F.2d 1340 (8th Cir. 1978), where the Board found that a 5-day grace period was a reasonable accommodation between the interest of the employees in returning to work as quickly as possible and the employer's need to effectuate that return in an orderly manner. However, in *International Business Systems*, 258 NLRB 181 fn. 4 (1981), it was found that the 5-day grace period served no useful purpose where the offer to return to work had been rejected, and the backpay period in that case was held to commence as of the date of the offer to return. Although here the offer to return also was initially rejected, the present matter is distinguishable in that the offer, by its terms, did not become effectively until a specified later date. Therefore, while no grace period would have been necessary here, from the offer made I find that the backpay period for all unfair labor practice strikers began on September 2.

[41] Although the Respondent sent employee Robert Liertz his offer of reinstatement by letter dated October 1, the mailing and an intervening weekend served to extend Liertz' response period until Monday, October 6. Liertz' backpay period ended on October 7, the day he returned to work.

[42] Although there is no showing in the record as to when Lindsey was offered reinstatement, the Respondent has not disputed the shown cutoff date asserted by the General Counsel.

[43] Apparently, Blalock had the facilities to do auto body repair work.

tends that Blalock has rendered himself ineligible for reinstatement.

Blalock, in turn, denied having entered company property during the strike and that it was he who had struck Pittman's car.[44]

Blalock related that while picketing outside the gate, 2 or 3 days after the start of the strike, he saw Bailey Jr. accompany Pittman to his car. Pittman did not slow down as he drove through the gate and caused striker Wayne Lewis to jump out of the way to avoid being hit. Pittman declared that his car had been hit with the stick,[45] so he made a U-turn and drove back through the gate, causing Blalock to scramble out of the way. Bailey Jr. came out and met Pittman. At the time of the incident, Lewis was about 6 to 8 feet outside the gate.

Blalock explained that he had pleaded guilty because he did not have the money for an attorney and had not been told of his right to have a court-appointed lawyer. In addition, he originally had expected that Lewis would keep his promise and testify that it had been he, not Blalock, who had had the stick. Lewis had accompanied him to court on April 17, 1981, when Pittman's charges were first set for hearing. However, the trial was postponed to May 15, by which date Blalock had learned from friends that Lewis had moved to Alabama. Accordingly, as Blalock did not have counsel, as he could pay the $60 in court costs to "get out from under the matter," and was able to repair Pittman's car himself for less than it might otherwise cost, Blalock pleaded guilty.[46] Blalock admitted having cursed nonstriking employees as they left work.[47]

Noting that, as found above, Lewis was among the strikers reinstated by the Respondent, Bailey Sr.'s account of Blalock's picket line activities leading to the decision not to reinstate him is credited. Unlike Blalock, who rather inconsistently has pleaded guilty to criminal liability for damaging Pittman's car, while asserting innocence and seeking to blame someone else who was not there, Bailey Sr. had continuously recognized Blalock's responsibility. In determining why Blalock alone among the unfair labor practice strikers was not ultimately reinstated, there is no evidence that he had been more active than other employees either in organizing for the Union or in urging the strike. Apart from the Pittman event, there is no demonstrated reason as to why the Respondent should be more reluctant to return Blalock to work than had been the case with the others, including Lewis.

Nevertheless, having accepted the Respondent's account that Blalock, during the strike, ventured on company property, cursed at departing nonstriking employees, and struck Pittman's car, it still does not appear, in balancing the Respondent's conduct that provoked the unfair labor practice strike, in the context of the numerous earlier company violations to be considered herein, against Blalock's picket line misconduct, that it can be concluded that Blalock's picket line activity was of such serious nature as to disqualify him from reinstatement. While Blalock's conduct can in no way be condoned, the Board has held that absent "brutal violence" a picket is not disqualified from reinstatement in spite of participation in various incidents of misconduct, which may include using obscene language, making abusive threats against nonstrikers, engaging in minor scuffles and disorderly arguments, momentarily blocking cars by mass picketing, and engaging in other incidents of minor misconduct.[48] Consistent with these cases, the Board and the courts long have held that minor active misconduct must have been contemplated by Congress when it provided for the right to strike and that this right would be unduly jeopardized if any misconduct, without regard to seriousness, would deprive the employees of the Act's protective mantle.

Accordingly, it is concluded that neither Blalock's actions nor his language were sufficient to warrant denying him reinstatement to his job as of September 2, consistent with the Union's unconditional offer to return.[49] The Respondent's failure to so reinstate Blalock is violative of Section 8(a)(3) and (1) of the Act.

6. The alleged failure to notify and negotiate with the Union concerning the sale of Sales' assets

Union Business Manager Ellis testified that in mid-November he telephoned Bailey Sr.[50] During the conversation, Bailey agreed to Ellis' suggestion that a mediator be present at their next meeting as at the last one on July 30. Ellis also told Bailey Sr. that he had heard through the grapevine that Bailey had been planning to sell his business. Bailey Sr. answered that he had no intention of selling, but that he knew some people who were interested in buying the business.

Thereafter, on January 8, 1981, Bailey Sr. sent the Union the following letter:

> Central Mack Sales, Inc., on January 7, 1981 entered into a contract to sell its physical assets to Carolina Mack Sales, Inc. This transaction is effective January 19, 1981. Central Mack Sales will release the Mack Truck Franchise and will terminate its operation.

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[44] Blalock described Pittman as a striker replacement who had been one of the first to apply for work in response to the Respondent's newspaper advertisement for mechanics.

[45] Blalock asserted that it had been Lewis who had been holding the stick, which he described as either a sawed-off pick handle about 1-1/2 inches in diameter or a large tobacco stick.

[46] Pittman, however, never took his car to Blalock's shop.

[47] Samuel T. Bailey, the Respondent's vice president, testified, contrary to Blalock, that he frequently had seen Blalock inside the fence during the picketing.

[48] *Coronet Casuals*, 207 NLRB 304, 305 (1973), and cases cited at 305 fns. 6–10.

[49] *Mark Twain Marine Industries*, 254 NLRB 1095, 1108–09 (1981). Blalock's entitlement to reinstatment as an unfair labor practice striker as of September 2 was not erased by his subsequent guilty plea to charges based on related picket line misconduct. The seriousness of Blalock's picket line misconduct must be evaluated on the basis of what actually was done by him. His obligation to answer for such conduct in another forum, while germane in helping to establish Blalock's responsibility, does not serve to exacerbate its seriousness so as to deprive him of the strong protections afforded unfair labor practice strikers under the Act which, otherwise, would be his. The penalty imposed did not affect Blalock's availability for assignment by the Respondent.

[50] Earlier, Ellis had written to Bailey Sr. requesting that the parties resume negotiations, to which Bailey had agreed. Accordingly, Ellis' call to Bailey, described herein, was to work out certain details concerning resumption.

> On behalf of Central Mack Sales, Inc., I repeat my offer to you to discuss all matters of mutual interest at any convenient time. I do not think it necessary to wait until a mediator becomes available as you have suggested.

Ellis forwarded the following letter, dated January 15, to Carolina Mack Sales[51] at its Raleigh office:

> The International Union of Operating Engineers Local 465 is ready, willing and prepared to bargain concernng wages and other terms and conditions of employment, including how the sale by Central Mack Sales to Carolina Mack Sales affects the employees.
>
> To date both Central Mack Sales and Carolina Mack Sales have refused to bargain at all.
>
> Please contact me as soon possible for bargaining.

Subsequently, Ellis received the following letter, dated January 19, from Bailey Sr.:

> In reply to your letter dated January 15, 1981, we take exception to the second paragraph which states "To date both Central Mack Sales and Carolina Mack Sales have refused to bargain at all."
>
> Your statement is completely false, and the record will show that you have repeatedly put off every offer on our part to bargain and not once have we refused to do so.
>
> We are and have been willing to meet at any reasonable time.

Ellis testified that Bailey's letter of January 8, written 1 day after the sale of Sales' assets, was the first notice to the Union that such a sale had been intended and that it had been issued approximately 24 hours after the transaction had taken place. He related that within a day of receipt of the January 8 letter, he had telephoned Bailey and asked if the latter would be willing to negotiate with him concerning the future of these employees. Bailey replied that Ellis would have to call his attorney, William Joslin. However, when Ellis telephoned Joslin, he was told that the Respondent had no responsibility for the employees; they no longer were the Respondent's employees and the responsibility lay with the new company.

After receiving notification that Sales' assets had been sold, Ellis did not thereafter present claims for backpay, vacation pay, or other monetary compensation, nor did he ever propose to the Respondent a time and place to meet to negotiate the effects on employees of the sale. In explanation, Ellis related that he did not feel he could effectively present demands or proposals to an employer who already had sold the assets of his business, but that he would have proceeded differently had he learned of the sale in advance.

Bailey Sr. testified that he first had begun to speak to the purchaser in October 1980. As negotiations progressed, it was expected that the deal for the sale of the assets could be completed on December 31, but certain discrepancies delayed in finalization until late in the afternoon of January 7, 1981. On that date, the parties signed an agreement whereby the purchaser would buy Sales' assets effective January 19.

On January 8, the day after execution of the sales agreement, Bailey told the employees of the sale and sent the Union written notification. During the week of January 12, Sales was shut down for inventory-taking. Certain bargaining unit mechanics were assigned to assist in this; others were laid off. The regular work of the shop did not continue that week.

Accordingly, the facts as to what occurred in connection with the sale of Sales' assets in relation to notice to the Union of the sale and subsequent bargaining are not in dispute.

Since the U.S. Supreme Court's decision in *First National Maintenance Corp. v. NLRB*,[52] an employer, to bargain in good faith, need not negotiate with its employees' bargaining representative over the decision to close a part of its business. However, an employer contemplating partial closure is required to give the union timely notice and to bargain concerning the effects of partial closure on the bargaining unit employees. The practical effect of the *First National Maintenance Corp.* decision is to equate the bargaining obligations of an employer who would partially close his business with those of employers contemplating total closure. Accordingly, while it is now settled that an employer may close his business, either partially or completely, without bargaining about the decision to do so, the Act requires that the employer afford the union the opportunity to discuss the effects of such closure on bargaining unit employees. In *Climate Control Corp.*,[53] a case involving complete closure, it was found that the respondent had failed to bargain in good faith with the union about the effects on employees of the termination of operations. There, as here, the decision to terminate was a fait accompli, and the business closed as contemplated by the time the Union received the respondent's letter of notification. When, here, Ellis attempted to secure negotiations on behalf of the affected employees, he was referred by Bailey to the Respondent's attorney, who, in turn, disclaimed the Respondent's responsibility for those employees and referred him to the purchaser of Sales' assets, Carolina Mack Sales. Ellis then wrote to that company to request bargaining, also without success. While it is conceivable that Ellis might have been more agressive in seeking negotiations, particularly in view of the later response from Bailey Sr. protesting interest in same, I find that after the runaround Ellis had received from Bailey Sr. and the Respondent's attorney Joslin, after first having been presented with an accomplished sale, Bailey's offer to bargain in his letters of January 8 and 19 was not in good faith. Contrary to the Respondent, I conclude that the Union has not slept on its rights. The Respondent's bad faith here concerning the Union is spotlighted by the mid-November conversation where

[51] Carolina Mack Sales is not named as a respondent in this proceeding.

[52] 452 U.S. 666 (1981).

[53] 257 NLRB 173 (1981).

Bailey Sr., when asked by Ellis whether the Respondent planned to sell its business, had denied same, although discussions concerning such a sale actually had been in progress since October. The Respondent's conduct herein, as indicated by the General Counsel, is consistent with the Respondent's earlier violation in *N. C. Coastal Motor Lines*,[54] where Coastal, one of the Respondent alter egos found herein, was held to have breached Section 8(a)(5) and (1) of the Act by unilaterally terminating the bargaining unit operation without notice to the union and without offering to bargain over the effects.

Under these circumstances, I find that the Respondent has failed to bargain in good faith with the Union about the effects of the partial termnination of its operations on the bargaining unit employees, in violation of Section 8(a)(5) and (1) of the Act.

7. The alleged unilateral change in terms and conditions of employment

The General Counsel contends that the Respondent contravened its bargaining obligation by bringing about certain unilateral changes in terms and conditions of employment of bargaining unit employees after the March 31 election without notice to or consultation with the Union. Except where indicated, these contentions have not been challenged by the Respondent.

The Board in *Master Slack* [55] again stated the general principles of law applicable to the General Counsel's contention:

> Unilateral changes of "wages, hours and terms and conditions of employment," as defined in Section 8(d), at a time when an employer its obligated to bargain with the duly designated representative of the employees in an appropriate unit, violates Section 8(a)(5) of the Act.[3] This applies even absent an independent showing of overall subjective bad faith[4] and is not excused by "economic expediency, even in good faith."[5]

[3] See *N.L.R.B.* v. *Benne Katz, etc., d/b/a Williamsburg Steel Products Co.*, 369 U.S. 736, 747 (1962); *N.L.R.B.* v. *C & C Plywood Corporation*, 385 U.S. 421 (1967), reversing 351 F.2d 224 (C.A. 9, 1965); *N.L.R.B.* v. *Acme Industrial Co.*, 385 U.S. 432 (1967).

These principles also are applicable where an employer changes terms and conditions of employment during the pendency of objections to an election . . . which eventually results in certification. (*Mike O'Connor Chevrolet-Buick-GMC Co.*, Inc., etc, 209 NLRB 701, 704 (1974), reversed on other grounds 512 F.2d 684 (C.A. 8, 1975).)

[4] *Id.*

[5] *Fleming Manufacturing Company, Inc.*, 119 NLRB 452, 465 (1957).

In the context of the above general principles, the General Counsel alleges that the following occurred:

[54] 219 NLRB 1009 (1975).

[55] 230 NLRB 1054 (1977), enfd. 618 F.2d 6 (6th Cir. 1980).

a. *The alleged more stringent policy for calling in when absent*

The Respondent by posted notice, dated April 15,[56] to all Sales shop personnel on the subject "Absent from work" announced the following:

> Any employee absent from work without proper notification to the company for a period of five (5) working days, will be automatically terminated.

Although Clinton Jackson[57] testified that while he personally had followed a practice of telephoning Shop Foreman Bob Jacklet,[58] he had not known of the prior existence of the rule set forth in the April 15 bulletin providing for discharge of employees who have not called in after 5 days of absence.

The reasonability of the policy posted on April 15 is not the issue here. The General Counsel's evidence that this rule did not exist before the Union's certification is unrebutted, and the posting of the rule at the time indicated is undisputed. As the rule created a different policy affecting the obligations and discipline of employees and the terms and conditions of their employment, the Respondent clearly was bound to bargain with the Union concerning this matter prior to implementation. The Respondent's failure to do so was violative of Section 8(a)(5) and (1) of the Act.

b. *More stringent requirements of physician's receipts to receive sick benefits*

Also on April 15, the Respondent posted the following bulletin to Sales shop personnel on the subject of vacations and sick leave:

> It is and has always been the Company policy, rules and regulations, that the vacation and sick leave[59] and the amount of each is based on the length of continued service.
>
> Also, in order to receive sick leave benefits, employee will have to have a doctor's receipt of his visit.

John Curtis Jones[60] testified that before the representation election the Respondent had followed a policy of providing 5 paid sick days per year. Sick employees could call Shop Foreman Jacklet, but no doctor's note ever had been required. This changed a week after the Union was certified as bargaining representative, when the April 15 bulletin was posted requiring, as applied, that employees who were out even for but 1 day submit a doctor's receipt stating the reasons for absence.

[56] The Union was certified on April 8.

[57] Jackson first left the Respondent's employ about 1975, but returned there in 1976 continuing to work as a mechanic until the strike of August 11. After the strike, he again worked for 2 more months before leaving the Respondent's employ.

[58] In accordance with the stipulation of the parties at the hearing, I find Jacklet to be a supervisor within the meaning of Sec. 2(11) of the Act.

[59] The Respondent provides 5 paid sick days a year.

[60] Jones was employed by the Respondent as a diesel mechanic from July 1974 until January 8, 1981, when Sales' assets were sold.

Jones related that this new policy was utilized after the representation election, but even before the notice was posted, to deprive him of paid holiday. Prior to the election, an employee, in order to receive holiday pay, was required to work both the day before and day after the holdiday. The record shows that the Respondent observed Easter Monday, April 7, as a paid holiday. Jones, however, had called in sick on April 8, the day after this holiday. On his return on Wednesday, April 9, he was told by Jacklet that he would not receive holiday pay for April 7. When Jones asked why, reminding Jacklet that he had called, Jacklet told him that he now would have to have a doctor's excuse. Jones' protests were unavailing and he was not paid for that holiday. Jones testified without contradiction that before the representation election, he had been absent on days immediately preceding or following holidays, but always had been paid without the requirement of a physician's note.

Having first learned of this rule from employees, Union Representative Ellis attempted to redress the situation by proposing, during the June 24 negotiating session, that employees be allowed 7, rather than 5, paid sick leave days per year and that physicians' certificates be required only after 3 consecutive sick days. This was rejected without a counterproposal.

Accordingly, it is concluded that by requiring, for the first time, immediately following the Union's selection as bargaining representative that employees submit physicians' "receipts" in order to receive sick leave benefits, without prior negotiation with the Union, the Respondent unilaterally created a more stringent prerequisite to eligibility. Also, as applied to Jones on April 8, the new rule also served to unilaterally change eligibility for holiday pay. As both matters affect terms and conditions of employment, the Respondent's unilateral conduct in both instances was in violation of Section 8(a)(5) and (1)of the Act.[61]

c. *The change in providing coffee for employees*

Henry Shields Jr., Curtis Jones, and Leamon Alford, all employed at the time by the Respondent,[62] testified that before the representation election, employees had been able to obtain coffee from an open pot on a table in the shop office. Although there was a box with "10 cents" written on it, these witnesses related that hardly anyone put money into the box to pay for their coffee. When Shields first began to work for the Respondent, he did contribute to the box, but discontinued when he noticed that in doing so he was virtually alone. Jones, too, described nonpayment as the general practice and related that he "could" take coffee 1 or 2 weeks at a time without contributing. Then, feeling guilty, he might put in a dollar. These witnesses understood that the coffee, the cups, and the accompaniments were paid for from proceeds from various soft drink vending machines on the premises[63] or by Bailey Sr.

However, on a Monday morning, about 1 week after the election, employees found that the coffeepot was gone from the office, replaced for the first time by a coffee vending machine at 25 cents a cup.

The Respondent contests the above facts only in asserting that the coffee provided before installation of the vending machine had not been free, as indicated by the 10-cent sign on the coffee box.

In the present matter, I find that under the longstanding practice before arrival of the coffee vending machine, coffee had been provided by the Respondent for employees at no required cost to them. While 10-cent contributions were encouraged by placement of the money box, such donations rarely were made. This contrasts with the involuntary 25-cent payments required by the vending machine.

No notice was given to the Union in advance of the machine's installation and, when the Union raised this matter, among others, during the June 24 negotiating sessions, the Respondent summarily rejected the proposed resumption of its former coffee policy as too costly.

In *Ford Motor Co. v. NLRB*,[64] the U.S. Supreme Court affirmed the Board's consistently applied rule that in-plant food prices are among those terms and conditions of employment about which the employer and the union must bargain under Section 8(a)(5) and 8(b)(3) of the Act, and observed that in-plant food prices and services are matters not too trivial to qualify as mandatory subjects of bargaining.

Accordingly, the Respondent clearly was required to notify and bargain with the Union concerning installation of the coffee vending machine before its installation. Even, assuming, arguendo, as in *Ladish Co.*,[65] that once the vending machine was installed, the Respondent, by reason of its contract with the machine supplier, could not control the price per cup,[66] it very much was within the Respondent's discretion to determine, in the first instance, whether the machine was to be installed. The Respondent's unilateral action and its later rejection of meaningful bargaining with the Union on this fait accompli during the June 24 negotiating session stand as violations of Section 8(a)(5) and (1) of the Act.

d. *Alleged change in vacation policy*

Jones, Shields, and Jackson, then employees, also testified that following the representation election, but before the first negotiating session, the Respondent changed its policy concerning vacation eligibility by requiring that employees be continuously employed for 1 year as of January 1 of the year in which they became vacation eligible. Before this, employees became eligible for vacations after 12 months of continuous service computed from the employee's date of hire.

[61] Although the Respondent did show that by April 8 Jones had used all 5 days of his sick leave, his claim on that occasion was not for sick leave but for holiday pay. His stated reason for not having received same is not rebutted.

[62] Alford, one of the employees who moved to Leasing after sales' assets were sold, is still with the Respondent. He testified as a witness for the Respondent.

[63] Jones had received this information from shop clerk Glen Alford in 1979.

[64] 441 U.S. 488 (1979).

[65] 219 NLRB 354 (1975), enf. denied 538 F.2d 1267 (7th Cir. 1976).

[66] The Respondent did not offer to prove that it could not control the coffee vending machine price.

Accordingly, under the preexisting system, an employee hired on February 1 of a given year, if continuously employed, would become eligible for a vacation as of February 1 of the following year, his anniversary date. Under the system allegedly put into effect after the election, a continuosly employed employee with a February 1 starting date would not become eligible on his anniversary date because he had not been employed for 12 months by his first January 1 with the Employer, but would have to continue to work until after January 1 of the following year.

It is not clear exactly when in 1980 this asserted change in vacation policy was put into effect. Inferentially, it is tied to the above-quoted bulletin posted on April 15, which concerned the requirement for doctors' receipts in order to receive sick leave benefits. That bulletin also provided, somewhat ambiguously, that the amounts of vacation and sick leave are based on length of continuing service. This notice, however, did not detail the alleged changes in vacation policy. Shields, however, testified that he had learned of the change when, "after the union started," Shop Foreman Jacklet announced to employees in the plant that they no longer would get a vacation after 12-months but that they would have to wait 2 years.

Union Respresentative Ellis testified that his first knowledge of this more stringent vacation eligibility requirement also came from employee complaints. He thereafter sought to meet this issue at the June 24 bargaining session by proposing a progressive vacation schedule based on length of service, with initial eligibility vesting as of the employees' first anniversary dates. This, however, was rejected as too costly. On this matter, as with others, there was no company counterproposal.

The Respondent sought to show through the testimony of Donna Hester[67] and Sandra Nunn[68] that the vacation policy had not changed, but, rather, that eligibility always had been computed as of January 1.

Hester testified that at the bottom of an identified schedule of vacation and sick days, dated April 10, 1978, prepared by her for parts department personnel, she had written, "All vacation and sick leave are based from January 1 of the following year from the date the employee was hired." She testified that that notation was made after she had had separate conversations with Bailey Sr. and Hatton to the effect that employees, after April 1978, no longer were entitled to vacations after only 1 year of employment, calculated from the date of hire. When she made the notation, Hester also called a meeting of parts personnel and announced this new vacation scheduling policy to them.[69]

Although Nunn, too, testified that the January 1 computation date for vacation eligibility was put into effect before 1980, she contradicted Hester's account that it had been promulgated in 1978, relating that it had been put into effect in March 1977. Then, the policy had been typed at the bottom of a posted notice by Bailey's daughter, Crawford, explicating the weeks of available vacation to qualifying years of service. The relevant notation at the bottom of this notice was as follows: "Vacation contingent on continuous service and based on beginning date of January 1 of each year." Nunn iterated that this policy went into effect for all employees, including parts department personnel, in March 1977 while Nunn was bookkeeper, and did not thereafter change. As noted, by 1980, neither Hester nor Nunn was still employed by the Respondent.

In view of the pattern of unlawful conduct found herein calculated to undermine the bargaining process, including the several violations relating to unilateral changes in terms and conditions of employment, I credit the General Counsel's witnesses and find that the vacation policy was unilaterally changed, as described, after the 1980 representation election so as to precondition vacation eligibility on longer periods of continuous service than had been previously required. Although evidence given by Hester and Nunn tends to show that the asserted change had been in effect before 1980, Nunn, by testifying to a March 1977 promulgation, as noted, directly contradicted Hester's testimony that this same policy was first implemented in April 1978. Neither was still with the Respondent in 1980, when the events herein occurred, and their information is not current.

Accordingly, it is concluded that the Respondent violated Section 8(a)(5) and (1) of the act by unilaterally changing its policy concerning vacation eligibility in the period following the representation election and further violated those sections of the Act by refusing to meaningfully negotiate that change in policy with the Union during the June 24 bargaining session.

e. *The unilaterally imposed policy of laying off employees during slack work periods*

It is undisputed that on Thursday, July 24, Shop Foreman Jacklet summoned employees Curtis Jones, Henry Shields Jr., Clinton Jackson, Joe Williford, and Ernest Hollifield and informed them that Bailey had told him to send home anyone who did not have anything to do. The men then were told that they were being sent home and directed to call the shop before returning to work.[70]

The four employees then asked Vice President Hatton to speak to Bailey Sr. to see if the men could be sent home by seniority as they believed that certain employees who were continuing to work had not been with the Respondent as long as themselves.[71] They also asked for their paychecks for that week. Hatton went to the office and returned with their paychecks, but reported to the men that Bailey had said that he did not have a contract with anybody and did not give a damn about seniority.

[67] Hester had been Sales' parts manager for 9 months when she left the Respondent's employ in mid-August 1978 after nearly 4 years of service.

[68] Nunn was employed by Sales from September 1969 until May 1979, the last 4 years as bookkeeper.

[69] Although parts personnel are also within the bargaining unit, no mechanics were on the schedule prepared by Hester.

[70] Jackson testified that on the day in question work had not been slack. He had been road-testing a truck that afternoon and had returned to the plant about 4:30 p.m. Soon thereafter, he received the news of his layoff.

[71] There is no evidence that seniority previously had been observed in the plant.

The General Counsel, from testimony by Jones, Shields, and Jackson, contends that before July 24, when work had been slack in the shop, the employees were not sent home but were assigned to clean the premises and equipment and to do general repair work. Accordingly, the July 24 layoff was a departure from past practice.

The layoff continued through the next day, Friday, July 25. On the following Monday, July 27, when the men returned to the shop requesting either their jobs or layoff slips, they were returned to work. Although the Union then was engaged in contract negotiations with the Respondent, it did not receive advance notification of these layoffs.[72]

The Board, in *Clements Wire & Mfg. Co.*,[73] noted:

> Although an employer may properly decide that an economic layoff is required,[5] once such a decision is made the employer must nevertheless notify the Union, and, upon request, bargain with it concerning the layoffs, including the manner in which the layoffs and any recalls are to be effected.[6] By failing to so notify the Union while its objections to the election were pending, Respondent acted at its peril and, since the Union was thereafter certified as the collective-bargaining representative of its employees, Respondent thereby violated Section 8(a)(5) and (1) of the Act.[74]

[5] See, e.g., *Southern Coach & Body Company Inc.*, 141 NLRB 80 (1963), enforcement denied 336 F.2d 214 (5th Cir. 1964).

[6] See, e.g., *Keystone Casing Supply, Inc.*, 196 NLRB 920 (1972); see also *The Lange Company, a Division of Garcia Corporation*, 222 NLRB 558 (1976).

Accordingly, the Respondent's failure to notify and bargain with the Union concerning the unilateral layoff of Jones, Shields, Williford, and Jackson violated Section 8(a)(5) and (1) of the Act.

B. *Additional Discriminatory Treatment of Employees—Facts and Conclusions*

1. Reduction in the workweek

The General Counsel contends that on March 24 the Respondent, by posted bulletin, signed by Bailey Sr., notified employees of its intent to reduce the weekly work hours of unit personnel from 42.5 hours per week to 40 as of March 26.[75] This, assertedly, was done in retaliation for employee support for the Union. The new work schedule, as posted, altered the existing 5-day workweek to establish one with hours from 8 a.m. to 5 p.m. and lunch from 12 to 1 p.m. This allegedly replaced the hours established in an earlier notice to employees, posted August 10, 1979, also signed by Bailey Sr., which had set the 5-day week at 42.5 hours. Under the first such schedule, employees worked from 7:30 a.m. to 5 p.m., with lunch also from noon to 1 p.m. Hours worked in excess of 40 per week were overtime paid at time and a half.

Clinton Jackson[76] testified that after March 26 he no longer received overtime as in the past.

The parties agreed to restrict the evidence on this allegation to General Counsel's Exhibit 19.[77] Without becoming overly involved, records forming part of that exhibit show that during the fourth quarter of 1979 all unit employees were paid a total of 372 hours of overtime out of a total of 8120.8 compensated hours. In the first quarter of 1980, overtime for the unit totaled 315.4 hours of a total of 7805.[78] However, for the second quarter of 1980, the Respondent's record show that while 7721.8 hours were worked by unit employees, only 32 hours fewer than during the preceding quarter, only 144 hours were paid in total overtime. Expressed in percentages, during the fourth quarter of 1979 and the first quarter of 1980, overtime comprised 4.87 and 4.3 percent, respectively, of the net total number of hours worked. In the second quarter of 1980, total overtime hours were only 1.98 percent of the net total number of hours worked. The General Counsel contends that it therefore is reasonable to project the average of the 4.87 and 4.3 percentages of the two quarters preceding the asserted change to conclude that overtime during the second quarter of 1980 should have continued to run at 4.59 percent of the 7721.8 net hours compensated during that quarter. This would provide for a total of 334.4 hours of due overtime in the second quarter of 1980 as compared to the 144 overtime hours reflected by the Respondent's records.[79] The General Counsel also would project that average into the third quarter of 1980 until the start of the strike on August 11.

The Respondent has not offered justification for the reduction in work hours shown, but argues that this matter was improperly litigated as paragraph 10(a) of the consolidated complaint, which contains this allegaton, did not specifically refer to a reduction in available overtime hours.[80] The Respondent's argument is without merit. It is established that although premium pay may be required for work beyond 40 hours per week, employees can be required to work overtime as a condition of employment and have been terminated lawfully for refusing.[81] Employees are not free to set their own work

[72] As noted, in response to news of these layoffs, the Union, on July 30, filed the subsequently withdrawn unfair labor practice charges in Case 11-CA-930, whereafter the Respondent refused to continue negotiations, which in turn led to the strike.

[73] 257 NLRB 1058, 1059 (1981).

[74] In the present matter, the Respondent's obligation to bargain with the Union as the duly certified bargaining representative of its employees is even more pronounced than in *Clements Wire & Mfg. Corp.*, supra, as there the Union, although successful in a representation election, had not yet been certified at the time of the unilateral layoff pending determination of objections to the election.

[75] As noted, the representation election was set for March 31, 3 workdays after the effective date of this notice.

[76] Jackson was then employed by the Respondent as a mechanic.

[77] G.C. Exhs. 19(b) and (c) are summaries of the Respondent's business records showing the number of hours worked by individual unit employees during the fourth quarter of 1979 and the first two quarters of 1980.

[78] The work schedule change was posted at the end of the first quarter of 1980.

[79] As the unfair labor practice strike found herein occurred in the third quarter of 1980, the Respondent's records after August 11, when the strike began, would not be representative.

[80] Complaint paragraph 10(a) alleges that:

> On or about March 26, 1980, Respondent instituted a reduction in the number of hours worked weekly by its employees.

[81] See *Poppin Fresh Pies*, 256 NLRB 233 (1981).

hours and, similarly, may be disciplined for engaging in partial strikes to protest mandatory overtime.[82] As regular overtime work can be a required part of an employee's assigned work schedule and as the record shows that between August 10, 1979, and March 26, 1980, the Respondent's employees were officially bound by a 42.5 hour workweek, contrary to the Respondent, I find that the relevant complaint allegation was sufficiently specific for purposes of this proceeding.

Noting the Respondent's antiunion conduct found herein, the timing of the scheduling change, effective but 3 workdays before the representation election, and the absence of justification therefor, either to the employees affected or at the hearing,[83] I find that the reduction in the workweek was intended as a discriminatory reprisal for the employees' activities on behalf of and sympathies for the Union, and is in violation of Section 8(a)(3) and (1) of the Act.

2. Refusal to repair the steam jenny

The General Counsel contends that in mid-July the Respondent refused to repair the steam jenny[84] with the purpose of making the employees' work more difficult in reprisal for their having supported the Union. The General Counsel notes that although the Respondent had followed a practice of purchasing soap concentrate for the steam jenny once or twice each month, no shipments of concentrate were received in 1980 between May 23 and August 6,[85] and argues that this hiatus was deliberate. Without the steam jenny, employees are required to clean the greasy parts by hand.

The steam jenny that had been used in the Respondent's shop until mid-summer 1980 was an older machine with a history of frequent breakdowns.

In mid-July, the steam jenny again became inoperative when that mechanism's pump blew up. Clinton Jackson then informed Shop Foreman Jacklet of the steam jenny breakdown. Announcing that he had to clean some parts, he asked if Jacklet was going to get it fixed. Jacklet replied that he would check with Bailey Sr. When Jacklet did not get back to him in about 30 minutes, Jackson returned to Jacklet's office and was told by Jacklet that Bailey had stated that he was not going to fix the steam jenny. Jackson testified that he had had the use of the steam jenny for all the years he had worked for the Company and that when it had broken down in the past, it usually had been fixed by an outside repairman within 2 days. He conceded that the blown pump of the steam engine in July 1980 necessitated more than routine servicing.

Curtis Jones testified that on July 31, after the steam jenny had broken down, he, too, had asked Jacklet if the Company was going to repair the steam jenny or was going to get another one. He pointed out that it was hard for men to do their work without it. Jacklet told him that Bailey had said that he did not give a damn about the steam jenny and was not going to repair it.

The steam jenny was still inoperative when, on August 11, the men went on strike. However, on their return, they found that a new, smaller steam jenny had been installed.

Bailey Sr. testified that the old, larger steam jenny that had been in use had become worn out by mid-summer of 1980. However, with periodic servicing when necessary, the machine remained operational until August 25, when the new machine was installed. As the problems with it became cumulative, it was decided that it would be advantageous to get a replacement.

Bailey, citing the Respondent's financial difficulties, denied a discriminatory purpose in not fixing the jenny. He explained the delay in soap concentrate purchases between shipments of May 20 and July 31 by relating that additional soap had not been needed in that interval as the Respondent earlier had doubled its purchases, having received four barrels in March, two barrels on March 6 and 31, respectively. Because of the surplus of soap concentrate on hand, additional purchases before July 31 were not necessary.

From the record herein, it does not appear that the delay in fixing or replacing the steam jenny was in reprisal for the union activities and sympathies of its employees, but, rather, was caused by the Respondent's poor financial condition. The jenny apparently was beyond routine repair, earlier servicing had not proved effective, and the replacement cost on August 25 was in excess of $1000. Rebutting the General Counsel's contention that the failure to buy new soap concentrate was to further an attempt at unlawful retaliation, the Respondent had ordered new soap for the machine in July at a time when Jackson and Jones were complaining to Jacklet about the condition of the machine. It also appears from invoices submitted that, consistent with Bailey's testimony, additional soap had been purchased in March and May. Soap concentrate was uniformly received in two barrel shipments. Only one such shipment per month was received in January, February, and April, while there were two shipments received in both March and May. Bailey's testimony that the hiatus in purchases between May and July was based on a surplus is not rebutted and, as noted, the receipt of a shipment sent July 31 is inconsistent with the General Counsel's theory. Even assuming that Bailey had made the impatient remark concerning the steam jenny attributed to him by Jacklet, the weight of the evidence does not show that the steam jenny was allowed to continue in disuse for a purpose of harassing employees for having selected the Union. Accordingly, I do not find that the Respondent violated Section 8(a)(3) and (1) in this regard.

Summarizing, it has been found that the Respondent has refused to bargain in violation of Section 8(a)(5) and (1) of the Act by:

(a) Refusing to pursue scheduled contract negotiations with the Union because of the pendency of unresolved

[82] *Valley City Furniture Co.*, 110 NLRB 1589, 1594–1595 (1954).

[83] From the evidence presented it is reasonable to presume continuation of the number of work hours previously available until the August 11 strike as Sales' difficulties were caused by default of Coastal's mounting obligations rather than by a reduction in the volume of Sales' business.

[84] The steam jenny is a machine which jets a mixture of steam, hot water, and soap. It is used to clean truck, engines, parts, and all types of metal.

[85] The respective shipping dates for these purchases were May 20 and July 31, respectively.

unfair labor practice charges filed by the Union against the Respondent in Case 11–CA–9301, subsequently withdrawn.

(b) Refusing to bargain meaningfully with the Union during earlier contract negotiations concerning unilaterally imposed policy changes affecting vacation eligibility, the need for phsyicians' excuses as affecting eligibility for sick leave benefits and/or holiday pay, the duty to call in when absent, and on the terms under which coffee is provided to employees during the workday.

(c) Unilaterally making the following changes in its employees' terms and conditions of employment without prior notice to and bargaining with the Union:

1. As applied to Curtis Jones, requiring for the first time that employees present physicians' receipts in order to receive sick leave benefits and/or holiday pay, when the employee's absence for illness occurred on the day before and/or after the holiday.[86]

2. Increasing the amount of continuous service employees must have to become eligible for paid vacations.

3. Installing a vending machine dispensing coffee at a greater cost to employees than the previously available free or lesser priced coffee.

4. Modifying the attendance policy to provide for the discharge of employees who are absent for 5 working days without notifying the Respondent.

5. Laying off employees Curtis Jones, Henry Shields Jr., Clinton Jackson, and Joe Williford on July 24–25 when work was slack, rather than continuing the former policy on such occasions of having them perform clean-up and maintenance work.

(d) Failing to timely notify the Union of its intention to sell the assets of Sales and to bargain concerning the effects of the sale on employees.

The Respondent violated Section 8(a)(3) and (1) of the Act by:

(a) Reducing the number of hours worked weekly by its employees from 42.5 to 40 because of the employess' union activities and sympathies.

(b) Refusing to reinstate Andrew Blalock and delaying reinstatement of the following other unfair labor practice strikers after September 2, 1980, although an unconditional offer to return to work had been made on their behalf:

James Beach	Wayne Lewis
Troy Bullard	Robert Liertz
Ernest Hollifield	Troy Lindsey
Curtis Jones	Henry Shields Jr.

The Respondent violated Section 8(a)(1) of the Act by Bailey's statements to employees during the June 24 negotiating session to the effect that it was unlikely that the Union would get a collective-bargaining agreement and his initial refusal, for that reason, to name company grievance-processing representatives.

[86] As found here, the Respondent violated Sec. 8(a)(5) and (1) of the Act both by implementing the unilateral changes in working conditions found herein, and, again, by refusing to bargain in good faith with the Union when these matters were raised during later contract negotiations.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of the Respondent set forth in section III, above, occurring in connection with the Respondent's operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow thereof.

CONCLUSIONS OF LAW

1. Central Mack Sales, Inc. and its alter egos, Central Truck Leasing Corporation, North Carolina Coastal Motor Lines, Inc., and D. Thomas Bailey Sr., constitute a single employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. International Union of Operating Engineers, Local 465, AFL–CIO, affiliated with International Union of Operating Engineers, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. The following unit is appropriate for purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All parts department employees, mechanics, body and paint shop employees, cleanup steam room employees at the Respondent's Raleigh, North Carolina facility, excluding all office clerical employees, professional employees, salesmen, guards and supervisors, as defined in the Act.

4. About March 31, 1980, and at all times material thereafter, the Union herein represented a majority of the employees in the above-described appropriate unit, and has been the exclusive representative of all these employees for purposes of collective bargaining within the meaning of Section 9(a) of the Act.

5. The strike which commenced on August 11, 1980, was an unfair labor practice strike from its inception.

6. The Respondent violated Section 8(a)(5) of the Act by:

(a) Refusing to pursue contract negotiations with the Union because of the pendency of unfair labor practice charges filed by the Union against the Respondent.

(b) Refusing to bargain in good faith with the Union during contract negotiations with respect to unilaterally imposed policy changes affecting terms and conditions of employment of bargaining unit employees, although duly requested by the Union.

(c) Unilaterally making the following changes in the terms and conditions of employment of its employees without prior notice to and bargaining with the Union:

1. Requiring that employees present physicians' receipts in order to receive sick leave benefits and/or holiday pay, when the employees' absences occurred on the day before and/or after the holiday.

2. Increasing the amount of continuous service employees must have to become eligible for paid vacations.

3. Installing vending machines dispensing coffee at greater cost to employees.

4. Modifying the attendance policy to provide for the discharge of employees who have been absent for 5 workdays without notifying the Respondent.

5. Laying off employees Curtis Jones, Henry Shields Jr., Clinton Jackson, and Joe Williford when work was slow, rather than assign them to maintaince and cleanup work as had been the practice.

(d) Failing to timely notify the Union of its intention to sell the assets of Sales and to bargain concerning the effects on employees of that sale.

7. Respondent violated Section 8(a)(3) and (1) of the Act by:

(a) Reducing the number of weekly work hours for employees because of their union activities and sympathies.

(b) Refusing to reinstate unfair labor practice striker Andrew Blalock and delaying the reinstatement of the other unfair labor practice strikers named below although unconditional offers to return to work had been made on their behalf:

James Beach	Wayne Lewis
Troy Bullard	Robert Liertz
Ernest Hollifield	Troy Lindsey
Curtis Jones	Henry Shields Jr.

8. The Respondent violated Section 8(a)(1) of the Act by statements made to employees during contract negotiations that it was unlikely that the Union would get a collective-bargaining agreement and by initially refusing, for that reason, to name company grievance-processing representatives.

9. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

10. The Respondent did not violate the Act by any conduct not found herein to constitute an unfair labor practice.

THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall recommend that it be required to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that the Respondent violated Section 8(a)(1) and (3) of the Act, inter alia, by unlawfully refusing to recall Andrew Blalock and by delaying the recall of the unfair labor practice strikers after September 2, 1980,[87] I recommend that the Respondent be ordered to make whole Blalock and those other unfair labor practice strikers affected by the failure to receive prompt reinstatement for any loss of earnings the employees may have suffered as a result of the Respondent's unlawful actions. Backpay shall be computed with interest as prescribed in *F. W. Woolworth Co.*,[88] and *Florida Steel Corp.*[89]

Having found that the Respondent has further violated Section 8(a)(3) and (1) of the Act by reducing the length of the workweek from 42.5 to 40 hours during the second quarter of 1980, continuing into the third quarter of that year until the strike that began on August 11, in agreement with the General Counsel, I recommend that overtime pay at time and a half should be computed on behalf of affected employees for the above-indicated period at a projected 4.59 percent of the total net hours compensated, less overtime previously paid. This projected 4.59 percentage is based on the average of the 4.87 and 4.3 overtime percentages paid during the two quarters immediately preceding the unlawful change in the workweek. Overtime pay, with interest, shall be computed in accordance with the formula set forth above.

Because the Respondent failed to afford the Union an adequate opportunity to bargain about the effects of the sale of Sales' assets on bargaining unit employees in violation of Section 8(a)(5) an (1) of the Act, I shall recommend that the Respondent be ordered to bargain with the Union concerning the effects of this sale on all bargaining unit employees. However, as in *Climate Control Corp.*,[90] and *Merryweather Optical Co.*,[91] a bargaining order alone is an inadequate remedy because, now that the Respondent has sold part of its business without notice, the employees' bargaining power has been materially compromised. In order to create an atmosphere in which meaningful bargaining can be assured, some measure of economic strength must be restored to the Union.

Accordingly, the Respondent should be required to pay its bargaining unit employees amounts at the rates of their normal wages when last in the Respondent's employ from 5 days after the date of this decision until occurrence of the earliest of the following events: (1) the date the Respondent bargains to agreement with the Union on those subjects pertaining to the effects of the closing on bargaining unit employees; (2) a bona fide impasse on bargaining; (3) the failure of the Union to request bargaining within 5 days of this decision, or to commence negotiations within 5 days of the Respondent's notice of its desire to bargain with the Union; or (4) the subsequent failure of the Union to bargain in good faith. In no event shall the sum paid to any of these em-

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[87] The backpay period for all unfair labor practice strikers began on September 2 and, as found above, continued to the dates shown next to their respective names:

Henry Shields Jr.	Nov. 17, 1980
James Beach	Sept. 9, 1980
Troy Bullard	Nov. 11, 1980
Ernest Hollified	Oct. 2, 1980
Curtis Jones	Oct. 2, 1980
Wayne Lewis	Sept. 9, 1980
Robert Liertz	Oct. 7, 1980
Troy Lindsey	Sept. 11, 1980
Andrew Blalock	Jan. 8, 1981

As, in agreement with the General Counsel, I find that Blalock's backpay period ended when Sales' employees were laid off following the sale of that Company's assets, no reinstatement order would be appropriate as to the remaining alter ego Respondents. However, Blalock's recoupment and those of other employees may be enhanced by the remedy afforded below concerning the Respondent's failure to bargain with the Union concerning the effects on employees of the sale of Sales' assets.

[88] 90 NLRB 289 (1950).

[89] 231 NLRB 651 (1977). See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962).

[90] 257 NLRB 173 (1981).

[91] 240 NLRB 1213, 1216–17 (1979).

ployees exceed the amount the employees would have earned as wages from January 8, 1981, the date on which the Respondent sold Sales' assets, to the time such employees secured employment elsewhere, or the date on which the Respondent shall have made a bona fide offer to bargain, whichever occurred sooner, provided, however, that in no event shall the sum be less than these employees would have earned for a 2-week period at the rates of their normal wages when last in the Respondent's employ. Such earnings shall be computed based on a 42.5-hour workweek with interest in accordance with the formula set forth above.

Having found that the Respondent further violated Section 8(a)(5) and (1) of the Act by laying off employees Curtis Jones, Henry Shields Jr., Clinton Jackson, and Joe Williford from July 24, 1980, at 5 p.m. until the morning of July 28, 1980, without notice to and bargaining with the Union, as part of the remedy herein, the Respondent should be required to make those employees whole for any loss of pay suffered by reason of the Respondent's unlawful conduct. Backpay with interest shall be computed in accordance with the formula set forth above.[93]

I also shall recommend that a broad cease-and-desist order be entered.[94]

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[95]

ORDER

The Respondents, Central Mack Sales, Inc., Central Truck Leasing Corporation, North Carolina Coastal Motor Lines, Inc., and D. Thomas Bailey, Sr., Raleigh, North Carolina, their officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to bargain with International Union of Operating Engineers, Local 465, AFL–CIO, affiliated with International Union of Operating Engineers, AFL–CIO with respect to the effects of the sale of the assests of Central Mack Sales, Inc. on its employees in the following unit:

> All parts department employees, mechanics, body and paint shop employees, cleanup steam room employees at the Respondents' Raleigh, North Carolina facility, excluding all office clerical employees, professional employees, salesmen, guards and supervisors, as defined in the Act.

(b) Refusing to bargain or pursue contract negotiations with the above-named Union because of the pendency of unfair labor practice charges filed against the Respondent by the Union.

(c) Refusing, on request, to bargain in good faith with the Union with respect to unilaterally imposed policy changes affecting terms and conditions of employment of employees in the above-described bargaining unit.

(d) Unilaterally making the following changes in the terms and conditions of employment of its unit employees without prior notice to and bargaining with the Union:

(1) Requiring that employees present physicians' receipts in order to receive sick-leave benefits and/or holiday pay, when the employees' absences occurred on the day before and/or after the holiday.

(2) Increasing the amount of continuous service employee must have to become eligible for paid vacations.

(3) Installing a vending machine dispensing coffee at a greater cost to employees.

(4) Modifying the attendance policy to provide for the discharge of employees who are absent for 5 working days without calling in to the Respondent.

(5) Laying off employees without notice to and bargaining with the Union.

(e) Reducing the number of hours worked weekly by its employees in retaliation for their union activities and sympathies.

(f) Delaying reinstatement and/or refusing to reinstate unfair labor practice strikers where an unconditional offer to return to work has been made on their behalf.

(g) Creating an impression of the futility of the bargaining process by informing employees during contract negotiations, or at other times, that it is unlikely that the Union will succeed in obtaining a collective-bargaining agreement.

(h) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the above-named Union with respect to the effects on its employees of the sale of the assets of Central Mack Sales, Inc., and reduce to writing any agreement reached.

(b) Make whole its employees by paying those employees who were laid off on or after January 8, 1981, when the Respondent sold the assets of Central Mack Sales, Inc. normal wages, plus interest, for a period specified by the National Labor Relations Board, in the manner set forth in the section of this decision entitled "The Remedy."

(c) Make whole Andrew Blalock and the individuals named below for any loss of earnings they may have suffered by reason of the Respondents' discrimination against them and/or because of its refusals to bargain with the above-named Union with respect to the layoffs which commenced on July 24, 1980, and other unlawfully imposed unilateral changes in the terms and conditions

[93] It also is appropriate that employees adversely affected by other unilateral changes found herein also be made whole as indicated. For example, Curtis Jones should be compensated for Easter Monday, April 7, 1980, holiday pay denied him because of the change in the policy requiring physicians' receipts.

[94] As the unfair labor practices committed by the Respondent are serious, numerous, and include unlawful discharge, layoffs, and refusal to grant proper reinstatement, I shall recommend that it cease and desist therefrom and refrain in any other manner from interfering with the rights of employees guaranteed in Sec. 7 of the Act. *Climate Control Corp.*, supra; Magnesium Casting Co., 250 NLRB 692 fn. 3, 713 (1980); Cf. *Hickmott Foods*, 242 NLRB 1357 (1979).

[95] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

of its employees' employment, in the manner set forth hereinabove in the section of this decision entitled "The Remedy":

James Beach	Wayne Lewis
Troy Bullard	Robert Liertz
Ernest Hollifield	Troy Lindsey
Curtis Jones	Henry Shields Jr.
Clinton Jackson	Joe Williford

(d) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Post at its Raleigh, North Carolina location, copies of the attached notice marked "Appendix."[95] Copies of the notice, on forms provided by the Regional Director for Region 11, after being signed by the Respondent's authorized representative, shallbe posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. Also, immediately upon receipt and signing by the Respondent's authorized representative, copies of the attached notice will be mailed by the Respondent by certified mail, return receipt requested, to all former employees employed within the above bargaining unit since March 1, 1980, at their last known address.

(f) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS ORDERED that the consolidated complaint herein be dismissed insofar as it alleges violations of the Act not specifically found herein.

[95] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT fail and refuse to bargain with International Union of Operating Engineers, Local 465, AFL–CIO, affiliated with International Union of Operating Engineers, AFL–CIO with respect to the effects of the sale of the assets of Central Mack Sales, Inc., on our employees in the following appropriate unit:

> All parts department employees, mechanics, body and paint shop employees, cleanup steam room employees at our Raleigh, North Carolina facility, excluding all office clerical employees, professional employees, salesmen, guards, and supervisors as defined in the Act.

WE WILL NOT refuse to pursue contract negotiations with the above-named Union because it has filed unfair labor practice charges against us with the National Labor Relations Board.

WE WILL NOT refuse to pursue contract negotiations or otherwise bargain with the above-named Union with respect to our unilaterally imposed policy changes affecting terms and conditions of your employment.

WE WILL NOT unilaterally make the following changes or other modifications in the terms and conditions of your employment without prior notice to and bargaining with the Union:

> Require that you present physicians' receipts in order to receive sick leave benefits and/or holiday pay, when you are absent from work on the day before and and/or after the holiday.
>
> Increase the amount of continuous service you must have to become eligible for paid vacations.
>
> Install a vending machine selling coffee at greater cost to you than before.
>
> Modify the attendance policy to provide for the discharge of employees who are absent for 5 workdays without calling the plant.
>
> Lay you off when work is slack, or for other reasons, without notice to and bargaining with the Union.

WE WILL NOT reduce the number of hours worked weekly by you in retaliation for your union activities and sympathies.

WE WILL NOT delay reinstatement and/or refuse to promptly reinstate unfair labor practice strikers where an unconditional offer to return to work has been made on their behalf.

WE WILL NOT impress you with the futility of bargaining by telling you during contract negotiations, or otherwise, that it is unlikely that the Union will suceed in obtaining a collective-bargaining agreement.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL make whole our employees who were laid off on or after January 8, 1981, when we sold the assets of Central Mack Sales, Inc., by paying them normal wages, plus interest, for a period specified by the National Labor Relations Board.

WE WILL, on request, bargain with the above-named Union with respect to the effects on our employees of the sale of the assets of Central Mack Sales, Inc., and reduce to writing any agreement reached.

WE WILL make whole Andrew Blalock and the other individuals named below, with interest, for any loss of

earnings they may have suffered by reason of our discrimination against them or because of our refusal to bargain with the above-named Union with respect to the layoffs which commenced on July 24, 1980, and other unlawfully imposed unilateral changes in the terms and conditions of employment:

James Beach	Wayne Lewis
Troy Bullard	Robert Liertz
Ernest Hollifield	Troy Lindsey
Curtis Jones	Henry Shields Jr.
Clinton Jackson	Joe Williford

CENTRAL MACK SALES, INC., CENTRAL TRUCK LEASING CORPORATION, NORTH CAROLINA COASTAL MOTOR LINES, INC., AND D. THOMAS BAILEY SR.

Wilburn S. Bruce, d/b/a Landing Construction Company *and* Plumbers Local Union No. 68, a/w United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL-CIO, Petitioner. Case 23-RC-5175

14 December 1984

DECISION AND CERTIFICATION OF REPRESENTATIVE

BY CHAIRMAN DOTSON AND MEMBERS ZIMMERMAN AND HUNTER

The National Labor Relations Board, by a three-member panel, has considered determinative challenges in an election held 15 December 1983 and the hearing officer's report recommending disposition of them. The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows two for and one against the Petitioner, with two challenged ballots.

The Board has reviewed the record in light of the exceptions and brief, has adopted the hearing officer's findings and recommendation, and finds that a certification of representative should be issued.

The Employer provides construction and maintenance services necessary for the operation of a time-sharing resort. It has a plumbing crew which consists of two licensed plumbers and a plumbers' helper, who work together as a crew the vast majority of the time, performing essentially the same type of work. The crew spends approximately 50 percent of its time doing construction plumbing work in addition to maintenance plumbing work such as repairing garbage disposals, water heaters, and toilets. None of the crew performs any electrical or landscaping work.

In addition to the plumbing crew, the Employer has a general maintenance employee, Drab, and a landscaping and maintenance employee, Escobedo. Drab's responsibilities include the repair of broken door locks, loose carpeting, malfunctioning light switches, broken furniture and kitchen appliances, and replacing missing light bulbs. Although Drab spends 65 to 70 percent of his time performing maintenance repair plumbing such as fixing leaky faucets, he is not a licensed plumber and does not perform any new construction plumbing work. On two occasions Drab was consulted on the routing of new construction plumbing, but only for the purpose of anticipating future maintenance needs. Unlike the plumbing crew, Drab drives his own truck on the job, in which he carries his tools. The plumbing crew has its own toolshed. Moreover, Drab, unlike the plumbing crew, is salaried, is on 24-hour call, carries a beeper, and receives his orders directly from the guest check-in office or from the Employer's president or vice president, rather than from Plumbing Supervisor Dunn.

Employee Escobedo's primary responsibility is to care for the grounds. He is assigned to the landscaping/groundskeeping crew, and acts as an interpreter for the landscaping supervisor Dahlkemper, from whom he receives his instructions. Escobedo spends at least 50 percent of his time mowing, weeding, mulching, fertilizing, and planting, and performs general maintenance work including plumbing repairs similar to those performed by Drab. Escobedo stores his tools in a landscaping lockup shed separate from the plumbing crew's toolshed and, unlike the plumbing crew, Escobedo is a salaried employee.

Based on the foregoing, and contrary to our colleague, we agree with the hearing officer's conclusion that Drab and Escobedo are dual-function employees who do not share a sufficient community of interest with the plumbing crew employees to be included in the bargaining unit. *Berea Publishing Co.*, 140 NLRB 516 (1963); *Ocala Star Banner*, 97 NLRB 384 (1951); *NLRB v. Kane/Miller Corp.*, 474 F.2d 407, 409-410 (5th Cir. 1973). Although Drab and Escobedo perform plumbing repair work in addition to their other duties, they are salaried, work under different supervisors with different work crews, and in Drab's case, at different hours. Moreover, they do not regularly perform the same type of plumbing work as that performed by the plumbing crew for sufficient periods of time to warrant inclusion in the unit. The record reveals that the plumbing duties performed by Drab and Escobedo are limited to routine repairs such as fixing leaky faucets. Neither performs significant amounts of new construction plumbing work, which comprises 50 percent of the work of the plumbing crew.

We shall therefore sustain the challenges to the ballots of employees Arnold Drab and Robert Escobedo, and issue a certification of representative.

CERTIFICATION OF REPRESENTATIVE

IT IS CERTIFIED that a majority of the valid ballots have been cast for Plumbers Local Union No. 68, a/w United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL-CIO, and that it is the exclusive collective-bargaining representative of the employees in the following appropriate unit:

> INCLUDED: All plumbers and plumbers helpers employed by the Employer.

EXCLUDED: All other employees, guards, watchmen and supervisors as defined in the Act.

MEMBER HUNTER, dissenting.

Contrary to my colleagues, I would reverse the hearing officer and overrule the challenges to the ballots of employees Drab and Escobedo. In my view, Drab and Escobedo are "dual-function" employees who share a sufficient community of interest with unit employees to be included in the unit. See *Berea Publishing Co.*, 140 NLRB 516 (1963).

The unit, as described in the stipulated election agreement, includes: "All plumbers and plumbers helpers employed by the Employer." The hearing officer found that the Employer has a "plumbing crew"[1] whose employees are hourly paid and perform "mostly plumbing work," including new construction plumbing work. The hearing officer further found that Drab, who was employed as a general maintenance man, spent 65–70 percent of his time performing plumbing repairs; and that Escobedo, who was assigned to the landscaping crew, spent 25 percent of his time performing plumbing repairs. However, because he found that Drab and Escobedo did not regularly perform the *same type* of plumbing work as that performed by the "plumbing crew," the hearing officer found that they did not have a substantial community of interest in the crew's wages, hours, and other terms and conditions of employment. In this regard, the hearing officer also relied on the fact that Drab and Escobedo were salaried and that they worked under different supervisors from the "plumbing crew." My colleagues essentially have adopted the hearing officer's findings in full.

In my view, it is specious to distinguish between Drab and Escobedo on the one hand, and the "plumbing crew" on the other hand, based on the *type* of plumbing work they performed and, once that distinction is eliminated, any remaining distinctions are insufficient to exclude Drab and Escobedo from the unit. The record indicates that Drab and Escobedo regularly and routinely have performed plumbing work—i.e., Drab over half of the time and Escobedo about one-quarter of the time.[2] Although they may not have performed exactly the same work as that performed by the "plumbing crew," there is no dispute that the work was related. Moreover, even assuming that the Employer has a "plumbing crew"—a matter which is not free from doubt—the unit description is not resricted to any such crew; rather, the unit specifically includes "plumbers" and "plumbers helpers." Under the circumstances herein, it would be purely a matter of semantics to hold that Drab and Escobedo were not "plumbers" while they were performing plumbing work.

Accordingly, based on their regularly and routine performance of plumbing work, Drab and Escobedo have a substantial community of interest with the Employer's plumbers and plumbers' helpers which requires their inclusion in the unit. I therefore would open and count their ballots before issuing the appropriate certification.

[1] The Employer excepted to this, among other, factual findings of the hearing officer.

[2] In *Berea Publishing Co.*, above, the Board held that a dual-function employee who devotes less than 51 percent of his time to unit work may have sufficient interest in the unit's conditions of employment to be included in the unit. The test is whether the dual-function employee regularly devotes "sufficient periods of time to the unit work" to demonstrate that he has a "substantial community of interest in the unit's wages, hours, and conditions of employment." 140 NLRB at 519.

Vought Corporation–MLRS Systems Division *and* International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW). Case 26–CA–10240

14 December 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS ZIMMERMAN AND DENNIS

On 16 May 1984 Administrative Law Judge Donald R. Holley issued the attached decision. The General Counsel and the Respondent filed exceptions and supporting briefs, and the Respondent filed an answering brief to the General Counsel's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions as modified.

The judge found that the Respondent violated Section 8(a)(1) of the Act by requesting an employee to keep it informed about other employees' union activities; maintaining and enforcing an overly broad no-distribution rule; coercively interrogating employees about union support or activities; threatening employees with plant closure or reduction of the work force if they selected the Union to represent them; soliciting and promising to resolve employee grievances if employees would abandon support of the Union; altering an employee's work assignments for supporting the Union; and threatening to discharge an employee for engaging in union solicitation. We affirm these findings.[2]

The judge also recommended the dismissal of allegations that the Respondent created an impression of surveillance of employees' union activities in violation of Section 8(a)(1) of the Act; issued an oral warning on 5 May 1983[3] and a written warning on 20 May to employee David Evans in violation of Section 8(a)(3) and (1); and discharged Evans on 24 May, also violating Section 8(a)(3) and (1). The General Counsel excepted only to the judge's failure to find the latter three violations. We find merit in the General Counsel's exceptions.

Evans was employed as a dispatcher at the Respondent's munitions production facility in Camden, Arkansas. His responsibility was to see that the production line received the proper hardware and materials needed to build MLRS (Multiple Launch Rocket System) launchers. This involved keeping an inventory on the SPLL (Self Propelled Loader Launcher) line storage bins, filling out requisition request forms for the warehouse, and delivering the parts to the appropriate bins on the SPLL line. It is undisputed that Evans performed his work well before early March and had been complimented for oustanding work at least once.

In early March, Evans contacted union representative R. T. Buttram to discuss unionization of the Respondent's facility. Evans met with Buttram on 8 or 9 March, and the Union thereafter conducted an organizational campaign among the plant's production employees. Evans served as chairman of the in-plant organizing committee, distributed union literature and authorization cards, and discussed unionization with employees, and wore union insignia at work. It is undisputed the Respondent became aware of the union campaign and of Evans' participation almost immediately.

On 11 March Production Supervisor Sonny Blair approached Evans and told him he had heard there was an organizational effort and that some employees had met with a union representative. Blair told Evans that, based on their past close personal friendship, he thought he could count on Evans for any information he might need about the campaign.[4] The judge found Blair's statement violated Section 8(a)(1).

On 15 March General Manager Harry LeCost met with Evans' immediate supervisor Donald Dahlke and Dahlke's superior Charles Simpson, and told them that Evans had been passing out information and harassing people during working hours.[5] LeCost told the supervisors to explain to Evans what he could and could not do during working hours. Dahlke and Simpson met with Evans. Dahlke informed Evans that it had come to

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] The Respondent excepted only to the judge's findings concerning its asking an employee to become an informer, its maintenance and enforcement of the no-distribution rule, and its threat to discharge an employee. In upholding the judge's finding as to the no-distribution rule, we do not rely on his citation to *Intermedics, Inc.*, 262 NLRB 1407 (1982), but instead on our recent decision in *Our Way, Inc.*, 268 NLRB 394 (1983), and on *Stoddard-Quirk Mfg. Co.*, 138 NLRB 615 (1962). Nor, in finding the violation, do we rely on his statement, in sec. III,B,2, par. 6, of his decision, that the Respondent's cancellation of the rule on 27 September 1983 constituted an acknowledgement it was unlawful.

[3] All dates are in 1983 unless otherwise stated.

[4] Evans responded by telling Blair that if there was anything he thought Blair needed to know he would be sure to tell him.

[5] The meeting represents the first time the general manager had been involved in employee discipline.

his attention that Evans was handing out handbills and harassing employees during working hours, and he would be terminated if he did not stop. Dahlke told Evans that what Evans did on breaks, lunch, and before and after work was his personal time, but work was to be performed on worktime. Evans denied harassing employees and distributing materials during worktime. The judge observed the Respondent's no-distribution rule was unlawful because it required prior company approval of material to be passed out,[6] and that the Respondent did not have a no-solicitation rule and discriminatorily permitted working time solicitation for churches, football pools, gifts, and antiunion activities. He concluded Dahlke's threat to Evans violated Section 8(a)(1) as it "imparted" the message he would be fired if he solicited for the Union on company time.

On 17 March, while Evans was distributing handbills in the Respondent's parking lot, Superintendent Jim Coffin approached him and told him he could not hand out literature on company property. After Coffin departed, security personnel arrived and told Evans to stop his activity and leave company property. The judge found the maintenance and enforcement of the overly broad no-distribution rule, described above, violated Section 8(a)(1).

On 5 May Supervisor Dahlke gave Evans an oral warning regarding his work performance. Dahlke told Evans his production was slipping, as the storage bins Evans had been servicing were not fully stocked. Dahlke also stated that he had been told Evans was not doing his job. Evans admitted his bins were not filled, but explained that he had insufficient time to prepare all the necessary requisitions because he had to assume the job responsibilities of an employee who had recently been transferred from the department;[7] that the Respondent had recently instituted a time-consuming policy requiring Evans to obtain a production supervisor's signature on all requisitions to the warehouse;[8] that requisitions left for signature on Supervisor Dahlke's desk often piled up without being signed; and that there was a delay of up to 2 weeks in acquiring parts from the warehouse.[9] Evans also explained that employees on the SPLL line, where the depleted bins were located, worked overtime, yet he was not permitted to do so during the period of his alleged decline in productivity though he had previously been allowed overtime.[10] The record also shows that, shortly after Evans' 24 May discharge, Brad Byars, a SPLL line employee, apparently assumed some of Evans' job responsibilities, and three new employees were hired on the SPLL line to perform Evans' "other duties."[11]

Dahlke testified he issued the oral warning after the Respondent's production schedule slipped twice due to parts shortages. Dahlke claimed that he received repeated complaints from Superintendent Gilton and Floor Supervisor Blair concerning Evans' excessive talking and hardware parts shortages on the SPLL line. According to Dahlke, the supervisors felt that the production decline occurred because of Evans' excessive talking in March and April. Dahlke stated, after receiving the complaints, he observed Evans performing his job and noticed he spent a lot of time talking to other employees.

On 18 May employee Leland Patterson approached Evans and informed him Jerry McClendon, a new white employee, had shown up at the Respondent's facility in dress rather than work clothes.[12] Patterson told Evans he thought McClendon would soon be placed into a head supervisory position over Gary Wright, a black employee who had recently been promoted to the top supervisory position in the department. Evans communicated the rumor to at least three black production employees,[13] and suggested they might want

[6] The distribution rule in effect on 15 March 1983 prohibited: "Reproducing, posting, or passing out typed or printed material other than Company business without the permission of the Director of Professional Services." The rule provided for disciplinary action up to and including discharge.

[7] The employee, Jewel Jones, was a dispatcher whose primary responsibility was to complete requisitions for shortage items on the SPLL line. The record indicates that her transfer occurred in March at approximately the same time the slump in production on the SPLL line allegedly began.

There was disputed testimony as to whether Evans assumed all employee Jones' job duties as dispatcher. It is clear, however, Evans took over all of Jones' requisition writing duties for the SPLL line, which was about half her work.

[8] Before April 1983, Evans had been allowed to deliver the requisitions directly to the warehouse without prior supervisory approval. There was conflicting testimony regarding whether the signature of a production supervisor or that of any supervisor was sufficient to fulfill the requirement.

[9] The Respondent argues, if Evans had effectively carried out his responsibility to prioritize the requisitions on Dahlke's desk, the shortage items on the SPLL line would have been obtained from the warehouse more quickly. There is no dispute Evans failed properly to prioritize.

[10] Evans was allowed to work overtime prior to March, but was not scheduled for overtime after 1 March. Employees on the SPLL line worked various durations of overtime during the period from March to 5 May. Dahlke refused Evans' request to work overtime to deal with the SPLL line shortages. Dahlke testified that putting Evans on overtime would have been futile because the warehouse did not work overtime during the period in question.

[11] Though Byars' testimony that the Respondent hired three new SPLL line employees to handle Evans' "other duties" is undisputed, he stated he did not know whether the employees handled only Evans' former duties.

[12] Evans is also white.

[13] Evans admitted relaying the rumor to Alexia Page and Nelson Holliman. The credited testimony indicates that Evans also related the rumor to Martha Hopson. Hopson testified Evans also repeated the rumor to employee Dewey Ross.

to raise the McClendon promotion issue at the next meeting the Company had with its black employees.[14]

Hopson testified Evans told her, if black employees did not help them get the Union, they would never get anywhere with the Company. Hopson stated the employees became angry and frustrated, and employee Ross became so upset he refused a supervisor's request to work overtime that day. The same day, according to Blair, Holliman and Hopson informed him of the McClendon rumor and asked if it was true.[15] After checking with higher management, Blair told the black employees the rumor was not true. The record shows the rumor was common knowledge, and that rumors circulated around the plant frequently.

On 20 May Dahlke and Blair met with Evans in the office of Human Resources Manager Phillip O'Connor. Dahlke gave Evans a written warning for allegedly intimidating and harassing employees on the production line.[16] Dahlke read the warning to Evans and asked him to sign it. Evans replied the warning was "bullshit," and denied harassing anyone. He refused to sign the warning, stating he was not guilty. Dahlke then told Evans signing did not admit guilt, and that Evans had to sign the warning because it was going into his personnel file. Evans again refused to sign, saying, if the warning went into his file, it would be without his signature.

Evans requested and received a copy of the warning. Dahlke then read the warning to Evans again and asked him to sign it. Evans repeated the warning was "bullshit" and once more refused. According to Blair's evidently credited testimony, Evans stated, if the warning got into his file without his signature, "Dahlke, I'll have your ass." Dahlke repeated that he was only telling Evans what the employees had complained about. Evans leaned across the table, pointed his finger at Dahlke's face, and stated, "Dahlke, I'm telling you to get fucked . . . Dahlke, you're just trumping up these charges because I won't kiss your ass and do somebody else's job." Dahlke responded, "David, it has nothing to do with you kissing anybody's ass." The conversation ended with Dahlke asking Evans to sign the warning once more, and Evans refusing.

Dahlke testified he recommended Evans be discharged for allegedly insubordinate and threatening conduct, and that O'Connor and LeCost agreed. On 24 May Evans received a notice of termination for directing "abusive, derogatory, and threatening comments, to your supervisor."[17]

The Respondent's progressive disciplinary system normally involves an oral warning, a written warning, a final warning, and, finally, suspension or discharge. Supervisor Dahlke testified, however, the regular disciplinary system is not followed in situations such as that of Evans. The record shows that the Respondent had fired five employees in the past without first issuing a warning. Four were discharged for fighting, and one for insubordination in refusing to work when his request for 2 days off was denied by his supervisor.

The undisputed testimony established that profanity was used routinely by employees and supervisors at the facility, and that no employees had been disciplined for such conduct.[18] On two occasions while wearing an "I'm for Vought" button, employee Crawford told Supervisor Manning he was "dumb, stupid, idiotic and was walking around with his head up his ass," and was not disciplined in any way. Evans is the only employee ever discharged by the Respondent for allegedly using abusive language or threatening a supervisor.

Conclusions

Contrary to the judge, we find the Respondent's 5 and 20 May warnings to Evans, as well as the Respondent's 24 May discharge of Evans, violated Section 8(a)(3) and (1) of the Act.

The 5 May Oral Warning

The judge found the 5 May oral warning for not keeping storage bins filled was not unlawful because "[t]he record clearly reveals that the Re-

[14] It is undisputed that the Respondent had been meeting with black employees on a periodic basis to discuss work-related problems concerning job promotions and racial discrimination at the Respondent's facility.

[15] Holliman testified he asked Blair if the rumor was true, but made no mention of being bothered or harassed by Evans. Only Hopson specifically complained Evans bothered her. Blair acknowledged no other employees complained to him about the rumor.

[16] The "Details of Violation" section of the warning stated:

> On May 18, 1983, employee was discussing business other than work on company time, thereby keeping employees, on the assembly line, from completing their assigned tasks. The Production employees have complained to the Production Supervisor that they are being harassed.

The "Consequences" section stated, "If the above infractions continue, the said employee will be terminated."

[17] The "Details of Violation" section of the notice read:

> Company Rule V, 4—During a counseling session with you on Friday 20 May 1983, conducted by your supervisor, M. Dahlke and witness S. Blair (production supervisor), you displayed an attitude of total disrespect to your supervisor. During this discussion you directed abusive, derogatory, threatening comments to your supervisor.

The "Consequences" section of the notice stated:

> This gross act of insubordination, by use of verbal threats and abusive language directed at your supervisor, is a most serious offense and will not be tolerated by this Company. Therefore, you are being discharged from the Company for your gross acts of misconduct and violation of Company Rules.

[18] Dahlke admitted employees at the facility "use curse words" and that Evans and other employees had previously "cursed" at him and not received a warning. Dahlke also admitted he never warned any employee about the type of profanity he called "shop talk."

spondent was experiencing shortages of line storage hardware items at or about the time Evans was warned," and because "Evans, who admittedly did engage in union-related discussions with other employees during working time, had ceased by 5 May to perform his dispatcher functions with as much enthusiasm as he had shown before he became involved in the union organizational campaign."

In reversing the judge, we are guided by the principles set forth in *Wright Line*.[19] Under *Wright Line*, the General Counsel has the initial burden of making a prima facie case that protected conduct was a "motivating factor" in the employer's discipline of the employee. Once the General Counsel has made such a showing, the burden shifts to the employer to establish it would have taken the same action absent such conduct.

We examine initially the first prong of the *Wright Line* test. The Respondent became aware of the union organizational campaign and of Evans' active participation, which included acting as chairman of the in-plant organizing committee, distributing union literature and cards, discussing the Union with coworkers, and wearing union insignia at work shortly after the campaign began. As previously related, the judge found, and we agree, the Respondent committed three unfair labor practices against Evans individually: attempting to recruit him as a company informer, enforcing an unlawful no-distribution rule against him, and threatening him with discharge 15 March for lawful solicitation activities. Such conduct exhibits substantial union animus, as do additional uncontested findings of unlawful activity directed against other employees, including coercively interrogating employees, threatening them with plant closure or reduction of the work force if they unionized, soliciting and promising to resolve grievances, and altering an employee's work assignments for supporting the Union.

Given the evidence of animus, the timing of the warning coincident with Evans' union activity and only 7 weeks after an illegal threat to discharge him on account of it, as well as Evans' previous unblemished work record (including at least one commendation for outstanding performance), we find the General Counsel has established a strong prima facie case that the 5 May warning was motivated by Evans' union activity.

We next consider whether the Respondent has met its burden of showing it would have warned Evans on 5 May notwithstanding his union activity. The Respondent presented substantial testimonial evidence that supervisors had complained about parts shortages on the SPLL line and Dahlke noted two successive instances of shortages before issuing the warning to Evans. While we accept the judge's finding that the SPLL line shortages occurred about the time that Evans was warned, we reject the conclusion the Respondent believed Evans was responsible. The judge failed to give proper weight to undisputed evidence that other factors caused the falloff in production.

As previously detailed, Evans' job duties included maintaining an inventory on the SPLL line storage bins, completing requisition forms for needed line storage hardware, obtaining the required hardware from the plant warehouse, and delivering the parts to the proper bins on the SPLL line. During the entire period of the production decline, however, Evans also performed the work of a recently transferred dispatcher who had filled out requisitions for the SPLL line, assuming close to 50 percent of the dispatcher's total responsibilities. Beginning in April, the Respondent initiated a time-consuming policy requiring Evans to obtain a supervisor's signature on every requisition he made out, and it is undisputed requisitions accumulated on Dahlke's desk awaiting approval.[20] It is also not contested Evans experienced delays of up to 2 weeks in receiving the requested parts.

At the same time the Respondent increased Evans' job responsibilities, it refused to allow him to work overtime to catch up, though it had frequently permitted him overtime before March 1. By contrast, employees on the SPLL line worked substantial overtime during the period from March to May, thus aggravating the shortage situation. Finally, there was evidence that, in addition to the employee who took over Evans' position, three new employees were hired to work on the SPLL line, shortly after Evans' termination, to perform Evans' "other duties," suggesting, if not demonstrating conclusively, the shortages stemmed, and were known to have been, from insufficient manpower.

Accordingly, we find the Respondent failed to meet its burden of rebutting the General Counsel's prima facie case, and conclude the Respondent's oral warning to Evans violated Section 8(a)(3) and (1) of the Act.

[19] 251 NLRB 1083 (1981), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

[20] Although Evans did not contradict the Respondent's assertion that he failed properly to prioritize the requisition requests submitted to Dahlke, the Respondent failed to establish that the omission contributed significantly to the production decline. Indeed, the Respondent gave no reason for altering its policy to require supervisory approval of the requests, nor did it present any reason they could not have been signed expeditiously—especially since Evans had routinely been entrusted with the responsibility previously.

The 20 May Warning

On 20 May Evans received a written warning for allegedly intimidating and harassing employees on the production line. Two days before, Evans related a rumor to three or four black employees that a white employee might be promoted over a black and suggested they take the issue up at the next meeting the blacks had with management. In concluding the issuance of the warning was not unlawful, the judge stated that "by his actions on May 18 Evans disrupted the work of at least four (4) production employees, and it is clear that the situation was brought to Supervisor Blair and Superintendent Gilton's attention." The General Counsel contends that Evans engaged in protected concerted activity on 18 May, and that Evans did not disrupt production, and thus that the warning violated the Act.

In determining whether the 18 May warning was lawful, we must decide (1) whether Evans' communications with black employees constituted protected concerted activity and (2) if so, whether his comments so interfered with production as to lose their protected status.[21]

The Board recently stated it would find an employee's activity concerted only where it was engaged in with or on behalf of other employees, and not "solely by and on behalf of the employee himself."[22] The Board further stated, "Once the activity is found to be concerted, an 8(a)(1) violation will be found if, in addition, the employer knew of the concerted nature of the employee's activity, the concerted activity was protected by the Act, and the adverse employment action at issue (e.g., discharge) was motivated by the employee's protected concerted activity."[23]

In *Mushroom Transportation Co. v. NLRB*,[24] the Third Circuit stated:

> It is not questioned that a conversation may constitute a concerted activity although it involves only a speaker and a listener, but to qualify as such, it must appear at the very least it was engaged in with the object of initiating or inducing or preparing for group action or that it had some relation to group action in the interest of the employees.[25]

Concerted efforts by employees to alleviate racially discriminatory employment conditions have long been held protected activity,[26] so long as they do not interfere with another important labor law principle such as the rule of exclusive representation.[27]

We find employee Evans was engaged in protected concerted activity in communicating the McClendon rumor to black employees on 18 May. His remarks related to group action concerning possible racial discrimination by the Respondent, as Evans specifically urged the employees to bring the issue to management's attention. The content of the remarks was protected since it concerned the topic of a racial discrimination, which had aroused the attention and concern of employees in the production department, and which was the subject of periodic meetings between management and employees aimed at resolving the problem.[28]

We do not agree with the judge that Evans' remarks disrupted the production of four employees and thus lost the protection of the Act. Only two employees confronted management regarding the rumor they had heard, and only Hopson testified to telling Blair she was being bothered by Evans.[29] The other employee, Holliman, merely asked Blair if the rumor was true and then returned to work. There is no record evidence clearly indicating Holliman and Hopson were on working time when they approached Blair, and certainly none showing that what would have been at most a brief absence from their duties disrupted or interfered with production. In any case, Evans' remarks would not reasonably tend to incite employees or otherwise impede production, particularly since he advised the black employees to raise the issue with management in a future scheduled meeting concerning racial discrimination.

We conclude, therefore, as follows: (1) Evans' remarks to the black employees constituted protected concerted activity; (2) the comments did not, nor did they have the reasonable tendency to, disrupt production; (3) the Respondent was aware of the remarks; and (4) the Respondent issued a written warning to Evans on 20 May because of his protected statements.[30] Accordingly, contrary

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[21] See *Millers Discount Dept. Stores*, 198 NLRB 281 (1972), enfd. 496 F.2d 484 (6th Cir. 1974).

[22] *Meyers Industries*, 268 NLRB 493, at 497 (1984).

[23] Ibid.

[24] 330 F.2d 683, 685 (3d Cir. 1964).

[25] Accord: *Root-Carlin, Inc.*, 92 NLRB 1313, 1314 (1951); *Cox Enterprises*, 264 NLRB 878, 879 (1982).

[26] *Honeywell, Inc.*, 250 NLRB 160, 161 fns. 6 and 7 (1980), enfd. mem. 107 LRRM 3213 (3d Cir. 1980).

[27] *Frank Briscoe, Inc. v. NLRB*, 637 F.2d 946 (3d Cir. 1981).

[28] It is immaterial whether the rumor was accurate. *R. J. Liberto, Inc.*, 235 NLRB 1450, 1453 (1978).

We also observe that the rumor passed on by Evans was common knowledge among employees, that rumors were often circulated in the plant, and that Evans did not instigate the rumor, but merely passed it on.

[29] Hopson's testimony that employee Ross became so upset by the rumor that he refused to work overtime is of questionable validity and relevance. Neither Ross nor representatives of management testified he refused to work overtime on 18 May or, if he did, why he did. Assuming he did refuse, there is no evidence management knew why he refused, or that Evans was responsible for the refusal.

[30] *Meyers Industries*, supra at 497; *Wright Line*, supra.

to the judge, we find the Respondent's 20 May warning to Evans violated Section 8(a)(3) and (1) of the Act.

The 24 May Discharge

The judge found that Evans was discharged for insubordination, having allegedly used abusive language and threatened Dahlke during the 20 May meeting in which Evans received a written warning, notwithstanding undisputed evidence of two instances in which employee Crawford used profanity and was not disciplined. Both instances involved Crawford telling Supervisor Manning that he was "dumb, stupid, idiotic, and walked around with his head up his ass." The judge stated: "In comparing the Crawford-Manning situation to the situation under discussion, the General Counsel is clearly engaging in an apples and oranges comparison, as it is clear that Crawford did not threaten Manning while making his demeaning remarks." He concluded that the General Counsel failed to sustain the *Wright Line* burden of establishing that Evans' participation in union activities was a "motivating reason" for the discharge. Contrary to the judge, we find the General Counsel's prima facie case is overwhelming. We have previously detailed Evans' union activity and the five unfair labor practices committed against him, including the 15 March discharge threat, the 5 May oral warning, and the 20 May written warning that included a threat to discharge. Indeed, Evans received the illegal 20 May warning during the very meeting at which he is alleged to have been insubordinate.

We further find the Respondent has failed to show Evans' conduct would have resulted in discharge had he not engaged in union and protected concerted activity.

In discharging Evans, the Respondent admittedly departed from its established progressive disciplinary system involving an oral warning, a written warning, a final warning, and, finally, suspension or discharge. Five other employees had previously been fired without first receiving an oral or written warning: four for fighting and one for insubordination in refusing to work after denial of a request for 2 days off. The undisputed testimony reveals that profanity by employees and supervisors at the plant was common. Dahlke admitted employees at the facility "use curse words" and that Evans had previously "cursed" when talking to him. In addition, Dahlke admitted he had never warned Evans or any other employee about the type of profanity described as "shop talk." No one at the Respondent's facility had ever been discharged for using abusive language. Nor are we able to agree with the judge that employee Crawford's abusive, profane conduct toward Supervisor Manning was less objectionable than Evans' response to Dahlke. We do not interpret Evans' statement, "Dahlke, I'll have your ass," as a threat to do any more than file a grievance or Board charge or to report Dahlke to higher management. We conclude that Evans did not engage in insubordinate conduct on 20 May, and his discharge therefore violated Section 8(a)(3) and (1) of the Act.[31]

In light of our finding of three additional unfair labor practices, and to correct certain inadvertent errors, we shall issue new conclusions of law, an amended remedy, and a new Order and notice to employees.

Conclusions of Law

1. By requesting an employee to keep it informed about other employees' union activities; maintaining and enforcing an overly broad no-distribution rule; coercively interrogating employees about union support or activities; threatening employees with plant closure or reduction in the work force if they selected the Union to represent them; soliciting and promising to resolve employee grievances if employees would abandon support of the Union; altering an employee's work assignments for supporting the Union; and threatening to discharge an employee for engaging in union solicitation, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Sections 8(a)(1) and 2(6) and (7) of the Act.

2. By issuing an oral warning on 5 May and a written warning on 20 May to employee David Evans, and by discharging Evans on 24 May, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(3) and (1) and Section 2(6) and (7) of the Act.

Amended Remedy

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative

[31] Even if Evans' statements were insubordinate, it would not alter our conclusion about the illegality of his discharge. The Board has long held an employer cannot provoke an employee by its unlawful conduct to a point where he commits an act of insubordination and then rely on the act to discipline the employee. *NLRB v. M & B Headwear Co.*, 349 F.2d 170, 174 (4th Cir. 1965); *Max Factor & Co.*, 239 NLRB 804, 817 (1978), enfd. 640 F.2d 197 (9th Cir. 1980). *TRW-United Greenfield Division*, 260 NLRB 73, 82 (1982).

Evans' statements to Dahlke were made immediately after receiving an unlawful warning for allegedly interfering with production and harassing other employees. Evans was justifiably outraged and accused Dahlke of trumping up the charges. The Respondent's unlawful conduct clearly provoked Evans' emotional response, and we refuse to allow the Respondent to take advantage of its illegal action by raising the defense of insubordination.

action designed to effectuate the policies of the Act.

We shall, inter alia, order the Respondent to offer David Evans immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, and to make him whole for any loss of earnings he may have suffered as a result of the discrimination practiced against him. Backpay shall be computed as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *Florida Steel Corp.*, 231 NLRB 651 (1977). See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962). We shall order the Respondent to remove from its files any reference to the unlawful warnings issued to Evans on 5 and 20 May 1983, as well as to his discharge, and to notify him in writing that this has been done and that the warnings and discharge will not be used against him in any way.

ORDER

The National Labor Relations Board orders that the Respondent, Vought Corporation–MLRS Systems Division, Camden, Arkansas, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Requesting employees to keep it informed about other employees' union activities.

(b) Maintaining and enforcing a no-distribution rule prohibiting reproducing, posting, or passing out typed or printed material other than company business without company permission.

(c) Coercively interrogating employees about union support or activities.

(d) Threatening employees with plant closure or reduction in the work force if they select the Union to represent them.

(e) Soliciting and promising to resolve employee grievances if employees would abandon support of the Union.

(f) Altering an employee's work assignments for supporting the Union.

(g) Threatening to discharge an employee for engaging in union solicitation.

(h) Discharging, issuing oral or written warnings to, or otherwise discriminating against any employee for engaging in union or protected concerted activity.

(i) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer David Evans immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, and make him whole for any loss of earnings or other benefits resulting from his discharge, in the manner set forth in the remedy section of this decision.

(b) Remove from its files any reference to the unlawful warnings and discharge and notify the employee in writing that this has been done and that the warnings and discharge will not be used against him in any way.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its Camden, Arkansas facility copies of the attached notice marked "Appendix."[32] Copies of the notice, on forms provided by the Regional Director for Region 26, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

CHAIRMAN DOTSON, dissenting in part.

Unlike my colleagues, I would adopt the judge's dismissal of charges regarding Evans' second warning notice and discharge. I agree with the judge that Evans' spreading rumors and interrupting the work of others during non-breaktime is not privileged against legitimate discipline. And, while my colleagues interpret Evans' threatening remarks to Dahlke to refer to filing a grievance or a Board charge, I see no warrant for such speculation concerning Evans' personally abusive comments. Protected activity does not become a mantle of immunity from discipline for abusive conduct which would not be tolerated in the normal course of events. Accordingly, I would affirm the judge's

[32] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

conclusions regarding Evans' insubordination and threats.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT request you to keep us informed about other employees' union activities.

WE WILL NOT maintain and enforce a no-distribution rule prohibiting reproducing, posting, or passing out typed or printed material other than Company business without Company permission.

WE WILL NOT coercively question you about your union support or activities.

WE WILL NOT threaten you with plant closure or reduction in the work force if you select the Union to represent you.

WE WILL NOT solicit and promise to resolve your grievances if you will abandon your support for the Union.

WE WILL NOT alter your work assignments for supporting the Union.

WE WILL NOT threaten to discharge you for engaging in union solicitation.

WE WILL NOT discharge, issue oral or written warnings to, or otherwise discriminate against you for engaging in union or protected activity.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer David Evans immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, and WE WILL make him whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest.

WE WILL notify him that we have removed from our files any reference to his discharge and that the discharge will not be used against him in any way.

VOUGHT CORPORATION–MLRS SYSTEMS DIVISION

DECISION

STATEMENT OF THE CASE

DONALD R. HOLLEY, Administrative Law Judge. On an original charge filed by International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) (the Union) on June 3, 1983,[1] the Regional Director for Region 26 of the National Labor Relations Board (the Board) issued a complaint on July 20 which alleged, inter alia, that Vought Corporation–MLRS Systems Division (Respondent) had engaged in conduct which violated Section 8(a)(1) and (3) of the National Labor Relations Act (the Act). By answer, which was timely filed, Respondent denies it has engaged in the unfair labor practices described in the complaint.

The case was heard in Camden, Arkansas, on October 13 and 14, 1982. All parties appeared and were afforded full opportunity to participate. At the commencement of the hearing, the General Counsel was permitted to amend the complaint to correct the spelling of Respondent's name, and to allege that Respondent had engaged in additional violations of Section 8(a)(1) of the Act during the months of September and October through the conduct of its supervisors and/or agents Phillip O'Connor and James Rudolph; and by issuing a warning to employee David Evans on March 15, 1983. Subsequent to the close of the hearing, the General Counsel and Respondent filed briefs which have been carefully considered.

On the entire record, and from my observation of the demeanor of the witnesses when they appeared to give testimony, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent maintains an office and place of business in Camden, Arkansas, where it is engaged in the manufacture of nonguided missile launchers. It is admitted that in the course and conduct of such business, it annually purchases goods and materials in an amount exceeding $50,000 from suppliers located outside the State of Arkansas, and it annually sells and ships to customers located outside said State products and goods valued in excess of $50,000. It is admitted, and I find, that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. STATUS OF LABOR ORGANIZATION

It is admitted, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

Respondent employs approximately 450 employees at its Camden, Arkansas facility, which consists of three

[1] All dates herein are 1983 unless otherwise indicated.

production buildings, an administration building, and a remote ammunition storage site called the LC–12 area. Most of its employees work in its metal parts building where it manufactures its principal product, a rocket or missile launcher, which is a track vehicle.

It is undisputed that at all times material the employees at the Camden facility were supervised and directed by, inter alia: Harry LeCost, general manager; Phillip O'Connor, human resources manager; Charles Simpson, operations control manager; Donald Dahlke, production control supervisor; James Coffin, superintendent; Leland Gilton, superintendent; Tommy Thompson, production manager; and Sonny Blair, supervisor.[2]

David Evans, the alleged discriminatee in this case, was hired by Respondent as a general assembler, labor grade 2, at $4.80 per hour on June 14, 1982, and remained in Respondent's employ until he was discharged on May 24, 1983. Respondent utilizes an assembly line in its main production area, the metal parts building. The line is referred to in the transcript as the spill line. Actually the correct name of the line is the SPLL (Self Propelled Loader Launcher) line. While assigned to work on the SPLL line, Evans was accorded what he considered to be special treatment as he was sent in November 1982 to White Sands, New Mexico, with Supervisor Tom Alston to repair a vehicle damaged in testing. On his return, he was informed that the supervisor in charge of testing, and Billy Smith, senior vice president of Respondent, felt he had done an outstanding job as well as representing the Company on a personal basis while at White Sands.

Within 5 months of his date of hire, Evans was promoted from labor grade 2 to the position of dispatcher, a labor grade 16 position which paid $6.01 per hour. His duties as a dispatcher were to inventory the line storage bins on the SPLL line, to fill out requisitions for needed line storage hardware, and to obtain the line storage hardware from the warehouse and place it in appropriate bins. It is undisputed that Evans performed credibly as a dispatcher until March 1983.

At some point near the first of March, Evans submitted a bid for a supervisory position. On March 6 or 7, Donald Armstrong, a black employee, was selected to fill the supervisory position. Sonny Blair, a supervisor in the metal parts buildings, then a friend of Evans, testified Evans told him that not getting the job was bad enough, but to be beat out by a "nigger" was another thing. Bradley Byars, an employee, testified Evans made a similar comment to him when Armstrong got the job.[3]

Immediately after he learned that Armstrong had been selected for the supervisory position he had sought, Evans contacted the Union and was put in contact with R. T. Buttram, an International representative. Shortly thereafter, on March 8 or 9, Evans met with Buttram and, acting together, they initiated a unionization campaign at Respondent's facility.

From the time he met with Buttram forward, Evans, who acted as the chairman of the organization committee at the plant, openly sought to cause employees to join the Union by distributing union literature in the parking lots, by distributing union authorization cards among the employees, by discussing unionization with the employees, and by wearing at work items which had the UAW insignia on them.

Shortly after the union campaign began, a segment of Respondent's employees organized an "I'm for Vought" campaign and such employees held several meetings, sold I'm for Vought buttons or badges to employees, and distributed petitions in the plant which were signed by employees who desired to join the I'm for Vought committee and/or to meet with Respondent management.

During the period extending from early March through mid-October the General Counsel has alleged and contends that Respondent violated the Act in numerous respects. The allegations and the evidence offered to prove them are discussed below.

B. *The Alleged 8(a)(1) Violations*

1. Paragraphs 7(a) and (b) of the complaint allege that about March 11, Respondent, acting through Sonny Blair, created an impression that its employees' union activities were under surveillance by Respondent and asked an employee to ascertain and divulge to Respondent the union membership, activities, sympathies, and desires of other employees. The General Counsel sought to prove the allegations through the testimony of Evans.

Evans testified that after he contacted the Union on March 6 or 7, he and unnamed employees met with International Union Representative Buttram on March 8 or 9. He claims that on March 11 Sonny Blair approached him while he was in the engineering area of the metal parts building, indicating he would like to talk to him. Evans claims they sat down on a rocket box and that Blair, after indicating he had heard an organization attempt was underway and some employees had met with a union representative, commented that he knew that, based on their past close, personal friendship, he could count on him for any information he might need concerning the matter. Evans claims he replied if there was anything he thought he needed to know he would be sure to tell him. Blair denied the conversation ever occurred.

Noting that the record reveals Blair and Evans were close friends when the union campaign began, and that it also reveals that Respondent officials learned of the unionization attempt immediately after it was instituted, I credit Evans rather than Blair. In my view, the testimony in question does not justify a finding that Respondent, through Blair, sought to create an impression that it was engaging in surveillance of its employees' union activities. Instead, the violation committed was that it, through Blair, violated Section 8(a)(1) by requesting that Evans become a company informer.

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[2] It is admitted, and I find, that at all times material each of the named individuals were supervisors and agents of Respondent within the meaning of Sec. 2(11) and (13) of the Act. In addition, it is admitted, and I find, that security officers Donnie Pipkin and Glenda Burns were, at all times material, agents of Respondent within the meaning of Sec. 2(13) of the Act.

[3] Evans denied making such a comment to either individual and contended, instead, that he had no hard feelings because Armstrong had two college degrees and was better qualified while he was just a high school graduate. I was not impressed with Evans' denial and I credit Blair and Byars.

2. Paragraph 8(a) of the complaint alleges that Respondent has maintained an unlawful no-distribution rule since December 3, 1982, and paragraph 8(b) of the complaint alleges that such rule was unlawfully enforced on March 17, 1983.

The record reveals Respondent distributes its company rules to new employees at their time of hire, requiring them to sign an acknowledgment that they have received a copy of such rules. Employees violating the rules are subject to disciplinary action up to and including discharge. Rule V,6, prohibits:

> Reproducing, posting, or passing out typed or printed material other than Company business without the permission of the Director of Professional Services.

The record reveals the above-described rule was promulgated on a date prior to December 3, 1982. Human Resources Manager O'Connor testified without contradiction that the rule under discussion was canceled on September 27, 1983, and that notice of such action was posted on all company bulletin boards and Respondent's supervisors were instructed to tell their employees the rule had been canceled.

The record reveals that Evans commenced to assist Union Representative Buttram distribute union literature in the facilities' parking lots at the metal parts building and building M-3 shortly after employees met with Buttram on March 8 or 9. Evans testified that he went to the parking lot of building M-3 at approximately 6:30 p.m. on March 17 to distribute union literature. When Superintendent Jim Coffin arrived at the lot, Evans offered him a piece of literature, telling him he would appreciate his support in the organizational drive. After commenting that he bet Evans would appreciate his support, Coffin told the employee he could not distribute literature on company property. Evans replied he could under Federal law. According to Evans, security officer Donnie Pipkin approached him several minutes after Coffin left and told him he would have to leave company property. After Evans told Pipkin he had the right to distribute under Federal law, Pipkin indicated he was unaware of it and would have to check with his supervisor. Shortly after Pipkin left, Evans indicated that security officer Burns and three other guards arrived at the parking lot in two cars. Evans claims Burns then told him he would have to stop doing what he was doing and leave company property. He indicated he then told Burns he had the right under Federal law to distribute literature in the parking lot and claims Burns said she did not know the law and would contact Mr. Cary, her supervisor. According to Evans, one of the guards, whose last name is Steward, commented in Burns' presence that he wished she would turn him loose on Evans as he would kick his "ass" and get him out of there.

Coffin did not dispute Evans' version of the event when called as a witness, and Pipkins and Stewart were not called to testify. Burns claimed during her testimony that two rather than three guards accompanied her to the parking lot on the occasion under discussion. She denied she told Evans he could not pass out literature and had to leave, and claimed, instead, that she merely asked the employee what his name was and who he worked for. According to Burns, Evans replied by stating he was within his rights and, if she continued to harass him, he could sue her and her boss. She claimed she was later told by her boss that Evans was within his rights and she was to return to headquarters. Burns denied she was aware at the time that a company rule prohibited distribution of literature on company property. Finally, she indicated, she thought the incident occurred on March 16 rather than March 17.

Evans was the more impressive witness, and I credit his version of what occurred when Burns was present rather than the version she gave.

By canceling the no-distribution rule set forth above on September 27, 1983, Respondent, in effect, acknowledged the rule was unlawful. As no evidence was offered by Respondent to show any business justification for the rule, I find it was unlawfully broad. Accordingly, I find that by maintaining and enforcing the rule under discussion, Respondent violated Section 8(a)(1) of the Act as alleged. *Stoddard-Quirk Mfg. Co.*, 138 NLRB 615 (1962); *Essex International*, 211 NLRB 749 (1974); and *Intermedics*, 262 NLRB 1407, 1408 (1982).

3. Paragraph 9 of the complaint alleges that on June 9, 1983, Respondent, through the acts of Jim Coffin, unlawfully interrogated an employee, threatened plant closure and loss of jobs if the employees selected the Union as their bargaining representative, and unlawfully solicited complaints and grievances and promised employees increased benefits and improved terms and conditions of employment.

James Crawford, a machine operator, testified that during the months of March and April he was on the employees for Vought committee and wore an I'm for Vought button. By June 9, his sentiments had changed and he had traded the I'm for Vought button for a UAW badge. Crawford claims that on June 9, as he was leaving the bathroom, Coffin asked him what he was doing wearing the UAW badge. When he replied he had a right to wear the badge, he claims Coffin told him he had been talking to the president of Vought in Dallas and the latter had said if the Union came in they were going to say, "Fuck the investment" and they would move the plant to Dallas. Crawford claims he then told Coffin, "Mr. Coffin, you just broke federal law." According to Crawford, Coffin then stated, "Well, we'll cut the work force back to one third," and Crawford replied, "Again, you have broken the Federal law. It is against the law for you to threaten to move the plant because of union organization." At that point, Crawford claims Coffin stated: "Well, they can't move M-3, but we can cut the work force back here." At some point in the conversation, Crawford claims Coffin asked him what he was dissatisfied about, and Crawford indicated he was dissatisfied with an evaluation prepared by his supervisor, Jimmy Don Manning. According to Crawford, when he indicated he had discussed the evaluation with Manning's superior, Superintendent Leland Gilton, Coffin told him, "Well, let me get you a meeting with Mr. Thompson. I'll have a meeting set up with him.

You're too valuable an employee to be wearing that union badge."

While Coffin denied he had any conversation with Crawford concerning the Union, he admitted he learned Crawford had a grievance and that he informed the employee he would help him resolve it. He testified that after telling Crawford he would assist him, he spoke with Leland Gilton and Thompson concerning the matter and informed them Crawford used to be a good worker, but had fallen on his "ass." When O'Connor appeared as a witness during Respondent's presentation of its case, he testified that on October 10 Respondent posted a notice placed in the record as Respondent's Exhibit 3 to dispel a rumor circulated by Crawford regarding a statement allegedly made by Coffin. The text of the notice is as follows:

> RUMOR: VOUGHT CORPORATION WILL CLOSE THE MLRS PLANT IN CAMDEN, ARKANSAS IF THE UNION IS VOTED IN TO REPRESENT CERTAIN EMPLOYEES, CONCERNING WAGES, HOURS OF WORK AND WORKING CONDITIONS.
>
> FACT: VOUGHT CORPORATION-MLRS DIVISION HAS NO INTENTION TO CLOSE ITS DEDICATED MLRS FACILITY IN CAMDEN, ARKANSAS. OUR INVESTMENT OF OVER 50 MILLION DOLLARS WAS BASED ON OUR OPTIMISM THAT WE COULD WIN GOVERNMENT CONTRACTS, AND PROVIDE JOBS FOR ALL OF US FOR THE FUTURE. AS YOU KNOW, COMPETITIVELY BID GOVERNMENT CONTRACT AWARDS ARE BASED ON MANY FACTORS: *WAGES PAID, MATERIAL AND EQUIPMENT COSTS, QUALITY* AND *RELIABILITY* OF THE PRODUCT AND MEETING *DELIVERY SCHEDULES.*
>
> WE AS A UNITED TEAM WORKING TOGETHER CAN MAKE THIS HAPPEN!

At the time of the hearing, Crawford was still employed by Respondent. He was a very positive witness and there is no doubt in my mind that he testified truthfully. I credit his account of his June 9 conversation with Coffin, and I find that Respondent, through Coffin's June 9 actions, unlawfully interrogated Crawford by asking him what he was doing wearing a UAW button, unlawfully threatened plant closure and/or reduction of the work force if employees selected the Union as their bargaining representative, and unlawfully solicited Crawford's grievances and/or complaints, promising to attempt to resolve them to cause him to abandon his support of the Union. Such conduct violates Section 8(a)(1) as alleged.

4. At the commencement of the hearing, the General Counsel amended the complaint to allege that on Septmeber 21, 1983, Phillip O'Connor interrogated an employee regarding his union membership and activities and granted a benefit to such employee to encourage his withdrawal of union membership.

Employee Crawford testified that after he told Coffin he was dissatisfied with the evaluation written by his foreman, Manning, O'Connor asked him on September 8 why he had not been to his office to see him. According to Crawford, O'Connor then suggested he come to his office on Monday, September 12, at 2 p.m. Crawford testified that when he went to O'Connor's office on Monday, September 12, O'Connor told him he disagreed with the employee evaluation and would set up a meeting for Monday, September 19, with Production Manager Tommy Thompson, Superintendent Leland Gilton, Supervisor Jimmy Don Manning, the employee, and himself. Crawford indicated no meeting was held on September 19, but that on September 21 O'Connor told him, "Why don't you come to my office at 2 p.m. and we'll just tear the damned thing up." According to Crawford, when he went to O'Connor's office that afternoon, O'Connor sent a secretary for his records and, while she was gone, O'Connor showed him an LM-2 report, which contained the salaries of International Union representatives, indicating he wanted him to look at it to see what his money would be going for if the Union came in. O'Connor then showed him that Archie Buttram received $55,000 per year. Crawford testified O'Connor then said, "I would like to know what happened to you . . . you used to think so positive . . . you used to be against unions when you came out here. It seems like you're thinking negative now." Crawford claims he responded, "No sir, I feel like I'm thinking positive now." When the secretary returned with Crawford's records, he claims O'Connor took out the February and June evaluations, indicated he disagreed with both of them, and tore them up. Crawford indicated that during the meeting he was wearing a UAW cap, a UAW button, a penholder with UAW insignia, and a UAW belt buckle. He testified that as he was leaving O'Connor's office, the latter stated, "[Y]ou're wearing a damned UAW belt buckle too."

O'Connor's account of the Crawford evaluation matter was markedly different from the version given by the employee. O'Connor indicated that, at some point, Billy Smith, Respondent's senior vice president, visited the plant, and Crawford sought him out as he entered the men's room in the metal parts building to tell him he had received a bad evaluation from his supervisor and his machine, which had been leaking oil, had not been fixed. O'Connor testified Smith told him and Plant Manager Harry LeCost he wanted Crawford's complaints checked out and taken care of, if true. O'Connor claims he was in the plant the next week and, on speaking with Crawford, learned he was no longer operating the machine with the oil leak. He indicated he asked Crawford about the evaluations and was informed the employee was upset because a recent evaluation he had received from Jim Manning was contradictory to one he had previously gotten from Jim Smith. O'Connor claims he told Crawford to go to Leland Gilton, the superintendent, and try to work the problem out. O'Connor testified he heard nothing further from Crawford until he and LeCost were walking through the plant about 3 or 4 weeks before the hearing in this case (October 13 and 14, 1983). On that

occasion, O'Connor recalls that LeCost approached Crawford and asked him if his machine still leaked oil. According to O'Connor, after Crawford told LeCost he no longer worked on that machine, the employee informed him Gilton did not fix his evaluations. O'Connor claims he then asked Crawford if he wanted a meeting with him and, when the employee said yes, he told him to come to his office at 2 o'clock and they would talk about it.

O'Connor testified that, at the time in question, he was aware that Crawford had filed an unfair labor practice charge against Jim Coffin, and this caused him to be cautious in his discussion with Crawford. He indicated that, when Crawford came to his office at the appointed time, he informed him he did not want him to construe anything he may do that day to have any effect on how he felt about him or his union activity. He claims Crawford stated he understood that completely, and he continued by stating he could not care less whether Crawford voted union or no union. According to O'Connor, Crawford replied, "I know that."

O'Connor testified he had just received the UAW LM-2 report before meeting with Crawford and agreed that he showed it to Crawford, indicating it contained the salaries of representatives. In response to Crawford's inquiry, he showed him the figure for Buttram's salary. He claims that after looking at the document Crawford commented it looked like they were in the wrong business. O'Connor indicated that when his secretary brought him Crawford's file, he removed the Jim Smith and Manning evaluations, noted there were conflicting statements in them, and indicated to Crawford that he intended to tear them up. He claims Crawford asked if he could look at his personnel file to see if there were any more evaluations in it, and that he tore up the two evaluations and threw them in the wastebasket in the employee's presence.

O'Connor did not recall whether Crawford was wearing a UAW button and hat on the occasion in question. He denied he asked the employee what had happened to him and that he commented he used to be positive. He also denied saying, "You're wearing a damned UAW belt buckle too." and claimed that, instead, he said, "I see the UAW is giving out belt buckles . . . that's a good-looking belt buckle." He claims Crawford responded, "Yes, it is. It's a good one too," and the meeting ended as Crawford wished him a good day and he replied, "I'll see ya."

I credit employee Crawford's claim that O'Connor injected the discussion of his union sentiments into the September 21 discussion, and credit the employee's claim that O'Connor ended the meeting by commenting on his "damn" UAW belt buckle. While O'Connor maintained his composure when called as a witness by the General Counsel, he was visibly hesistant and tentative when describing his September 21 meeting with Crawford. I credit Crawford where his testimony conflicts with that given by O'Connor, and I find that on September 21, 1983, Respondent, acting through O'Connor, interrogated an employee concerning his union sentiments and thereby violated Section 8(a)(1) of the Act. Although O'Connor claimed he tore up the Crawford evaluations because they had not been properly placed in the employee's file but should have been retained by the supervisors who prepared them, the entire series of events, starting with Coffin and ending with destruction of the evaluations, convinces me O'Connor destroyed the documents in an attempt to cause Crawford to switch his allegiance back to Respondent. By engaging in such action I find, as alleged, that Respondent solicited and resolved an employee's grievance to cause him to abandon his support of the Union and it thereby violated Section 8(a)(1) of the Act. In addition, it is clear and I find that through O'Connor's action and conduct Respondent interrogated Crawford concerning his union sentiments in violation of Section 8(a)(1).

5. At the commencement of the hearing, the General Counsel amended the complaint to allege that on October 10, 1983, Supervisor James Rudolph placed restrictions on an employee's duties and responsibilities because he had engaged in union activities.

Employee Leland Patterson testified, without contradiction, that on October 11 his immediate supervisor, James Rudolph, told him he had been instructed from higher up that he was not to be dispatched to Atlantic Research Corporation any more. When the employee asked why, Rudolph said, "[I]t is because of union activities or what you wear." At the time, Patterson was wearing a UAW cap, a UAW button, and UAW belt buckle. Patterson asked Rudolph if he would put it in writing, and the latter replied, "No."

When called as a witness by the General Counsel, O'Connor stated Rudolph is the supervisor of the shipping area. He indicated he evaluates employees, can send employees home early, approves absences for sickness for 1 day, gives employees permission to work overtime, and can recommend that employees be discharged. I find that James Rudolph is a supervisor within the meanning of Section 2(11) of the Act. By altering an employee's work assignments because the employee displayed his support of the Union by wearing items containing union insignia, Respondent interfered with, coerced, and restrained the employee in the exercise of his Section 7 rights and thereby violated Section 8(a)(1) of the Act. *Virginia Power Co.*, 260 NLRB 408, 409 (1982).

C. *The Alleged Unlawful Warnings Given to Evans on March 15 and May 5*

1. The March 15 warning

It is undisputed that on March 15 General Manager LeCost called Evans' immediate supervisor, Dahlke, and Dahlke's boss, Charles Simpson, to his office and told them Evans had been passing out information and harassing people during working hours. The supervisors were told they were to counsel Evans and tell him what he could and could not do during working hours.

At approximately 1 p.m., Dahlke and Simpson met with Evans in the manufacturing conference room, which is presumably located in the metal parts building where Evans works. Evans and Dahlke described the meeting, and the General Counsel placed a written summary of the meeting prepared by Dahlke in evidence as

General Counsel's Exhibit 6. It appears that during the meeting Dahlke informed Evans that it had been reported to him that he was passing out information and harassing personnel during working hours and, if such activity did not cease, he would be terminated. Dahlke informed the employee that what he did on breaks, lunch, before and after work was his personal time, but, on worktime, work was to be performed. Evans asked who he had been harassing and Dahlke refused to tell him. Indeed, Dahlke testified he had not been told who Evans had harassed. Evans then denied he had harassed anyone or distributed any material during working time, and informed Dahlke and Simmons he knew the law better than they did and would comply with it. While he had Evans' audience, Dahlke told him he had not been wearing safety glasses in work areas and he had a defective partial sticker on his vehicle and would have to obtain a new sticker at the metal parts building gate. Noting he had not been issued any safety glasses, Evans agreed to obtain a pair, and he indicated he would obtain a new sticker from security.

While Dahlke sought to justify his March 15 actions by claiming that Superintendent Leland Gilton and Supervisor Sonny Blair complained to him frequently in early March that they were experiencing shortages of line hardware items such as nuts, bolts, washers, rivets, and other small items which Evans was to keep in the line storage bins, and they had noticed that Evans was spending an inordinate amount of time talking to employees rather than working, I do not credit that portion of Dahlke's testimony. Dahlke indicated very clearly that he was told by LeCost to tell Evans what the general rules were to be on March 15, and he failed to indicate that LeCost mentioned Gilton, Blair, or shortages when he told him to talk to the employee. The sole subjects mentioned by LeCost were passing out handbills and harassing personnel. It is clear to me, and I find, that LeCost was referring to Evans' union activities, and LeCost's message to Dahlke and Simpson was to tell the employee he could not engage in such activities during working time.

Under Board law, Dahlke's discussion with Evans on March 15 would have been perfectly legal if Respondent had a rule which prohibited all forms of solicitation in its plant during the time employees were supposed to be working. Here, however, the General Counsel established through the testimony of Evans, employee James Crawford, and Dahlke himself, that prior to March 15, 1983, employees had solicited during working time for contributions to churches, football pools, a gift for Superintendent Gilton's wife, moneys for a woman whose house had burned down, and various other things. Moreover, the record reveals that during March 1983 and thereafter, antiunion employees solicited other employees during working time to join the I'm for Vought committee and to attend its meetings, and it permitted them to solicit the signatures of employees who desired to meet with Human Resources Manager O'Connor to discuss their problems. Significantly, the employees who solicited for the I'm for Vought Committee and for the visit(s) to O'Connor's office were admittedly not told they would be fired if they continued to engage in such activity.

In sum, the record in the instant case reveals that Respondent had no rule prohibiting solicitation at its facility on March 15, 1983. While it had a rule prohibiting the distribution of literature which had not been approved by Respondent, that rule was invalid and unlawful for the reasons set forth, supra. In the circumstances described, I find that the real message Dahlke imparted to Evans on March 15 was that he would be fired if he solicited for the Union on company time. As other forms of solicitation were not then punished by discharge, I find that Respondent, through Dahlke's actions on March 15, interfered with, restrained, and coerced Evans in the exercise of his Section 7 rights and thereby violated Section 8(a)(1) of the Act as alleged.

2. The May 5 situation

David Evans' immediate supervisor, Dahlke, testified that after Production Superintendent Gilton and Floor Supervisor Blair complained to him repeatedly that they were experiencing line hardware shortages and felt the situation existed because Evans was talking too much rather than filling his bins, he observed Evans while he was performing his job and noted he spent a lot of time talking to other employees. According to Dahlke, after Respondent's production schedule slipped two times because of parts shortages, he gave Evans an oral warning concerning his work performance. Thus Dahlke testified that on May 5, 1983, he approached Evans and informed him he felt his production was slipping as his bins were not fully stocked, and he had been informed he was not doing his job. Admitting his bins were not fully stocked, Evans informed his supervisor that several factors had caused the situation Dahlke was complaining about. He indicated one problem was that he had insufficient time to prepare all the necessary requisitions for needed hardware because he was then performing the job of writing requisitions which had previously been performed by Jewel Jones, a female employee who had recently been transferred to another job; that another problem was a requirement that he seek out and obtain the signature of a production supervisor before he could submit requisitions; another problem was the fact that he had left requisitions on Dahlke's desk for signature and Dahlke let them pile up before he signed them; another problem was that his departments had been working some overtime but he was not given authority to work overtime to enable him to keep the bins in his department fully stocked; and, finally, he claimed that it was taking stores up to 2 weeks to fill some of his requisitions.

While the General Counsel claims that Dahlke gave Evans an oral warning on May 5 for discriminatory reasons, I find he offered insufficient evidence to prove the violation alleged. The record clearly reveals that Respondent was experiencing shortages of line storage hardware items about the time Evans was warned, and my careful review of the record convinces me that Evans, who admittedly did engage in union-related discussions with other employees during working time, had ceased by May 5 to perform his dispatcher functions

with as much enthusiasm as he had shown before he became involved in the union organizational campaign. Noting that Dahlke made no mention whatsoever of Evans' union activities or sentiments while warning him on May 5, I find that by issuing the warning Dahlke did not engage in conduct which violates Section 8(a)(1) of the Act as alleged.

D. *The May 20 Written Warning and the May 24 Termination*

The record reveals that on May 18, 1983, Leland Patterson, Evans' father-in-law, informed Evans that Jerry McClendon, a new white employee, who was coming to work in dress clothes rather than work clothes, was, in his opinion, being groomed for a supervisory position which would place him over Gary Wright, a black employee who had recently been promoted to a supervisory position at LC–12, the ammunition storage area. After hearing the rumor, Evans admittedly relayed it to Alexa Page and Nelson Holliman, two black production employees. According to Evans, he suggested to Holliman and Page that they might want to bring the McClendon matter up at the next meeting the Company had with its black employees.[4]

A Respondent witness, Martha Hopson, indicated during her testimony that Evans' actions on May 18 were not as limited as he claims. She testified that, in addition to discussing the McClendon rumor with Page and Holliman, he also discussed it with her and another black employee named Dewey Ross. Hopson claims that after telling her the Company intended to place a newly hired white man over Gary Wright, Evans told her if the black people did not help them get the Union in there, they would never get anywhere with the Company. According to Hopson, the blacks all became angry and frustrated and Ross became so upset that he refused his supervisor's request that he work overtime that day. Although Evans denied he mentioned the rumor under discussion to Hopson on May 18, Supervisor Blair testified Hopson confronted him with the rumor that day, and Hopson testified she subsequently agreed to give O'Connor a written statement concerning the affair. It is clear to me, and I find, that Evans discussed the McClendon rumor with Hopson on May 18 as she claims.

Supervisor Blair testified that on May 18 Holliman and employee Martha Hopson informed him of the McClendon rumor and asked if he would find out if it was true. To check out the rumor, Blair contacted Superintendent Gilton, informed him of the rumor, and indicated that one of the employees had informed him that, when telling black employees of the rumor, Evans had made a comment like, "[S]ee what Vought is doing to you colored employees." After talking to Blair, Gilton testified he contacted O'Connor at Human Resources and learned the rumor was not true. Gilton then informed Blair the rumor was not true, and Blair told Holliman and Hopson the McClendon rumor was not true—that McClendon was just being trained to take over the job vacated by Gary Wright when he was promoted to his supervisory position.

On May 20, 1983, Dahlke was summoned to O'Connor's office where he was informed Evans had harassed production employees on May 18 and he was to give the employee a written warning that he would be terminated if he continued to engage in such activity. After leaving O'Connor's office, Dahlke prepared the written warning placed in the record as General Counsel's Exhibit 4. The "Details of Violation" section of the warning states:

> On May 18, 1983, employee was discussing business other than work on company time, thereby keeping employees, on the assembly line, from completing their assigned tasks. The Production employees have complained to the Production Supervisor that they are being harassed.

The "Consequences of continued misconduct and follow-up action to be taken" section of the warning states:

> If the above infractions continue, the said employee will be terminated.

After preparing the above-described written warning, Dahlke called Evans to his office and, in the presence of Supervisor Blair, told Evans the meeting was a disciplinary action; that they had complaints that he had been intimidating or harassing people on the floor and they needed to take action to stop this. Dahlke then read the contents of the warning and asked Evans to sign the warning. Evans stated this was a "bunch of shit" and stated he had not been harassing anyone on the floor. Stating he was not guilty, he said he would refuse to sign the warning. According to Evans, Dahlke then told him that by signing he did not admit guilt, but he had to sign it because it was going in his personnel file. Evans again indicated he would not sign the warning and informed Dahlke that, if the warning went in his file, it would go without his signature. In addition, he stated if the document was going in his file he should be given a copy.

When Evans indicated he wanted a copy of the warning, Dahlke handed him the original copy and Evans took it to a secretary outside the office and asked that she copy it for him.

Dahlke and Blair's account of what happened after the secretary returned with a copy of the May 20 warning differs markedly from the account of events described by Evans during his testimony.

Evans claims that, when he returned to the office, Dahlke asked him to sign the warning again and he refused, telling the supervisor it was just a "bunch of shit" trumped up against him because of his union activities. He claims Blair commented at that time that he had some complaints that he had been harassing people and interfering with their work, and that caused him to say:

> What have I been harassing them about? Have I been talking to them about hunting, fishing, fucking, biting? What have I been talking about? Bring somebody up here and let them say to me what I have been harassing them about. And if I am guilty, of harassing or stopping work, then I will sign this

[4] The record reveals that Respondent was meeting with its black employees periodically at the time to discuss their problems.

> reprimand, but until you can prove to me that I am guilty of doing this, I will not have nothing to do with it.

According to Evans, the meeting ended after he made the above-quoted comments and Dahlke told him as he was leaving that what took place in the room was private and confidential and should stay there.

Blair testified that, after Evans left the room where the meeting was held, he and Dahlke remained so they could document what had been said during the meeting. According to Blair, when Evans returned to the room with a copy of the warning, Dahlke read the warning to the employee again and Evans stated again that it was "bullshit" and he did not do it. Blair testified Dahlke then said, "Hey, I'm just telling you what the people on the floor complained about," and Evans responded by saying he did not do it and if it got in his file without his signature, "Dahlke, I'll have your ass." Blair claims Dahlke again stated he was just telling Evans what they complained about, and that, at that point, Evans leaned across the table, pointed his finger at Dahlke's face, and stated: "Dahlke, I'm telling you to get fucked . . . Dahlke, you're just trumping up these charges because I won't kiss your ass and do somebody else's job." According to Blair, Dahlke responded by saying, "David, it has nothing to do with you kissing anybody's ass." Blair claims the conversation ended with Dahlke asking Evans to sign the warning once more, and with Evans refusing to sign again. At that point, Blair indicated Dahlke thanked Evans and the employee left.

Dahlke testified that Evans' actions during the May 20 meeting made him mad and caused him to recommend that he be discharged because he had been insubordinate and had threatened him. O'Connor and LeCost concurred in the recommendation, and on May 24 Evans was called to the administration building where Jesse McHenry (O'Connor's subordinate), in Dahlke's presence, informed him he was terminated by reading the "Notice of Disciplinary Action" which was placed in the record as General Counsel's Exhibit 5. The "Details of Violation" section of the notice provides:

> Company Rule V, 4.—During a counseling session with you on Friday, 20 May 1983, conducted by your supervisor, M. Dahlke and witness S. Blair (production supervisor), you displayed an attitude of total disrespect to your supervisor. During this discussion, you directed abusive, derogatory, and threatening comments to your supervisor.

The "Consequences" section of the notice states:

> This gross act of insubordination, by use of verbal threats and abusive language directed at your supervisor, is a most serious offense and will not be tolerated by this Company. Therefore, you are being discharged from the company for your gross acts of misconduct and violation of Company Rules.

During his testimony, Dahlke admitted that Respondent's progressive disciplinary system normally involves an oral warning, a written warning, a final warning, and finally suspension or discharge. He claimed the regular system is not followed in situations such as the Evans situation. While Dahlke admitted employees at the facility curse and that Evans had previously cursed when talking to him, he indicated he had never warned Evans or others about the type of cursing he described as shop talk.

Anticipating the possibility that Evans said what Dahlke and Blair claim he said during the May 20 meeting, the General Counsel adduced testimony through Evans, Martha Estes, and James Crawford which reveals that profanity is routinely uttered by employees, and by supervisors as well, while they are working at the facility. In addition, Crawford credibly testified that on two occasions when he was wearing an "I'm for Vought button" and while arguing with his immediate supervisor, Jimmy Don Manning, he told Manning he was dumb, stupid, idiotic, and he was walking around there with his head up his "ass." Crawford indicated Manning did not discipline him in any way because he made such remarks.[5]

Human Resources Manager O'Connor admitted during his testimony that Evans is the only employee it had discharged for using abusive language or threatening a supervisor. With respect to the progressive disciplinary warning system, he indicated Respondent fired employees for fighting, although they were given no oral or written warnings, and it had previously fired one employee for insubordination without giving the individual a warning. The employee fired for insubordination had requested that he be permitted to take 2 days off, and when the supervisor denied the employee's request, he indicated he would take the time off any way.

While the General Counsel claims, in effect, that Respondent was still treating Evans disparately when it issued the May 20 written warning, I am unable to agree. My review of the record convinces me that by his actions on May 18 Evans disrupted the work of at least four production employees, and it is clear that the situation was brought to Supervisor Blair and Superintendent Gilton's attention. In the circumstances, I find that Respondent lawfully reprimanded the employee for his actions.

With respect to the discharge issue, it is clear and I find that, by using abusive language and threatening Dahlke during the May 20 meeting, Evans was guilty of insubordination. Participation in union activity does not insulate an employee from discharge if he is insubordinate, particularly in a situation such as the one presented here where the insubordinate acts did not occur while the employee was participating in protected concerted activity at the time. The General Counsel contends, however, that, as the record reveals that swearing is an everyday occurrence in Respondent's plant, and he has

[5] Manning denied that Crawford made such remarks, indicating he would not be working for him if he had. I do not credit Manning's denial. The record reveals that Manning gave Crawford a bad evaluation after the remarks were made and I note that Manning made no attempt to relate what Crawford did say when complaining about a dull drill bit situation. Crawford was by far the more impressive witness, and I believed him.

shown through the testimony of Crawford that Supervisor Manning imposed no discipline on Crawford when he used abusive language and informed him he was walking around with his head up his "ass," that I should find Evans was treated in disparate fashion. I find his argument to be without merit. In comparing the Crawford-Manning situation to the situation under discussion, the General Counsel is clearly engaging in an oranges and apples comparison, as it is clear that Crawford did not threaten Manning while making his demeaning remarks. Moreover, I note that Crawford was punished to some extent as the record reveals that his remarks to Manning caused the latter to prepare an evaluation which Crawford did not enjoy.

In sum, I find the General Counsel has failed to sustain the burden placed on him by *Wright Line*, 251 NLRB 1083 (1980), he has failed to establish, prima facie, that Evans' participation in union activities was a "motivating reason" in Respondent's decision to discharge him. I find that David Evans was discharged for cause and recommend that the allegation that he was discharged in violation of Section 8(a)(3) of the Act be dismissed.

CONCLUSIONS OF LAW

1. Vought Corporation–MLRS Systems Division, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By unlawfully interrogating employees concerning their union activities and sentiments, requesting that an employee keep it informed of the union activities of other employees, threatening plant closure and/or reduction of the work force if its employees obtain union representation, soliciting employee grievances and promising to resolve them to cause employees to abandon their support of the Union, destroying adverse employee evaluations to cause employees to abandon their support of the Union, altering work assignments because employees support the Union and/or display its logo on their apparel, threatening to terminate employees for engaging in union solicitation while imposing no punishment on employees engaged in other types of solicitation, and maintaining and enforcing an unlawfully broad no-distribution rule, Respondent has violated Section 8(a)(1) of the Act.

4. Respondent has not violated the Act except as expressly indicated in this decision.

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative action necessary to effectuate the policies of the Act.

[Recommended Order omitted from publication.]

Walter Brucker & Co., Inc. *and* Jeffrey Wright.
Case 4–CA–12594

14 December 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS ZIMMERMAN AND DENNIS

On 25 October 1982 Administrative Law Judge Norman Zankel issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

The judge concluded that the Respondent violated Section 8(a)(1) of the Act by discharging employee Jeffrey Wright on 9 November 1981[1] because he contacted the Bucks County Housing Authority (Authority) to determine whether the Respondent was paying the proper wage rate for corrective "punch" list work at a housing project.[2] On careful consideration, and for the reasons stated below, we have decided to reverse the judge's decision and to dismiss the complaint.

The pertinent facts, more fully set forth in the judge's decision, are as follows.

The Respondent employed Jeffrey Wright as a carpenter during October and November 1981, and he performed corrective punch list work at the Perkasie housing project. Although he received rated carpenter wages[3] for this work during the payroll week ending on 28 October, he received nonrated carpenter wages for similar work for the payroll week ending on 4 November. Because of this discrepancy, Wright discussed the proper wage rate for the work with his fellow employees, Durrell Hange,[4] Khaliq Culbreath, and Keith Long, at lunchtime on 6 November.

During their discussion, Wright asked Culbreath whether he had received rated carpenter wages for performing corrective punch list work at the project. Culbreath replied that the Respondent had not paid him rated wages for the work either that week or the prior week. Culbreath then asked Hange whether the Respondent was correct in paying nonrated carpenter wages for corrective punch list work. Hange replied that he was not sure and suggested that Culbreath should contact Walter Brucker Jr., the Respondent's vice president, about this matter. Wright then told Culbreath that he had received rated carpenter wages for this work the prior week but only nonrated carpenter wages that week. When Wright asked what he was going to do about it, Culbreath replied that he really did not know. Wright then said: "Well, listen, I've been here a little bit longer. I know the Bruckers a little better. I'll see what I can find out." While not specifically mentioned by the judge, the record establishes that Culbreath did not contact Walter Brucker Jr. personally because, as he testified, "I had spoken to Jeff [Wright] and he . . . said that he would find out about the information."

Later that day, Wright asked Julia Brucker, the Respondent's secretary and treasurer, to explain why he had received rated carpenter wages for performing corrective punch list work at the project on 28 October but nonrated carpenter wages for identical work on 6 November. Julia Brucker replied that corrective punch list work was nonrated, and that the Respondent erred by paying him rated wages for his work on 28 October. Wright then telephoned the Authority to determine the proper wage rate. As a result of Wright's inquiry, the Authority notified the Respondent on 9 November that Wright had contacted the Authority and that the Respondent should submit its payroll records.[5]

After learning of the telephone call, Walter Brucker Jr. went to the project and fired Wright. When Wright asked why he was being fired, Walter Brucker Jr. replied: "I don't need any disloyal soldiers in my camp and I don't need anybody contacting the Bucks County Housing Authority behind my back when you know I'm having troubles with them."

We agree with the judge that Wright's discussion with his fellow employees at lunch on 6 November about the applicable wage rate for performing corrective punch list work at the project was an effort to initiate and promote concerted action.[6] As the

[1] All dates are in 1981.

[2] A "punch" list itemizes work that the contractor needs to correct.

[3] A "rated" wage is a rate that an employer must pay employees under the Pennsylvania Prevailing Wage Act.

[4] Although Wright referred to Hange as a foreman, the complaint did not allege, and the Company refused to stipulate, that Hange was a supervisor. The judge, finding that Hange's status was not fully litigated at the hearing, assumed that he was an employee.

[5] It is uncontested that Karl Gabler, the Authority's executive director, asked Gerry Burton, an Authority employee, to request the payroll records because the Respondent had not submitted recent payroll records for the corrective punch list work it was then performing.

[6] *Mushroom Transportation Co. v. NLRB*, 330 F.2d 683, 685 (3d Cir. 1964); *Red Ball Motor Freight*, 253 NLRB 871 (1980), enfd. 660 F.2d 626 (5th Cir. 1981), cert. denied 456 U.S. 997 (1982); *Titanium Metals Corp.*, 251 NLRB 1180 (1980), enfd. 671 F.2d 973 (6th Cir. 1982).

judge noted, when Wright spoke to the Respondent and later to the Authority, he voiced a complaint about wages that Culbreath and he both shared. Wright was clearly acting "on the authority of other employees"[7] because the record shows that Culbreath refrained from making his own wage complaint, relying instead on Wright to resolve the matter.[8]

We disagree, however, with the judge's finding that the Respondent knew before discharging Wright that his contact with the Authority was concerted. It is well settled that Section 8(a)(1) of the Act is violated only if at the time of the discharge the employer had knowledge of the concerted nature of the activity for which the employee was discharged.[9] Absent evidence of actual knowledge,[10] the judge inferred knowledge because employees could be expected to group together to protest alleged wage underpayments, and because the Authority's request for all employees' payroll records instead of just those of Wright alone provided a "basis for [the Respondent] to have understood that [the] request . . . involved an investigation of alleged underpayment *to a group* of employees." Knowledge of concerted activity cannot be inferred whenever an employer takes an action that affects the working conditions of more than one employee or because a governmental agency invokes a legal or contractual right to inspect the payroll records of a firm doing business with it. It is just as likely that the Respondent believed that Wright alone protested its wage policies, especially because Wright referred only to the discrepancy in his personal wages when he confronted Julia Brucker on 6 November. It is also just as likely that the Authority requested the Respondent's payroll records simply because the Respondent had not submitted them for the corrective punch list work at the project. In fact, as we have noted, this was the sole reason for the Authority's request.[11]

Because a preponderance of the evidence fails to establish that the Respondent knew that Wright's contact with the Authority was concerted, we shall dismiss the complaint.[12]

ORDER

The complaint is dismissed.

MEMBER ZIMMERMAN, dissenting.

I dissent from my colleagues' reversal of the judge's finding that the Respondent violated Section 8(a)(1) of the Act by terminating employee Jeffrey Wright because he contacted the Bucks County Housing Authority to determine whether the Respondent was paying the proper wage rate to its employees on a housing project. For the reasons set forth by the judge in his decision, as well as those set forth in my dissenting opinion in *Meyers Industries*, 268 NLRB 493 (1984), I find that Wright's inquiry to the Housing Authority constituted protected concerted activity.

Briefly, the record established that the Respondent discharged Wright because he sought information from the Housing Authority concerning the proper wage rate to be paid employees for doing corrective work at the Perkasie housing project. The majority finds, and I agree, that Wright's prior discussions with his colleagues concerning variances in wage rates were an effort to initiate and promote concerted action. The majority also concludes that *Meyers Industries* is inapplicable except to the extent it sets out the standard for determining concerted activity because here, unlike *Meyers*, there is actual evidence of concerted activity. Nonetheless, the majority refuses to find Wright's discharge a violation of Section 8(a)(1) of the Act on grounds that there was insufficient evidence to establish that the Respondent knew of the concerted nature of Wright's contact with the Housing Authority. I disagree.

As noted, it is undisputed that Wright was engaged in concerted activity when he contacted the Housing Authority. It is equally clear, as the judge

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[7] *Meyers Industries*, 268 NLRB 473, 497 (1984).

[8] Although discussing the per se standard of concerted activity established in *Alleluia Cushion Co.*, 221 NLRB 999 (1975), the judge did not rely on *Alleluia* in concluding that Wright had engaged in concerted activity. Because we overruled *Alleluia* in *Meyers Industries*, supra, we rely solely on the objective standard of concerted activity *Meyers* established, but find *Meyers* distinguishable because the evidence shows the presence of actual concerted activity.

[9] *Meyers Industries*, supra, 497; *Diagnostic Center Hospital Corp.*, 228 NLRB 1215, 1216 (1977); *New England Fish Co.*, 212 NLRB 306, 311 (1974).

[10] The judge found no actual knowledge of the concerted activity because Wright never informed the Respondent or the Authority that he was questioning the wages paid to other employees, and because the Authority never told the Respondent that Wright questioned the wages paid to anyone other than himself.

[11] Our dissenting colleague argues that we should infer knowledge because "the Respondent's officers were aware that they were underpaying the employees," and "the Housing Authority, in response to Wright's inquiry, requested *all* personnel records, not just *Wright's*." The record evidence demonstrates, however, that the Respondent had a good-faith belief that the Pennsylvania Prevailing Wage Act no longer applied to the corrective "punch" list work because the Respondent continued to perform corrective work on the project voluntarily even though its 1-year maintenance agreement covering its work on the project had expired. While the Pennsylvania Department of Housing and Industry rejected the Respondent's position, it also rejected Wright's contention that the work was rated carpenter's work, finding instead that "the workmen performing work on the outstanding punch lists and any subsequent minor corrective work may be paid at a *laborer's rate*." The record evidence further establishes that the Housing Authority requested all the payroll records not because of Wright's complaint, but because the Respondent failed to submit any of the required payroll records involving the corrective "punch" list work.

[12] In view of the lack of knowledge, Chairman Dotson finds it unnecessary to pass on the concerted nature of Wright's activity.

found, that the Respondent knew or should have known of the concerted nature of Wright's conduct. Contrary to the majority, the judge properly inferred employer knowledge of Wright's conduct. Thus, the judge noted that the Respondent's officers were aware that they were underpaying the employees and should have known that Wright's questions concerning the pay rate would result in group action, since the payment of proper pay rates is a matter which all employees would support.[1] The judge further relied on the fact that the Housing Authority, in response to Wright's inquiry, requested *all* personnel records, not just *Wright's*. Thus, it was reasonable to assume that Wright's protest was not solely for his own benefit but on behalf of all the employees, and as such constituted protected concerted activity.

Assuming, however, that knowledge of Wright's actual concerted conduct cannot be inferred, I would still find his discharge unlawful for the reasons set forth in my dissent in *Meyers Industries*. There I stated that the individual assertion of an employment-related statutory right is presumptively concerted and is therefore protected by Section 7 of the Act. Here, *Wright* sought to ensure that the Employer paid the proper wage rates set forth by the Pennsylvania Prevailing Wage Act. The employees' right to the higher "rated" as opposed to "non-rated" wage rate was mandated by this legislation. Thus, because of the nature of the right asserted, i.e., one determined by the legislature to be in the public interest, it is proper to presume that the individual assertion of this right is supported by other employees. Moreover, in light of the actual concerted nature of Wright's conduct, the presumption cannot be rebutted and the Respondent, therefore, cannot carry its burden that Wright's action was opposed by his fellow employees. Accordingly, I conclude that the Respondent's termination of Wright violated Section 8(a)(1) of the Act regardless of whether the Respondent knew of the actual concertedness of Wright's conduct.

[1] My colleagues argue that knowledge of Wright's concerted activity cannot be inferred because the Respondent had a good-faith belief that it was paying its employees the proper wage rate and the Housing Authority's request of all of the Respondent's payroll records resulted from the Respondent's failure to submit any records regarding its corrective "punch" list work rather than simply Wright's inquiry. I remain unpersuaded. The Respondent's mistaken belief that it was paying the proper wage rate is of no consequence here where it knowingly reduced employee wage rates and therefore could reasonably have expected some type of employee reaction. Additionally, contrary to the majority, the unalterable fact still remains that the catalyst for the Housing Authority's action was Wright's initial inquiry concerning the proper wage rate.

DECISION

STATEMENT OF THE CASE

NORMAN ZANKEL, Administrative Law Judge. The case was tried before me on September 2, 1982, at Philadelphia, Pennsylvania.

A complaint and notice of hearing was issued by the Regional Director for the Board's Region 4 on January 28, 1982, based on a charge filed by Wright on December 10, 1981.[1]

In substance, the complaint alleges that Wright was terminated on November 9 in violation of Section 8(a)(1) of the National Labor Relations Act (the Act) because he contacted the Bucks County (PA) Housing Authority (the Authority) to determine whether the Employer was paying the proper wage rate for work performed at a project which the Employer had constructed for the Authority.

The Employer filed a timely answer which admitted certain matters but denied the substantive allegations and that it had committed any unfair labor practices.

All parties appeared at the trial. Each was represented by counsel and was afforded full opportunity to be heard, to introduce and meet material evidence, and to examine and cross-examine witnesses, to present oral argument, and to file briefs. Counsel for the Board's General Counsel and the Employer's counsel submitted posttrial briefs, the contents of which have been carefully considered.

On consideration of the entire record, the briefs and my observation of the witnesses and their demeanor, I make the following

FINDINGS AND CONCLUSIONS

I. JURISDICTION

Jurisdiction is uncontested. The Employer is a Pennsylvania corporation engaged in the business of general construction. Its principal place of business is at New Britain, Pennsylvania.

The Employer admits that during the year immediately preceding issuance of the complaint it performed services valued in excess of $50,000 within Pennsylvania for the Palisades School District (Kitnerville, Pennsylvania), which received goods and materials valued in excess of $50,000 directly from points outside of Pennsylvania during the same period of time.

Based on the foregoing, and the record as a whole, I find the Employer is, and at all material times has been, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. *Southern Alleghenies Disposal Services*, 256 NLRB 852 (1981).

II. THE ALLEGED UNFAIR LABOR PRACTICES

The operative facts are substantially undisputed. Thus, the recitation of facts found below is based on the composite of the testimony of all witnesses, unrefuted oral testimony, supporting documents, and careful consider-

[1] All dates are in 1981 unless otherwise stated.

ation of the logical consistency and inherent probability of events.

Not every bit of evidence, or every argument of counsel, is discussed. Nonetheless, I have considered all such matters. Omitted material is considered irrelevant or superfluous. To the extent that testimony or other evidence not mentioned might appear to contradict the findings of fact, that evidence has not been overlooked. Instead, it has been rejected as incredible or of little probative worth. *Bishop Malco*, 159 NLRB 1159, 1161 (1966).

Credibility resolutions, wherever necessary, have been based on my observation of witness demeanor, the weight of the respective evidence, established or admitted facts, inherent probabilities and reasonable inferences which may be drawn from the record as a whole. *Northridge Knitting Mills*, 223 NLRB 230 (1976); *V & W Castings*, 231 NLRB 912 (1977); *Gold Standard Enterprises*, 234 NLRB 618 (1978).

A. *Background*

On July 6, 1979, the Employer and the Authority contracted for the Employer to perform general construction work on 128 dwelling units known as Miriam Wood Brown Village located at Perkasie, Pennsylvania (Perkasie).

Payment for work performed at the Perkasie site was to be made under the Pennsylvania Prevailing Wage Act. For convenience, such covered work will be hereinafter called "rated." When the Employer performed services on projects not within the purview of either the Pennsylvania Prevailing Wage Act or the Federal Davis-Bacon Act, the wage payments were made at a different sum. Herein, the latter payments will be called "nonrated." At Perkasie, the carpenters' rated wage was $15.43 per hour and the nonrated wage was $10 per hour.

Relevant Employer hierarchy consists of Walter Brucker Sr., president; Walter Brucker Jr., vice president; and Julia Brucker, secretary-treasurer.

Each Friday was the Employer's normal payday. Checks received covered work performed for 1 full week ending at the close of business of each Wednesday immediately preceding the payday on which a paycheck was drawn.

Charging Party Wright began his employment with the Employer during the first week of November 1979. He worked consecutively until his termination, claimed to be unlawful, on November 9, 1981. Wright initially was employed as a laborer. He asked to be sent to carpenter apprentice school. The Employer complied. Concurrently, Wright worked as an apprentice carpenter. He became certified as a carpenter effective June 17. Since that time, Wright worked as a carpenter for the Employer.

Wright worked for the Employer on the original construction, during 1980, at the Perkasie site. He received the rated wage for such work.

B. *The Present Dispute*

In late October and November, Wright worked at the Perkasie site. At various times, D. Hange,[2] K. Culbreath, and K. Long, both apprentice carpenters, worked at Perkasie with Wright during these few weeks. Specifically, these individuals performed work which appeared on a so-called punch list. A punch list consists of items which need corrective action by construction contractors.

During the payroll week ending October 28, the Employer paid Wright the rated wage for the work he performed at the Perkasie site the previous week.

On October 28,[3] Wright spoke with another employee (Waddington) and discussed the wages paid for work on the Perkasie site. They observed that Culbreath and Long previously had not received the rated wages for that work. Later that day, Wright spoke with Hange at the Perkasie site. He asked Hange whether a nonrated or rated wage was supposed to be paid for Perkasie site work. Hange responded he did not know the answer, speculated it was a rated job and asked whether Wright received the rated wage. Wright answered in the affirmative, and the conversation ended.

The next payroll week ended November 4. The employees were paid for that week's work on November 6. Unlike the prior wage payment, Wright received only the nonrated wage for his work at the Perkasie site. A discussion concerning the Perkasie wages ensued during the lunch hour on November 6. Wright, Culbreath, Hange, and Long were eating lunch together. The four of them comprised the Employer's entire Perkasie work force at that time. Wright asked Culbreath whether the latter received rated pay for his Perkasie work. Culbreath answered he had not received the prevailing rate. Culbreath asked Hange whether his (Culbreath's) nonrated pay was correct. Hange said he was not sure. He told Culbreath to ask Walter Jr.

Wright told Culbreath he did receive the rated wage a week earlier, but that this week he (Wright) had received only nonrated pay for Perkasie work. Then, according to Wright's uncontradicted testimony, Wright asked Culbreath, "Well, what are you going to do about it?" Culbreath responded, "Well, I really don't know." Wright suggested, "Well, listen, I've been here a little bit

[2] Identified by Wright, without contradiction, as a foreman. The parties, however, did not stipulate Hange is a supervisor, nor is he alleged to be such in the complaint. Walter Jr. testified that Hange "was in charge" of the activities at Perkasie and that he would tell Hange what he needed to do and left Hange with the responsibility to complete the tasks. Culbreath testified Walter Jr. physically was present at Perkasie approximately only 15 percent of worktime and that Hange told Culbreath what to do and inspected his work. Based on these factors, the General Counsel's posttrial brief, seeking to impute Hange's knowledge to the Employer (see sec. C–5, below), urges "the record shows Hange to be a supervisor." No request is made for me to make such a finding.

I decline to resolve Hange's status. I am not satisfied the issue was fully litigated. There is only the minimal evidence described bearing on Hange's status. Since job titles are not dispositive of supervisory status, I am not bound by the undisputed evidence he was a foreman. In the absence of a motion to amend the complaint to allege Hange as a supervisor, the Employer may rely on the perfunctory attention given to his status during the trial.

[3] This date is derived from Wright's testimony. The General Counsel's brief asserts the conversation occurred on October 30. This discrepancy is not material. The substance of the conversation is undisputed.

longer. I know the Bruckers a little better. I'll see what I can find out."

After work on November 6, Wright traveled from the Perkasie site to the Employer's office. There, he met Walter Sr. and Julia. Wright asked for clarification of the apparent discrepancy in pay he received on October 28 and November 6. Wright said he received rated wages for his Perkasie work during the former week, but nonrated wages for such work performed during the latter week.

Walter Sr. opined the nonrated wage was appropriate for maintenance work rather than original construction, and punch list corrections were considered maintenance. Julia commented she had already discussed the wage rate discrepancy with Walter Jr. Julia said they had concluded the rated wage had been paid by mistake on October 28. She explained to Wright that the Employer considered the punch list work to be "maintenance items" which should be compensated at nonrated amounts. Thus, she told Wright his correct wage was the nonrated sum of $10 per hour he had been paid on November 6 for Perkasie work. Further, Julia said she and Walter Jr. had decided not to try to recoup the October 28 overpayment from Wright. Julia ended the conversation by telling Wright to speak with Walter Jr. after 6 p.m. that day if Wright was not satisfied with her explanations.

Wright went home after leaving the Employer's office. He telephoned the Authority's office and asked for Gerry Burton, an official of the Authority. Burton was not there. Wright was advised Burton would return Monday, November 9. Wright left a detailed message for Burton. The message identified the purpose of his call and the identification of the Employer, jobsite, and wage rate received.

Wright did not attempt to contact Walter Jr. on November 6. Instead, he deferred such a conversation until he would obtain further information from the Authority.

About 9 a.m., Monday, November 9, Burton called Wright at a jobsite other than Perkasie at which he was working for the Employer. Burton confirmed the accuracy of the message she had received from Wright. He asked Burton what wage rate was applicable to him at Perkasie. Burton said she did not know. They arranged to meet at 4:15 or 4:30 p.m., after Wright concluded his day's work.

Burton then called the Employer's office. She spoke with Julia Brucker. What Burton said is in dispute. Julia claimed she was told the Authority believed the Employer was "having trouble with one of your employees, Jeffrey Wright." Burton did not testify.[4] However, Karl Gabler, Burton's superior, testified he asked Burton to call the Employer to request submission of payrolls. The record reflects Wright's inquiry was intended to be confidential.

The General Counsel asserts, in salient part, that the Employer became aware of the concerted character of the activity by means of Burton's request for payrolls, because such documents applied to *all* the employees working at Perkasie. The Employer contends Julia's testimony that Burton explicitly identified Wright shows he was engaged in personal, not concerted, activity.

Contrary to the General Counsel's position, I do not conclude Julia's testimony concerning the November 9 call from the Authority[5] presents a critical credibility issue. Julia conceded the point sought by counsel for the General Counsel. Julia acknowledged she was asked for payrolls. That acknowledgment is the factual predicate for the General Counsel's contention the Employer was apprised of the existence of concerted activity. The purported identification of Wright (emphasized by the Employer) and the request for payrolls (highlighted by the General Counsel) are not mutually exclusive. That Wright's name may have been mentioned does not negate a finding of employer knowledge of concerted activity. In my view, if Wright's confidentiality had been betrayed by a revelation of his identity to the Employer, such a transmittal would have definitely linked Wright to the alleged concerted activity. I concede it is possible the Bruckers could have surmised, on their own, that it was Wright who contacted the Authority. Such a conclusion could be deduced from Wright's confrontation of November 6 with Julia regarding the wage payments. Nonetheless, I conclude the means by which the Employer learned, or formed its belief, that Wright contacted the Authority is of no moment.

Based on the foregoing, I find, factually, that some time between 9 and 11:45 a.m., on November 9, the Employer learned (or came to believe) that Wright had contacted the Authority and, as a result, the Authority requested submission of the payrolls for the employees doing the punch list work at Perkasie.

At approximately 11:45 a.m., Walter Jr. appeared at the jobsite. He ordered Wright to stop working, to gather his tools, and leave. He told Wright the Employer no longer required his services.

Wright asked "what this was all about." Walter Jr. exclaimed, "I don't need any disloyal soldiers in my camp and I don't need anybody contacting the Bucks County Housing Authority behind my back when you know I'm having troubles with them."

Wright claimed he tried to offer an explanation, but was cut off. Walter Jr. said Wright should work until noon and claim his paycheck.

Wright left the job as ordered. He immediately visited Burton at the Authority's office. He told Burton he had been discharged. Burton said she still did not know what rate was appropriate, but the Authority was looking into it.[6]

Wright then went to the Employer's office. Julia met him. She said she could not understand why he had contacted the Authority when the Employer had treated him so well. Wright tried to explain he was simply seeking information to use in his conversation with Walter

[4] I make no adverse inference on this omission. Burton, who presumably is still an employee of the Authority, was equally available to both parties.

[5] Julia could not recall whether it was Burton or Gabler who called that date.

[6] Official correspondence following Wright's termination shows a subsequent determination that rated wages were appropriate for the punch list work at the Perkasie site.

Jr. about the pay discrepancy. That explanation was to no avail. He received his final paycheck and left.

C. *Analysis*

1. The parties' contentions

The General Counsel contends Wright's November 9 discharge was in retaliation for having engaged in protected concerted activity. In contrast, the Employer argues that Wright's contact with the Authority was not "concerted" activity and, if it had been, no violation exists because it has not been proved that the Employer knew Wright's actions were concerted.

2. The discharge

In answer to complaint paragraph 4(b), the Employer claimed Wright's termination was due to his failure to follow Julia's November 6 statement that if Wright was not satisfied with her explanation as to pay discrepancy, he should speak with Walter Jr.

During the trial (apparently for the first time) the Employer claimed Wright's termination was caused, partially at least, because it anticipated a need for layoffs due to lack of work. Thus, the Employer shifted its defense from a concession of *discharge* for failure to do what Julia said to a claim Wright was *laid off* for lack of work. Also, at the trial, the defense shifted yet one more time. Walter Jr. claimed one reason for the termination was Wright's apparent "unhappiness," referring to Wright's conversation with Julia on November 6 regarding his wage payment. Such shifting permits an inference that the Employer is seeking to disguise its true reason for the termination. (*Pilgrim Life Ins. Co.*, 249 NLRB 1228, 1245–46 (1980).)

The "lay-off" defense is patently shallow. Wright had worked from November 7, 1979, through November 9, 1981, without interruption. No layoff of any employee actually occurred until December 23, 1981. This was 6 weeks after Wright's termination. Moreover, the record shows Wright was treated in a disparate manner. Employees normally were given at least 1 day's notice of layoff. Here, Wright was preemptorily removed from his job. He was not permitted to complete the workday.

Walter Jr. provided candid, though damaging, evidence of the cause of the termination. He testified, "I believe Wright should have come to me if he had any problems. I have always tried to be fair with all my employees. I thought I was due the courtesy of at least a phone call before he went to a customer of mine and complained about me." Viewed in isolation, this statement might be considered innocuous. Conceivably, it is an expression of legitimate management concern that employees should not denigrate their employer to customers.

However, the surrounding circumstances persuade me that the quoted statement is tantamount to an admission the discharge was caused solely to retaliate against Wright for having made inquiry of the Authority as to the accuracy of the wages. The complete context in which the termination occurred provides a telling setting.

Wright's confrontation, on November 6, with Julia established the unlawful framework. It is not unreasonable to conclude that Julia's request of Wright to consult with Walter Jr. was her effort to prevent employees from making official inquiries as to the propriety of the wage payments. Julia admittedly had earlier discussions concerning the payment with Walter Jr. There existed some real question whether their determination to pay nonrated wages for the punch list work was a proper decision. As previously noted, the Pennsylvania Department of Labor and Industry ultimately decided that the Employer should have paid the prevailing wage for the work in question. (See fn. 6, supra.)

Julia's November 6 remarks to Wright tend to show that the Employer was not merely concerned over the fact Wright had contacted a *customer*. Thus, Julia commented that she could not understand why Wright contacted the Authority in the face of the rather beneficent treatment the Employer accorded him in the past. Such remonstration bears the implication that the Employer believed Wright's contact with the Authority could produce a *compliance* problem with wage *enforcement* officials.

Walter Jr. was concerned with the same problem. That concern was manifest in his precipitous and spontaneous reaction to the knowledge that Wright had contacted the Authority. Though it is not the Board's province to monitor compliance with wage statutes, it is appropriate to consider such matters in an assessment of motivation. Walter Jr. was party to the decision to pay nonrated wages for the punch list work in question. Certainly, if that decision was successfully challenged, the Employer would be, at least, subjected to increased costs for wages.

On balance, I conclude Walter Jr. was not so much concerned that Wright might have set out to embarrass the Employer in the eyes of a customer as with the fact Wright's actions had already initiated an investigation by the Authority when it requested the Employer to submit its payrolls.

In sum, I do not accept the Employer's defenses that Wright's termination was caused by (1) a purported insubordinate act, (2) a need to lay off employees for lack of work, or (3) concern over Wright's "unhappiness."[7] Instead, I conclude that Wright was discharged on November 9, 1981, because he contacted the Authority to determine whether the Employer had paid the appropriate wages for the Perkasie work.

3. The applicable precedent

Whether a discharge, predicated on the grounds found immediately above, constitutes proscribed conduct within the meaning of Section 8(a)(1) of the Act, remains a question. Resolution of this issue requires an analysis of the substantially undisputed facts, in coordination with the applicable decisional precedent.

The Board and the United States Court of Appeals for the Third Circuit, the circuit having jurisdiction over the instant dispute, have different views concerning the ele-

[7] This last-stated defense will be further discussed in sec. C,5, below.

ments which comprise an 8(a)(1) violation based on a "concerted" action theory. I have utmost regard for the authority and decisions of the Third Circuit Court of Appeals. However, I am bound to follow Board precedent unless it has been reversed by the Supreme Court, and may not apply inconsistent decisions of the various courts of appeals. *Los Angeles New Hospital*, 224 NLRB 960, 962 fn. 4 (1976), citing *Iowa Beef Packers*, 144 NLRB 615, 616 (1963).

The statutory declaration which is the root of the violation charged is Section 7 of the Act. That section of the Act provides that employees shall have the right to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection. That right has been broadly construed in consideration of potential 8(a)(1) violations. Thus, an employee is protected when he questions possible violations of the collective-bargaining contract (*Colonial Stores Inc.*, 248 NLRB 1187 (1980); *Schneider, Inc.*, 241 NLRB 850 (1979)), or attempts to enforce contract provisions *Sheet Metal*, 224 NLRB 835, 840 (1976); *Interboro Contractors*, 157 NLRB 1295 (1966), enfd. 388 F.2d 495 (2d Cir. 1957). The Third Circuit expressly repudiated the "constructive concerted activity" doctrine of *Interboro*. (See *NLRB v. Northern Metal Co.*, 440 F.2d 881 (3d Cir. 1971).) Such activities constitute the implementation of the terms of a collective-bargaining contract and are an extension of the concerted activity that gave rise to the agreement (*H. O. Seiffert Co.*, 199 NLRB 960, 966 (1972), affd. without opinion 75 LC ¶ 10,568 (9th Cir. 1974)). They affect the rights of all employees in the bargaining unit (*Interboro Contractors*, supra).

When an employee acts on his own on such matters as making safety complaints to a government body, such action is protected because safe working conditions are a matter of concern to all of the employees (*Alleluia Cushion Co.*, 221 NLRB 999, 1000 (1976)). An individual's protest over such things as pay (and racism) are protected where other employees share that employee's concern and interest in the matter (*Diagnostic Center Hospital Corp.*, 228 NLRB 1215, 1217 (1977)).

Where an employee undertakes such action in good faith, that action is protected even though it is ultimately determined that the employee's protest was without merit (*Bechtel Power Corp.*, 236 NLRB 771, 774 (1978); *Spinoza, Inc.*, 199 NLRB 525 (1972), affd. without opinion 478 F.2d 1401 (5th Cir. 1973); *General Nutrition Center*, 221 NLRB 850, 855 (1976)).

An employee's purely personal complaints are not protected (*Inked Ribbon Corp.*, 241 NLRB 7 (1979). See *Capitol Ornamental Concrete Specialties*, 248 NLRB 851 (1980), where an employee's complaint about the condition of an access road to the company's parking lot was held unprotected because the employee did not act in concert with others and the complaint did not touch on matters of common concern. Also see *National Wax Co.*, 251 NLRB 1064 (1980)). Personal gripes are not protected and an employee's activities in advertising to fellow employees that he openly defies his Company's policies are not protected (*Midland Frame Division*, 216 NLRB 302 (1975)). An employee is not protected when he defiantly refuses to abide by applicable rules of conduct and is openly contemptuous of management officials (*Golden Nugget, Inc.*, 215 NLRB 50 (1974)).

Also, an employee is not protected when he sends a letter to a third party which constitutes disloyalty and disparagement of a company's judgment and capacity effectively to perform its work (*American Arbitration Assn.*, 233 NLRB 71 (1977). Cf. *Allied Aviation Service Co.*, 248 NLRB 229 (1980), where the Board held that an employee's letter to a third party was protected where it related to a legitimate ongoing labor dispute and where the letter did not constitute disparagement or vilification of the employer's product or reputation).

An employee's complaints relating to working conditions are not protected if they are keyed to a personal feud with management rather than the correction of working conditions that concern the group (*Northeastern Dye Works*, 203 NLRB 1222 (1973)). An employee is not protected when he complains about the incompetency of management when the complaint is not about wages and conditions of employment but is merely intended to put management on the "hot seat" (*Shulman's Inc.*, 208 NLRB 772, 784 (1974), enf. denied on other grounds 519 F.2d 498 (4th Cir. 1975)). An employee's activity is not protected where it is purely personal, where other employees are not involved in the matter protested, and where no group of employees would benefit if the protest had been successful (*Tabernacle Community Hospital*, 233 NLRB 1425, 1429 (1978)).

4. Protected concerted activity—application of the above principles

The Board has extended the *Alleluia Cushion* (supra) doctrine to employees who attempt to obtain an employer's compliance with legal requirements that it pay its employees prevailing wages on government projects. *Batchelor Electric Co.*, 254 NLRB 1145 (1981); *Kyle & Stephen*, 259 NLRB 731, 733 (1982).

In *G. V. R., Inc.*, 201 NLRB 147 (1973), the Board was confronted with whether an employee's discharge for having given interviews during the investigation of an alleged *Davis-Bacon* Act[8] violation constituted concerted activity. The Board found:

> [A]n employee covered by a federal statute governing wages, hours, and conditions of employment who participates in a compliance investigation of his employer's administration of a contract covered by such a statute, or who protests his employer's noncompliance with the contract, is engaged in concerted activity for the mutual aid and protection of all the employer's employees similarly situated. 201 NLRB at 147. [Emphasis added.]

The Board cautioned, however, that the above finding was not to mean more than the salient principle it enunciated in *Thurston Motor Lines*, 159 NLRB 1265 (1966). In *Thurston*, the Board announced it would be contrary to public policy to hold that the making of complaints to public authorities *in the course of concerted activity* re-

[8] The Federal equivalent of the Pennsylvania Prevailing Wage Act, involved herein.

moves the protection of the Act from the concerted activity. 201 NLRB 147 fn. 2 (1973).

In *Hugh H. Wilson Corp.*, 171 NLRB 1040 (1968), enfd. 414 F.2d 1345 (3d Cir. 1969), the Board adopted a trial examiner's observation that:

> Concerted activity does not necessarily require some overt manifestation of physical action on the part of employees based on some prior compact among them such as a decision to lock arms and march against an employer making claims of opposition to him. Even individual protests are protected as concerted activity "If the matter at issue is of moment to the group of employees complaining and if the matter is brought to the attention of management by a spokesman, voluntary or appointed for that purpose, so long as such person is speaking of the benefits of the interested group." [171 NLRB at 1046]

In its *Hugh H. Wilson* opinion, the Third Circuit extensively and comprehensively reviewed the applicable precedent. The court found that the protests of individual employees about their employer's profit sharing plan were "sufficient . . . to fit in the mold of 'group action' which is considered to be an element of concerted activities under Section 7 [citing *Mushroom Transportation Co. v. N.L.R.B.*, 330 F.2d 683 (3d Cir. 1964)]." In *Mushroom Transportation*, the court established the principle that to be concerted "it must appear at the very least that [the conduct] was engaged in with the object of initiating or inducing or preparing for group action or that it had some relation to group action in the interest of the employees." 330 F.2d at 685. Recently, the court reaffirmed this requirement. *Frank Brisco, Inc. v. NLRB*, 637 F.2d 946 (3d Cir. 1981).

In sum, the Third Circuit's decisions require affirmative evidence that group action is contemplated, whereas the Board's determinations need evidence merely that individual actions necessarily are on behalf, or in the interest, and the benefits derived from such actions would enure to the benefits, of other employees.

I conclude that the discussions during the November 6 lunch hour among all the Employer's employees at Perkasie reasonably may be held to be an effort to initiate and promote concerted action. I find, in particular, the conversation between Wright and Culbreath reflects such a result. It is clear that it was not only Wright who was concerned with his wage payment that day. Culbreath questioned Hange about his own (Culbreath's) pay. Hange counseled that Culbreath should take up the matter with Walter Jr. It was Wright's suggestion, based on his comparative longevity as an employee and his perceived greater affinity to the Bruckers, that he "see what . . . [he] . . . can find out" which created merely *an appearance* that Wright was voicing only an individual complaint.

Earlier wage discussions also are significant. Thus, the conversation Wright held with Waddington during which they noted the failure of Culbreath and Long to have received the prevailing wage shows the universality of concern over the wage issue and the breadth to which corrective action, if any was required, would have been addressed. Literally every employee who worked at Perkasie during the relevant times would have been affected. Indeed, that was the precise ultimate result of the investigation for which Wright was the catalyst. As earlier noted, the Department of Labor and Industries finally determined the prevailing wage rate was applicable and wage adjustments to the employees were required.

In *Air Surrey Corp.*, 229 NLRB 1064 (1977), enf. denied on other grounds 601 F.2d 256 (6th Cir. 1979), the Board held that an individual inquiry was protected concerted activity because (1) it advanced the purpose of a statute (Prevailing Wage Act), and (2) it related "to conditions of employment that are matters of mutual concern to all the affected employees." The Board concluded that collecting pay for one's work is on a par with safe working conditions (under the *Alleluia Cushion* doctrine) as a vital employee concern.

There is more compelling evidence in the instant case than in *Surrey*. In the latter case, there was no direct evidence that the employees acted in concert. However, the Board reasoned there existed "a likelihood that the other employees, in the absence of evidence to the contrary, shared the complaining employee's interest in receiving a valid paycheck and supported that cause."

In the case at bar, I do not find the General Counsel's principal theory to be based on the "constructive" concerted activity rule of *Interboro*. Rather, the thrust of the General Counsel's evidence is designed to show the presence of *actual* concerted conduct by the participation together of several employees in the activity claimed to be concerted. Thus, the General Counsel contends, as I find, that the evidence manifests such overt elements of group action on wages, a matter of clear interest to the employees, as satisfies the standard of the Third Circuit. Inasmuch as remedial action resulting from Wright's activity was bound to, and did, enure to the benefits of other employees, the Board's standards also are satisfied.

Based on all the foregoing, I find that Wright's inquiry comprised protected concerted activity.

5. The Employer's knowledge of the "concerted" nature of Wright's activity

A final issue still must be resolved. The question arises: Did the Employer know, prior to discharging Wright, that his contact with the Authority was concerted in character?

The Board in *Diagnostic Center Hospital*, supra, declared at 228 NLRB 1215 (1977):

> In order to sustain an 8(a)(1) discharge finding, it is necessary to establish that at the time of the discharge the employer had knowledge of the concerted nature of the activity for which the employee was discharged.

In *Tri-State Truck Service v. NLRB*, 616 F.2d 65 (3d Cir. 1980), the Third Circuit stated an employer "must have knowledge or reason to know, that employee activities have coalesced into group action for mutual aid or protection," 616 F.2d at 71.

The above-quoted language shows that both the Board and Third Circuit consider employer knowledge that employee activity has assumed a "concerted" nature (albeit within the confines of the respective definitions ascribed by each tribunal to that term) a necessary element of an unlawful 8(a)(1) discharge. I conclude the evidence satisfies both the Board's and court's standards for proof of employer knowledge.[9]

It is true, as the Employer contends, that Wright at no time announced to or informed the Employer that he was questioning the wage payments on behalf of any other employee. Also, there is no evidence Wright explicitly informed anyone at the Authority of such a fact. Finally, it is not asserted, nor is there evidence to show, that Burton told Julia (on November 9) that Wright had made such a representation to the Authority. Nevertheless, there is ample evidence from which I conclude the Employer actually knew or had reason to know of the concertedness of Wright's contact with the Authority.

Rarely would direct evidence of the requisite employer knowledge be available. Concerted and group action relative to wages, hours, and other terms and conditions of employment infrequently is undertaken in the presence, or with participation, of statutory supervisors. Judicial admissions of such knowledge are unlikely. To require such a quantum of proof, in my view, is unreasonable. Such a requirement would hold relatively unsophisticated employees to a standard of making explicit announcements to their employers that they have embarked on group action. It is more logical and fair that knowledge (or lack of it) be determined from *all* the surrounding circumstances.

The element of employer knowledge may be derived by inference. In *Diagnostic Center*, supra, the Board disapproved of the use of *multiple* inferences as the basis of finding an employer had knowledge of the concerted nature of the activity for which an employee was discharged. 228 NLRB at 1216 (1977). However, the Board did not disavow the validity of inferring the requisite employer knowledge in situations where the surrounding circumstances make such inference reasonable.

I conclude the instant case contains a variety of evidence from which the Employer's knowledge that Wright's activity was concerted may be inferred. Those factors are discussed below.

First, as earlier described, Julia and Walter Jr. had decided to pay the employees the nonrated wage for their work at Perkasie in October and November. That was a conscious and unilateral decision. The documentary evidence shows that decision reasonably could have been understood by them to bear the potential for concerted activity. This is so because their decision created a deviation from the former practice, dictated by the terms of the Employer's contract to perform the Perkasie work, of paying the prevailing wage at that project. In such context, group action to recoup wage underpayments was a readily anticipated consequence of that decision.

When Walter Jr. and Julia noted and discussed Wright's wage discrepancy between themselves, they agreed the prevailing rate he received was an error. If they were wrong, it is not unreasonable to charge them with expecting all the employees so aggrieved would exercise the option to bond together to achieve corrective action.

Walter Jr. and Julia testified as adverse witnesses called by the General Counsel and also as witnesses for the defense. I found each particularly articulate and intelligent. Those characteristics are persuasive indicators that each of them is, and was, fully capable of comprehending the implications and ramifications of their decision to pay nonrated wages to *all* their employees at Perkasie. Those personal features also provide a basis for Walter Jr. and Julia to have understood that a request for the payrolls involved an investigation of alleged underpayment *to a group* of employees.

Finally, the Employer's assertion that Wright's discharge was due to his "unhappiness" with his wage rate (see sec. C,2, above) supports an inference that the Employer knew of the concerted nature of Wright's activity. It is clear that Wright expressed his "unhappiness" on November 6 when he spoke with Julia. As far as the Employer was concerned, Wright's November 6 conversation with Julia was an individual inquiry or complaint. The record does not reflect Wright expressly said anything that day to dispel that understanding of the Employer. Nonetheless, the Employer did not discharge Wright on November 6. It did nothing to relieve him of his "unhappiness!"

On November 9, the situation changed. The Employer was informed Wright had contacted the Authority. Concurrent with that advice, the Employer's payrolls for *all* employees had been requested. The Authority did not limit its payroll request to those of Wright. Such limitation would have been reasonable if Wright had lodged a complaint in his individual capacity. The credited evidence shows Wright was specifically identified by Burton to Julia.

The failure to limit the request for payroll records to those of Wright, in the instant context, reasonably is susceptible to the interpretation that the group of employees were represented by Wright's contact. Walter Jr.'s precipitous and spontaneous reaction shows he harbored precisely such a belief. It was the very interjection of the advice Wright had contacted the Authority which was the direct cause of Walter Jr.'s visit to the jobsite to discharge Wright.

Based on all the foregoing, I find the Employer did have knowledge and reason to know Wright had been engaged in activity which was designed to initiate, induce, or prepare for, group action to correct wage discrepancies which might have befallen any of the Perkasie employees.

On the basis of the above findings of fact and upon the entire record in the case, I make the following[10]

[9] In reaching this conclusion, I do not at all rely on the evidence, and the General Counsel's argument on it, which tends to show Hange was a statutory supervisor. See fn. 2, above.

[10] Based on the conclusions of law, I deny the Employer's motion to dismiss the complaint allegations orally made at the conclusion of the presentation of the General Counsel's case-in-chief.

CONCLUSIONS OF LAW

1. Walter Brucker & Co., Inc. is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. When Jeffrey Wright contacted the Bucks County Housing Authority in November 1981, he was engaged in protected concerted activity.

3. The Employer's discharge of Jeffrey Wright on November 9, 1981, constituted unlawful interference, restraint, and coercion of employees for engaging in protected concerted activities in violation of Section 8(a)(1) of the Act.

4. The aforesaid unfair labor practice affects commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found the Employer violated Section 8(a)(1) of the Act in certain respects, I shall recommend that it be ordered to cease and desist therefrom and affirmatively take such action as will dissipate the effects of its unfair labor practice.

Because the Employer unlawfully discharged Jeffrey Wright it shall be ordered to offer him immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent job, without prejudice to his seniority or other rights and privileges. Also, the Order shall require the Employer to make Jeffrey Wright whole for any loss of earnings he may have suffered as a result of his unlawful discharge on November 9, 1981. The make-whole remedy shall require the Employer to pay interest upon the sum due. Such interest will be computed in the manner prescribed in *Florida Steel Corp.*, 231 NLRB 651 (1977). (See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962).)

Also, the Employer shall be ordered to expunge from its records any reference to Jeffrey Wright's discharge on November 9, 1981, and shall inform Wright, in writing, that such references have been expunged and that the conduct found unlawful herein will not be used as a basis for further personnel actions concerning him. See *Sterling Sugars*, 261 NLRB 472 (1982).

Finally, the Order shall require the Employer to refrain from, in any like or related manner interfering with, restraining, and coercing its employees in the exercise of their Section 7 rights. Upon the instant record, I conclude a broad prospective order is unnecessary. See *Hickmott Foods*, 242 NLRB 1357 (1979).

[Recommended Order omitted from publication.]

Stolte, Inc. *and* Kenneth Wilkie. Case 31–CA–12019

26 December 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS HUNTER AND DENNIS

On 31 August 1983 Administrative Law Judge Harold A. Kennedy issued a decision in this proceeding. The Charging Party filed exceptions and a brief. On 27 April 1984 the Board remanded the proceeding with the direction that the judge make more specific credibility findings and set forth the bases therefor. On 26 July 1984 the judge issued the attached supplemental decision. Thereafter, the Charging Party filed exceptions and a supporting brief, and the Respondent filed an answering brief.

The Board has considered the decisions and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions as modified herein.[2]

[1] The Charging Party has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] The judge dismissed the complaint allegations that the Respondent violated Sec. 8(a)(1) and (3) of the Act by discharging Kenneth Wilkie, as he found that Wilkie was dismissed for slow performance, and we affirm that finding. We note certain issues, however, which require a more thorough discussion than that furnished by the judge.

We note first that Wilkie was an active steward who constantly raised working condition-related complaints. From Wilkie's uncontradicted testimony, the Respondent was irritated with Wilkie's constant complaints. It is in this context that we have viewed the allegation that Wilkie was illegally discharged.

We also note certain alleged inconsistencies in the Respondent's testimony not directly addressed by the judge. One involves the Respondent's foreman James McCauley's testimony, at separate times during the hearing, that when Wilkie first began working for the Respondent his work speed was one-third that of the average worker, and that after he became steward his work speed was one-third that of the average worker. The General Counsel pointed out on cross-examination that McCauley stated that the reason he discharged Wilkie in February was because his rate of work had decreased after he became steward. McCauley then stated that Wilkie's work speed while he was steward was one-fourth that of the average worker. The General Counsel asked McCauley why he was now saying one-fourth, and McCauley replied that he had no answer. McCauley did note, however, that there was little difference between a third and a fourth slower. McCauley also indicated that he had told Supervisor Bragdon that Wilkie was doing one-third the work of an average worker. We note that McCauley had been consistent in stating that Wilkie's work speed had decreased after he became steward, until this attempt to quantify that decrease. Supervisor Bragdon also stated that McCauley had told him that Wilkie had slowed down since becoming steward. Thus, we find that McCauley's attempt to quantify Wilkie's work performance as one-fourth instead of one-third that of the average worker to support his statement that Wilkie's work rate decreased after he became steward is not critically inconsistent and is insufficient to discredit McCauley's testimony on this point.

Another alleged inconsistency involves Bragdon's affidavit to the Board, in which he stated, "Up until the time he [Wilkie] became steward, as far as I know his work was satisfactory. From that time on I heard complaints." This statement could be viewed as contradicting McCauley's statement that Wilkie had always been a slow worker. We note, however, that Bragdon did not have much occasion to view Wilkie's work. He testified that he personally observed Wilkie at work only once, and at that time Wilkie was slower than the other employees. Bragdon could not recall if he observed Wilkie before or after Wilkie became steward. In sum, we do not find Bragdon's testimony to be critically inconsistent from that of McCauley.

ORDER

The National Labor Relations Board orders that the complaint is dismissed.

DECISION

HAROLD A. KENNEDY, Administrative Law Judge. The only question presented in this case is whether an employer discharged one of its employees for engaging in union or "other protected concerted activities" and thereby violated Section 8(a)(1) and (3) of the National Labor Relations Act (Act). Having considered the entire record taken at the trial of this matter, held in Los Angeles, California, on February 23, 1983, and determined that the employee was terminated for other than any protected concerted activities, the complaint will be dismissed.

Kenneth Wilkie, the Charging Party, filed a charge with the Regional Director of the National Labor Relations Board's Region 31 on March 25, 1982, alleging that Respondent Stolte, Inc. had terminated him about February 12, 1982, "because of his union activities on behalf of Laborers International Union Local 300 of North America, AFL–CIO."[1] Thereafter, on May 28 a complaint issued alleging that: (a) About January 11 Wilkie was appointed a union steward for certain employees of Stolte working at its Galleria II jobsite in Glendale, California;[2] (b) between on and about January 11 and February 12 Wilkie "concertedly complained" about wages, hours, and working conditions of Respondent's employees; (c) during the same period Wilike complained to OSHA regarding the working conditions of employees; and (d) About February 12 Stolte discharged Wilkie and since that date has failed to reinstate him. The complaint also alleges that the discharge occurred "because Wilkie joined or assisted the Union or engaged in other protected concerted activities for the purpose of collective bargaining or other mutual aid or protection" and, thus, violated Section 8(a)(3). The complaint further alleges that the discharge operated to "interfere with, restrain, and coerce" Stolte's employees in the exercise of their rights guaranteed in Section 7 of the Act and, thus, violated Section 8(a)(1) of the Act.

Respondent admitted in its answer that Wilkie was appointed union steward about January 11 as alleged but denied the other allegations recited above. Respondent

[1] All dates are in 1982 unless otherwise stated.

The General Counsel called James Laney, a business agent for Local 300, to testify on his case-in-chief, but the Union did not otherwise participate in the proceeding.

[2] Job Superintendent Eugene Bragdon described the Galleria II project as "an addition to the existing Glendale Galleria Shopping Center," consisting "of a five-level parking structure and then a two-level mall with parking underneath it."

admitted all other allegations of the complaint which set forth the following matters:

1. Respondent is an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(6) and (7) of the Act.

2. Respondent is a California corporation engaged as a general building contractor of high-rise office buildings, commercial buildings, and shopping centers. Respondent maintains its principal place of business in Los Angeles, California, and in the course and conduct of its business purchases and receives goods and services valued in excess of $50,000 directly from suppliers located outside of the state.

3. At all times relevant the following persons held the positions indicated and were agents and supervisors as those terms are defined in the Act: Edward Cruz Jr., superintendent of the tower; Eugene Bragdon, superintendent of the mill and parking structure; Robert Allen Powell, carpenter foreman; James Daniel McCauley, Laborers' foreman; and John J. Neeson, project manager.

4. The Laborers' International Union of North America, Local 300, AFL–CIO, CLC (Union) is a labor organization as the term is used in the Act.

It remains only to be determined whether Wilkie's termination was for a purpose proscribed by the Act as alleged.

Five witnesses testified, two for the General Counsel and three for Respondent. The testimony is summarized hereinafter in order of their apperances.

Charging Party *Kenneth Wilkie* testified that he was hired by Superintendent Ed Cruz to work at Galleria II in Glendale on October 26, 1981. Wilkie stated that Cruz told him he was to start as a laborer and would later become a foreman. Wilkie worked as a laborer, reporting to Cruz, until around November 18 when he was laid off due to the fact that the Respondent and the "owner" had not signed a contract. Wilkie returned to work for Respondent at the same jobsite around December 18 and worked thereafter under Laborers' Foreman McCauley until terminated on February 12, 1982.

Wilkie stated that at first he was assigned to do vibrating work with a jackhammer, digging of footings, pouring of concrete, assisting in the engineering of layouts, and helping build barricades. "Everything changed," Wilkie said, when he was designated job steward by Local 300 on January 11.[3] From that time on, according to Wilkie, he was assigned to do such things as act as flagman, pick up rock, wash vehicles, sweep up, and clean barricades. Wilike indicated that other laborers spent their time working around "footings."

Wilkie testified that as steward he was called on to check on safety, see that laborers' work was performed only by laborers, and take grievances from other laborer employees. He stated that the duties of a job steward are set forth in a "Short Form Agreement."[4]

Wilkie stated that he was entitled to conduct union business during normal work time—after requesting permission of his supervisor. Wilkie testified concerning a number of conversations that he had with management personnel—Superintendent Cruz, Superintendent Bragdon, Carpenter Foreman Powell, and Laborers' Foreman McCauley—during the month that he served as steward.[5]

Wilkie went into some detail concerning complaints he made to Respondent's supervisors on the following dates, as follows:

January 11—McCauley—man alone in an unshored "footing" (or hole); also, carpenters doing laborers' work (oiling forms). McCauley agreed to "correct" both items.

January 12—McCauley—Wilkie wanted to check to see if two employees (operating engineers) helping with concrete pour were union laborers, but McCauley told Wilkie to return to work.

January 13—McCauley, Powell and Bragdon—repeat of January 11 complaints. Powell and then Bragdon consulted concerning the oiling of forms. Bragdon said carpenters would not oil forms but declined to assign work to laborers. Wilkie told to contact Union.

January 14—McCauley, Cruz and Bragdon—repeat of January 12 complaint and again rejected by McCauley, who told Wilkie to return to work. Cruz consulted, however, and Wilkie allowed to perform "union business." Wilkie asked to see papers of two workers (operating engineers) doing concrete work but McCauley "interfered." Bragdon then consulted, and Bragdon reported that the two men were "union." Business Agent Laney called in and the two workers refused to produce cards.

January 15—McCauley, Powell and Bragdon—repeat of complaints of January 11 and additional new complaints: two laborers worked during lunch hour and another performed "PTO" (vibrator) work without being paid the extra wages as required. After meeting with Powell, Wilkie went to Bragdon, who asked Wilkie to stop "these little small things." Wilkie then called union business agent as suggested by Bragdon.

January 18 (rain)—McCauley and Bragdon—repeat of January 15 complaint concerning pay for two employees who worked through lunch period. Bragdon stated that men volunteered such work, but Wilkie stated union men "don't volunteer." Bragdon became angry, ordered Wilkie out of office and commented, "You're the damndest steward that I've ever seen in my life."

January 20—McCauley and Bragdon—Wilkie and two other laborers told to enter a 10-foot caved-in footing and shovel out mud. Wilkie went to see Bragdon, who stated that he knew Wilkie had called "OSHA."[6] Bragdon said carpenters would shore up hole as OSHA directed, but Wilkie stated, "That's a laborer's job." Wilkie was told he was "starting an awful lot of problems" and was then assigned by (Bragdon through McCauley) to

[3] Union Business Agent Laney testified that the actual date of appointment was January 12 (R. Exh. 1).

[4] Respondent is signatory to the Master Labor Agreement (G.C. Exh. 4), however, not the Short Form Agreement (G.C. Exh. 2). A steward's duties under the two agreements are not dissimilar, however.

[5] Wilkie testified that McCauley reported to Cruz and that Cruz reported to Bragdon. Laborers' Foreman McCauley said he reported to Bragdon who reported to Project Manager Neeson.

[6] References to OSHA throughout proceeding actually refer to Cal-OSHA.

sweep the street. Later Wilkie was assigned to dust barricades and wash vehicles.

January 25—McCauley, Powell and Bragdon—Wilkie and two other laborers assigned again to shovel dirt out of hole. Wilkie criticized installed shoring as "a little death trap." Powell arrived, stated shoring was done as OSHA directed and commented that he hoped it would fall on Wilkie. Bragdon then consulted and told by Wilkie that Bragdon should be "ashamed" of the shoring. Bragdon responded that the shoring was done as directed by OSHA and told Wilkie to "stop all this junk." Wilkie said he would call OSHA and did so. Safety meeting then followed, attended by Cruz, Bragdon, and about 17 carpenters and five laborers. Workers told by Cruz to bring safety problems to him or Bragdon so they can be corrected. Bragdon then added that he would fire anyone calling OSHA or union business agent because "I can straighten things out." Wilkie was given a chance to speak and stated, "I'm the guy to call." Continuing, Wilkie told Bragdon before group that he "didn't believe a word" of Bragdon's that OSHA had directed that shoring be done "this particular way." Bragdon said, "You're calling me a liar. Take that back." Wilkie responded: "I'm taking nothing back, and you can't make me." The safety meeting ended, and Wilkie returned to work. Later in the day, Cruz called Wilkie out of the hole to meet with OSHA Inspector Francis Ford. Wilkie showed Ford the footing. Ford ordered another laborer who was working in the hole to get out and then handed a citation for incorrect shoring to Cuz. Wilkie then told Ford and Stolte had five 10-power boxes on the jobsite that were not grounded and the need for barricades around certain unguarded footings. Ford then "wrote" up these items, according to Wilkie, and directed removal of the power boxes and roping off of footings.[7]

February 1—McCauley—Wilkie asked and was allowed to call the Union to advise that a concrete pour was in progress. Later in the day Wilkie met with McCauley and Operating Engineers' Business Agent "Jerry," who had come to the jobsite at Wilkie's request as Laborers' Business Agent Laney was unvailable. Wilkie pointed out improper use of a forklift by carpenters in carrying forms and commented that OSHA had told Stolte "to get rid" of it. McCauley told Wilkie that his complaint concerned carpenters' business, and Wilkie told McCauley "not to interfere." Jerry stated that he would "take this up with the carpenter foreman," and Wilkie agreed to return to his work picking up rocks. Wilkie also complained to McCauley at lunch time that day that two laborers were working through the lunch period as had occurred previously. Wilkie pointed out that the prior lunch time work and the PTO work had not yet been paid. Wilkie said he told McCauley, "It's going to be in their check," and McCauley "just looked at me . . . ."

February 4—McCauley, Powell and Bragdon—Wilkie approached McCauley and, after mentioning his (Wilkie's) recent absence due to an injury, inquired whether the rumor of a layoff of laborers had any validity. McCauley said it did and indicated that he (McCauley) would be the only laborer who would continue to be working. McCauley allowed Wilkie to speak to Bragdon about layoff of carpenters. Powell, who entered Bragdon's office while Wilkie was there, stated that he was keeping five carpenters and two carpenter foremen on the job. Wilkie said he would have to call his union and walked out. Later that day McCauley advised Wilkie that he was not being laid off after all.[8]

February 8—McCauley and Bragdon—Wilkie, who was working in a 14-foot deep hole near a crane, told McCauley that he had to get out and get away from the carbon monoxide in the area. McCauley replied that he wanted Wilkie to work there but allowed Wilkie to go see Bragdon. Bragdon told Wilkie to go back and do what McCauley directed or he (Wilkie) could call the business agent. Wilkie returned to the hole after calling the business agent. The business agent, a Mr. Bibb, came to the jobsite and met with Bragdon and Wilkie. Bibb supported Wilkie and complained of the Union's need for frequent visits to the jobsite and assignment of carpenters to laborers' work. Also, at Wilkie's request, Bibb asked Bragdon to provide transportation to a hospital to persons hurt on the job (which was not done when Wilkie was hurt on February 2). Bragdon agreed to provide such transportation.

Wilkie testified that on February 12, the day he was terminated, he and two other laborers were at work on his jobsite. He said McCauley called him over, from the position he was picking up rocks, and told him: "Here's your check. I'm glad to get rid of you." McCauley gave Wilkie his check and two "lay-off slips." Wilkie said he inquired of McCauley what the slips were, and McCauley explained: "This is your termination slip and another slip showing we don't ever want you with Stolte again."

Wilkie stated that McCauley also made a comment to the effect that he was "glad to get rid" of him, but did not explain the reason for the termination.

One of the slips given to Wilkie, which bears the label, "Termination Notice," indicates that Wilkie was hired on October 27, 1981, and discharged on February 12, 1982, for being "Too slow—poor work." Wilkie said he was never reprimanded while in the employ of Respondent and was aware of no complaints about his work. He said no one ever told him to speed up his work. Wilkie acknowledged, however, he never filed grievances against the company for the problems he had complained about.[9]

[7] On cross-examination, Wilkie said an OSHA representative had come to the jobsite at an earlier time when he was not there. Wilkie said he had asked the union business agent to call OSHA and that he (Wilkie) and Bragdon had discussed the earlier OSHA visit about January 20. Wilkie said an OSHA inspector returned on January 27 and repeated the need to get rid of the "10 power boxes." On redirect Wilkie said he called OSHA on two occasions, once on the morning of January 25 and on a later date in the evening after he had gone home.

Business Agent Laney later testified that he had called OSHA in January at Wilkie's request. Defense witness Superintendent Bragdon also testified concerning vists by OSHA representatives.

[8] Wilkie said he did not work on February 5 as he met with laid-off workers who, he said, had not been paid.

[9] The termination notice has three columns captioned "Lay Off," "Discharge" and "Voluntary Quit." Under Discharge the following items appear: Refusal to follow instructions; Misconduct; Absentee; Not Qualified; Too Slow—Poor Work; and Others (Explain). A box next to "To Slow—Poor Work" was "blacked out."

On cross-examination Wilkie said he kept a camera in his car which he used to photograph work conditions during breaktimes or after working hours.

James Laney, business agent or field representative for Laborers' Local 300, testified that Wilkie was appointed steward on the recommendation of the field representative who had preceded him. He said he had known Wilkie for 7 or 8 years.

Laney said he made "frequent" trips to the Galleria II jobsite in response to Wilkie's complaints. Laney stated that he went to the jobsite on the average of "probably no less than three and probably as many as five times in a week" during the month period that Wilkie had served as steward. There were times he said when he had to go to the jobsite "twice in one day."

Laney stated that his usual procedure was to contact Superintendent Bragdon and then Steward Wilkie. He would usually return to speak with Bragdon alone, although Wilkie would sometimes follow along. Laney indicated that Stolte was more cooperative than most other employers. Said Laney:

> I would have to truthfully say that in the process of visitation on this job that any time I ran into a problem that seemingly could not be solved between me and Bragdon or McCauley, I went to [Project Manager] Mr. Neeson and he always resolved the problem for me.

Laney recalled details of certain visits made to Galleria II but not the dates. Laney remembered going to the jobsite in regard to "open trenches, shoring and barricades." Bragdon told Laney that these things would be corrected.

On another occasion Laney went to the jobsite in response to a complaint that "carpenters, plumbers [were] doing our work." Laney said he "did not see any infractions," noting that carpenters are allowed to carry lumber from a stockpile within a 25-foot radius to do their work and that plumbers are permitted to do what they were doing on that occasion, which he described as "some kind of sewer" work.

Laney recalled being called to the jobsite when "Double P" was pouring concrete. After some investigation, Laney told Bradgon that an "oiler," although a union man, should not be pulling "mud" out of a chute with a shovel or giving any directions to a truck "because that was a laborer's job." Laney had no criticism of the work being performed by the "operator" on the job, however. Bragdon told Laney then that "he would settle the issue, and the oiler put his shovel down."

Laney remembered talking to two workers on the jobsite who "were supposedly complaining" about not being paid for working through their lunch period. Said Laney:

> I dismissed the complaint because of the fact that they had answered that they worked through the lunch period on their own volition. And them working on their own volition did not allow me a point to collect because they were not complaining.

Testifying on cross-examination, Laney said he had talked to Bragdon concerning Wilkie's complaint that he had been unable to perform his duties as a steward. Laney indicated that Wilkie's complaint was not justified, stating, "I think that he had been offered the opportunities to do what was specified, within the working agreement."

Laney also testified on cross-examination that Stolte officials had mentioned the possibility of Wilkie's discharge becuse his work habits had changed. Laney acknowledged that he and Bragdon had observed Wilkie in the area of a ditch for a period of 15 or 20 minutes. Laney indicated at first that Wilkie was standing above the ditch, but then stated:

> He walked around. I do not know. He may have been picking up the rocks or doing something that I do not know anything about.

James McCauley, Stolte's Laborers' Foreman on the Galleria II project, began his employment with Stolte in December 1981. He was concerned with construction of the parking structure and worked under Superintendent Bragdon.

McCauley said he was responsible for the rehiring of Wilkie in December 1981 and thereafter supervised Wilkie's work. McCauley stated Wilkie used a vibrator for a couple of days and spent much of his time "cleaning the bottoms" of footings. McCauley asserted that Wilkie was assigned to do the same kind of work other laborers performed—cleaning of rebar, stacking of lumber, sweeping up, washing of vehicles, etc.

Wilkie was "very slow" from the beginning, according to McCauley. McCauley compared Wilkie's rate to be "about a third" of the average laborer. McCauley said he spoke to Wilkie early on about his slow pace, and the latter responded that "Rome was not built in a day." After being appointed steward, Wilkie's speed was even slower.

McCauley said he had authority to hire and fire and that he had told his superiors "half a dozen" times that he was going to lay off Wilkie because of his poor performance. McCauley said he was responsible for the information appearing in Wilkie's termination notice. McCauley testified that he had decided to let Wilkie go about 2 or 3 weeks, before he actually dismissed him. On cross-examination, when shown his affidavit, McCauley agreed that he had told Carpenter Foreman Powell in December, prior to Wilkie's designation as a steward, that he wanted to terminate Wilkie at that time because of his slow work.

McCauley maintained that there was no need for Wilkie to make complaints. McCauley said he would correct deficiencies called to his attention but that "99% of the time [Wilkie] would call the business agent." McCauley recalled an incident in which two laborers helped him pour concrete during a lunch period. Wilkie complained about it, and McCauley saw to it that they were paid for such work. On another, similar occasion Wilkie had complained to McCauley that the company must pay employees for working through lunch. McCauley acknowledged to Wilkie that he knew that fact,

which brought the following response from Wilkie: "Don't give me no shit or I'll make you pay me too."

McCauley disputed Wilkie's claim that the latter only took pictures during "Off hours." McCauley asserted that he observed Wilkie taking pictures at least a "half a dozen" times.

Eugene Bragdon identified himself as job superintendent at Galleria II. He stated that there was one other person on the job superior to him, Project Manager Neeson.

Bragdon stated that he had requested that Wilkie be rehired after being laid off, and he assigned Wilkie to work under Laborers' Foreman McCauley. Bragdon said he observed Wilkie working on one particular occasion and noted that Wilkie "threw out about a half a shovelful of dirt to two shovelsful of dirt by other laborers."

Bragdon thought he had discussed Wilkie's slow work with McCauley about a half a dozen times. Bragdon was not sure when the discussions took place but stated that McCauley had indicated Wilkie "had slowed down since he became steward."[10] Bragdon testified concerning certain incidents Wilkie had referred to in his testimony. Bragdon recalled that Wilkie complained that the company had allowed a concrete truck driver to "run a little water" to clean out the "chute when the truck is empty" instead of utilizing a laborer to perform such activity. He said he allowed Wilkie to call out his business agent (who agreed with Wilkie) about the matter.

Bragdon denied stating at a safety meeting, or on any other occasion, that he would fire anyone for calling OSHA or a business agent. He said he did want to be informed of all safety problems and had stated at safety meetings that nothing would be held against a person for reporting an unsafe condition.

Bragdon stated that Project Manager Neeson had requested the Cal-OSHA Consultation Service to visit the Galleria II jobsite in connection with the excavation work on the project. Cal-OSHA Consultant Manuel Ciriaco visited the site on January 20 and recommended utilization of certain safety procedures (R. Exh. 2). Bragdon said he thought the company had complied with Ciriaco's recommendations as to shoring. However, on January 25 Cal-OSHA Inspector John Ford made an inspection and on January 27 issued a citation alleging violation of two safety standards (R. Exh. 3A). In addition, Ford provided the company with an information memorandum recommending protection be provided employees working near a sloping bank (R. Exh. 3(b)).

Bragdon testified that Wilkie had been allowed to perform his duties as steward. Bragdon said he spoke with Union Business Agent Laney about Wilkie on a couple of occasions. On one of the occasions Laney told Bragdon that "he had informed Mr. Wilkie what his duties were as a steward and that he also owed the company responsibility for a day's work for a day's wages." Bragdon continued: "The second time was when Mr. Laney informed me that he had sat over in the parking lot at Thrifty Drug Store and observed Mr. Wilkie for a rather lengthy period of time doing nothing."

Bragdon stated that McCauley made the decision to discharge Wilkie. McCauley advised Bragdon of the decision and Bragdon in turn informed the project manager who had the final authority on the project. The Union was thereafter notified by letter dated February 10 of the termination as provided for in the collective-bargaining agreement.

Keith Tanner, administrative vice president of Stolte and custodian of the firm's records, took the stand to testify that the Company's records contradicted the Charging Party's testimony that he was on the job on January 20 and was not there on January 18. The company's records show that he was paid for work performed on January 18 and that he received no pay for any work on January 20 (R. Exh. 6).

Tanner also testified that he has been concerned with safety for Stolte for 15 years and that it has a "strong" safety program. He said employees at Galleria II were free to go to the project manager and to their union business representatives with safety complaints.

I am satisfied that Respondent terminated Charging Party Wilkie for a legitimate business reason. The credible testimony of Foreman McCauley and Superintendent Bragdon persuade me that Wilkie was discharged only because of his poor work performance. His work was "too slow" before he was designated steward, and his poor work performance deteriorated further after he became steward. Respondent demonstrated that Wilkie's termination would have taken place in the absence of any protected concerted activity. See *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).[11]

The General Counsel's argument in support of the charges is not persuasive. There is no question about Wilkie's right to make complaints concerning working conditions, including those that concern safety. That Cal-OSHA made an inspection at his request and issued a citation and information memorandum to Respondent, of course, does not satisfy the General Counsel's burden. Nor is the fact that complaints of Wilkie may have had "at least some merit."

I reject the General Counsel's contention that Respondent's "stated reason for Wilkie's termination is highly incredible and strongly hint at fabrication." The effort of the General Counsel's attorney to make McCauley's testimony appear inconsistent is unpersuasive. I credit McCauley's testimony over Wilkie. I specifically reject Wilkie's claim that no one ever complained about his work. And I reject Wilkie's assertion that Bragdon had threatened to fire anyone who complained to OSHA or to a union business agent. The failure of McCauley and Superintendent Bragdon to deny each and every assertion of Wilkie is not significant here. The failure to

[10] Bragdon agreed on cross-examination, however, that he had stated in an affidavit that as far as he knew, Wilkie's work was satisfactory up until he became steward.

[11] Wilkie's testimony on the General Counsel's case-in-chief, if considered alone, suggests that protected conduct could have been a motivating factor in his discharge. The General Counsel's other witness, Union Business Agent Laney, however, was of no assistance to his cause. Laney's testimony indicates that he was aware of Wilkie's poor performance and was in no position to question Wilkie's discharge for that reason.

call Carpenter Foreman Powell, who had no part in the discharge of Wilkie, is likewise of no significance.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(6) and (7) of the Act.
2. The Laborers' International Union of North America, Local 300, AFL-CIO, CLC is a labor organization within the meaning of Section 2(5) of the Act.
3. Respondent's discharge of Kenneth Wilkie on February 12, 1982, was for a legitimate business purpose and did not violate the Act.
4. It was not established that Respondent violated the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[12]

ORDER

It having been found and concluded that Respondent, Stolte Inc., has not engaged in any unfair labor practice, the complaint is dismissed in its entirety.

[12] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

SUPPLEMENTAL DECISION

HAROLD A. KENNEDY, Administrative Law Judge. On August 31, 1983, I issued a decision and recommended Order dismissing a complaint that charged Respondent with violating Section 8(a)(1) and (3) of the National Labor Relations Act by discharging one of its employees for engaging in union or "other protected concerted activities." On April 27, 1984, the Board remanded the proceeding with the direction that I make more specific credibility findings and set forth the bases therefor. The Board's remand Order reads in part:

> Since the Board considers the Judge's credibility resolutions presently inadequate, this proceeding therefore shall be remanded to the Judge in order that he can make specific findings as to the credibility of witnesses including, but not necessarily limited to, his reasons for crediting the testimony of Respondent's foreman, James McCauley, over Wilkie's; why he found unpersuasive the General Counsel's claim that McCauley's testimony was inconsistent; and more precisely what effect, if any, the testimony of James Laney, Laborers' Local 300 business agent, should have on this proceeding.

Foreman James McCauley impressed me as a truthful witness, and I specifically credit his testimony as to why he recommended Wilkie's discharge. I believe McCauley's testimony to the effect that he found Wilkie to be "very slow" from the start, that he worked more slowly than other laborers, and that his performance worsened after being appointed steward, notwithstanding the fact that McCauley had discussions with Wilkie about the speed of his work. I credit McCauley's testimony that Wilkie stated during one of such discussions that "Rome was not built in a day," and that on another occasion Wilkie responded, "I'm going as fast I can."

I find no significant inconsistent statements in McCauley's testimony in spite of the persistent, if not contorting, efforts of the General Counsel's attorney to make it appear so. A fair reading of McCauley's testimony, in my view, clearly indicates that McCauley recommended Wilkie's discharge only because of slow performance on the job.

It is apparent that McCauley did not regard Wilkie's attitude as a worker to be the best, but the record is not persuasive that McCauley recommended Wilkie's discharge because of a poor attitude or for any reason other than slow performance.

It was hardly critically inconsistent for McCauley to have stated in his affidavit that it took Wilkie "forever to a job" and state at other times that Wilkie worked at a one-third or at other slower rate than other workers. That McCauley did not remember that the affidavit that he signed stated that Wilkie took forever to do a job is of no moment.

The brief filed with me by the General Counsel's attorney went to some length to make it appear that McCauley's testimony contained inconsistencies and was thus unworthy of belief. There does appear to be some conflict in the testimony as to who was responsible for hiring (or rehiring) of Wilkie. McCauley answered in the affirmative to the question if he had been responsible for hiring Wilkie. McCauley said later he "was not the one that originally hired Mr. Wilkie" and stated that it was Edward Cruz who did (Wilkie himself said he was hired by Cruz. Superintendent Bragdon indicated in his testimony that Wilkie had worked for Cruz when Wilkie was first hired [in October before McCauley was employed by Respondent] and that he [Bragdon] had asked McCauley at a later time to notify the Union of the company's desire to recall Wilkie.) Such testimony on this matter of no more than secondary importance may be incomplete or even unclear, but it hardly "demonstrates McCauley's propensity to stretch his testimony to fit a given question," as the General Counsel's attorney has argued.

It is clear from McCauley's testimony that he took the initiative to discharge Wilkie. He consulted other officials, including his superior, Superintendent Bragdon, about terminating Wilkie, even though he had authority to discharge employees. (Bragdon also discussed the discharge with his superior, Project Manager Neeson, who signed the termination "slips" (G.C. Exh. 3).) I thus reject the General Counsel's attorney's assertion that McCauley "changed his testimony" on the point.

The "actual reasons" for Wilkie's termination were not "somewhat conflicting" as the General Counsel's attorney contended. That McCauley admitted that he "never timed Wilkie or other laborers" does not mean that McCauley made no judgment that Wilkie was a slow

worker or that there was another reason for recommending his dismissal.[1]

As the General Counsel's attorney pointed out in his brief, Wilkie's complaints went "substantially unrebutted and undenied." Certain testimony of Wilkie impressed me as improbable and not credible, however, in the face of impressive contradictory evidence. I was not persuaded by his claim that no one had discussed his work habits or the speed of his work while employed by Stolte. I thus credit McCauley's testimony on this point. Nor do I credit Wilkie's testimony that two workers had complained to him that work performed by them during a lunch hour had gone unpaid. I credit McCauley over Wilkie on this point also.[2] I am unpersuaded that Respondent refused or failed to furnish his eye protection as he claimed. Rather, I credit McCauley who testified that he had offered Wilkie safety glasses on a day he injured his eye while working with a pick "in an inch or two of slurry." I credit McCauley's testimony over the contrary testimony of Wilkie that McCauley assigned the same kind of work to Wilkie as he did to other laborers and that Wilkie took pictures during work time. Further, I am unable to credit Wilkie's claim that Superintendent Bragdon stated at a safety meeting attended by approximately 25 employees, including Foreman McCauley and Superintendent Cruz, that he would fire anyone who called OSHA or a union business agent. I credit Bragdon's testimony that he did not make such a statement and his specific testimony that he had stated at safety meetings that "nothing will be held against a man for reporting an unsafe condition."

The testimony of Business Agent James Laney, who was called by the General Counsel in support of the complaint, was significant in the lack of support it gave to the General Counsel's cause and the Charging Party Kenneth Wilkie's claim that he was discharged for union activities. Laney's testimony is persuasive that Respondent did not interfere with Wilkie's duties as a shop steward. Significantly, Laney testified that Stolte was more cooperative than most employers and that he could always resolve problems at the project manager's level if unable to do so with lesser officials. The most telling part of Laney's testimony was the support he gave on cross-examination to defense evidence presented later. Laney agreed that McCauley had told Laney prior to Wilkie's discharge of a change in Wilkie's work habits and that the company might terminate him. Laney testified that he spoke with Superintendent Bragdon about whether there had been a change in Wilkie's work habits after being designated steward. Laney agreed that there was an occasion when he observed Wilkie stand or walk around for a period of probably 15 or 20 minutes. Laney said he had made such observations from a Thrifty Drug store next to the jobsite. Superintendent Bragdon testified that he had discussed Wilkie's work habits with Business Agent Laney on two occasions and that Laney had offered these comments:

> Well, the first time that Mr. Laney and I talked about it he told me that he had informed Mr. Wilkie what his duties were as a steward and that he also owed the company responsibility for a day's work for a day's wages. Or words to that effect . . . . The second time was when Mr. Laney informed me that he had sat over in the parking lot at Thrift Drug Store and observed Mr. Wilkie for a rather lengthy period of time doing nothing.

Wilkie, of course, could properly complain about what he believed to be unsafe working conditions, including inadequate shoring of footings, inadequate access to medical treatment, and inadequate equipment or clothing. He could properly inquire about the union status of other workers peforming work on the jobsite. He could properly inquire as to whether employees who worked through their lunch period were compensated as provided for under the collective-bargaining agreement. He could properly protest that Respondent had improperly assigned nonlaborers to perform laborers' work. Wilkie was able to make such complaints, inquiries, and protests, however, and I remain unconvinced that Respondent terminated him for doing so. Respondent had a right to expect Wilkie would perform at a reasonable rate of speed while employed as a laborer although also serving as a steward, and it was not unlawful for Respondent to discharge him for failing to do so.

I have carefully reviewed the record and adopt and affirm all of the findings, conclusions, and recommended Order set forth in my decision of August 31, 1983.

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[1] The General Counsel also stated in his brief, without a record basis therefor, that:

> [i]t is clear that Neeson fabricated a variety of reasons for Wilkie's termination that not even McCauley had thought of, and McCauley is the supervisor who allegedly originated the idea to terminate Wilkie. Further, McCauley came up with several different reasons for Wilkie's termination at the time of the investigation of the instant case that McCauley couldn't remember during his testimony.

[2] According to McCauley, Wilkie told him, "Don't give me any shit or you'll pay me, too."

Keystone Auto Parts, Inc. *and* International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW). Case 6-CA-17118

31 December 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS HUNTER AND DENNIS

On 26 July 1984 Administrative Law Judge Marion C. Ladwig issued the attached decision. The Respondent filed exceptions. The General Counsel filed an answering brief, incorporating his brief to the judge, and a motion to strike the Respondent's exceptions.[1]

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[2] and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Keystone Auto Parts, Inc., McKeesport, Pennsylvania, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

[1] The General Counsel has moved that the Board strike the Respondent's exceptions because they were not served properly and because they fail to identify the portion of the judge's decision to which the Respondent is excepting, contain no reference to any pages of the official record, and fail to cite any authority for any positions taken. Contrary to the General Counsel's assertions, the record shows that the exceptions were served properly. As for the contention that the exceptions were otherwise deficient, we find that the exceptions meet the requirements of Sec. 102.46(b) of the Board's Rules and Regulations inasmuch as they specify parts of the judge's decision to which objection is made, and they also generally dispute certain of his conclusions. Accordingly, the General Counsel's motion is denied.

[2] Contrary to the judge's finding, we find that the record is not clear as to whether employee McGraw signed a dues-checkoff card. Accordingly, any moneys owed to the Union for loss of dues caused by the Respondent's failure to apply the collective-bargaining agreement to McGraw must run from the date of the Union's first demand to the Respondent that the union-security clause be applied to McGraw.

DECISION

STATEMENT OF THE CASE

MARION C. LADWIG, Administrative Law Judge. This case was tried at Pittsburgh, Pennsylvania, June 5, 1984.[1] The charge was filed by the Union February 17 and the complaint was issued March 30.

After agreeing to include the classification "computer operator" in the collective-bargaining agreement covering the office employees, the Company hired a computer operator at a substandard rate, without benefits, and later claimed that he was a part of management and not a member of the bargaining unit. The primary issue is whether the Company, the Respondent, unlawfully refused to bargain by unilaterally withdrawing recognition from the Union as the representative of the computer operator classification, violating Section 8(a)(5) and (1) of the National Labor Relations Act.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the General Counsel's brief, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Company, a Pennsylvania corporation, retails and wholesales auto parts at its store in McKeesport, Pennsylvania, where it annually receives goods valued over $50,000 directly from outside the State and derives over $500,000 in gross revenues. The Company admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *Hiring of Computer Operator*

In December 1982 the Company purchased a new computer, expecting it to be in operation in 3 or 4 months. About a year and a half later, there remained several months before the computer could be expected to be in full operation.

One problem was that the computer was purchased with standard software that was not appropriate for keeping inventory in the auto parts business, and the Company decided not to go to the expense of having the computer reprogrammed to fill its particular needs. The other problem was that its employees were not properly trained to work with the software.

The Company assigned the work of entering the inventory control data into the computer to computer operator Ethyl Germack, to office employees Francis Adams and Marsha Haberjak, and to a member of the store employees' bargaining unit, inventory clerk Bonnie Stern. At the time, only Stern was represented by the Union. Germack and the other office employees were excluded from the bargaining unit.

On July 18 a consent election was held in a unit of "All office clerical employees, including accounts receivable clerks, accounts payable clerks and computer operators," and the Union was certified July 27. Meanwhile, the Company was dissatisfied with the progress of the work on the computer. It laid off operator Germack before the election, but agreed with the Union to retain the classification of computer operator in the bargaining unit.

Instead of recalling and training computer operator Germack or hiring a fully trained computer operator, the Company arranged for part-time employees of CDA, the computer company, to come in and load the computer

[1] All dates are from July 1983 until June 1984 unless otherwise indicated.

with the inventory data. When the Union protested that this was bargaining unit work, the Company laid off the part-time CDA employees and assigned Francis Adams, the accounts receivable clerk, to work as the computer operator in the afternoons. (She had helped select the computer and was the most knowledgeable office employee in its operation.) Adams was being paid $7 an hour, although the wage rate of computer operator Germack (as well as the accounts payable clerk) had been $4.90 an hour.

In the collective bargaining that followed, the Company and Union specifically included the computer operator classification in the contractual bargaining unit, along with the accounts receivable and accounts payable clerks. In an addendum to the store employees' existing agreement, the parties agreed that each of the office employees would receive a 20-cent increase, raising Adams' wage rate to $7.20 an hour and the accounts payable clerk to $5.10 an hour.

Adams continued to work in the afternoons (at her $7.20 accounts receivable clerk rate) as a part-time computer operator until January 3, when the Company hired computer operator Robert McGraw to work part time as "part of management" at $4.50 an hour, without contractual benefits. McGraw was a student at a computer school. He had had experience with computer inventory work in the auto parts industry, but he was not trained to work with the Company's computer software. Adams assisted him in learning to load the inventory data into the computer, performed computer functions that he was not trained to do, and continued to do part of the inventory work. The Company permitted McGraw to set his own working hours, and between January 3 and June 5 (the date of trial), he averaged working 30 to 33 hours a week (as compared to the 35 hours that full-time employee Adams was working). McGraw was not paid time and a half for Saturday work, as required by the collective-bargaining agreement.

In late January McGraw signed a dues-checkoff card (Tr. 13) for his union dues to be checked off under the contractual union-shop provision. The Company refused to check off his dues, informing the Union that McGraw was a salaried, part-time employee, who "was going to be part of management" (Tr. 13).

B. *Contentions and Concluding Findings*

The General Counsel contends that the Company violated Section 8(a)(1) and (5) by unilaterally withdrawing recognition from the Union as the collective-bargaining representative of any employee classified as a computer operator.

The Company's principal defense is that McGraw is not a computer operator, but a "computer programmer." The undisputed testimony is to the contrary. Accounts receivable clerk Adams credibly testified that neither she nor McGraw does any computer programming and that there is no difference in the type work McGraw and computer operator Germack did (Tr. 87–89). McGraw credibly testified that he was merely doing data entry and inventory control work, not the work of a computer programmer (Tr. 116). I therefore reject this defense.

The Company contends that McGraw is not in the bargaining unit because he is a part-time employee, setting his own hours, but there is no basis in either the certification or the collective-bargaining agreement for excluding part-time employees. The Company contends that McGraw is only a temporary employee, despite his long tenure and the contractual provision limiting a temporary assignment to 2 weeks. Evidently because McGraw clearly has no supervisory or managerial authority, the Company no longer appears to contend that this underpaid employee is "part of management."

I find that computer operator McGraw is clearly a member of the bargaining unit and that the Company unlawfully refused to bargain by unilaterally withdrawing recognition from the Union as the representative of the computer operator classification, violating Section 8(a)(5) and (1) of the Act. *El Centro Health Center*, 266 NLRB 1 (1983).

CONCLUSIONS OF LAW

By unilaterally withdrawing recognition from the Union as the bargaining representative of the computer operator classification, the Company engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find it necessary to order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having unlawfully refused to include the newly hired computer operator in the contractual bargaining unit, it must make the employee whole for any loss of wages and other benefits, and the Union whole for any loss of dues resulting from its failure to honor the employee's dues-checkoff authorization, plus interest as computed in *Florida Steel Corp.*, 231 NLRB 651 (1977). In the absence of a specific wage rate negotiated for the computer operator, I find it appropriate to base the employee's backpay on the former rate of $4.90 an hour, plus the 20-cent increase negotiated for other office employees.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[2]

ORDER

The Respondent, Keystone Auto Parts, Inc., McKeesport, Pennyslvania, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Unilaterally refusing to recognize International Union, United Automobile, Aerospace and Agricultural

[2] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

Implement Workers of America (UAW) as the exclusive bargaining representative of the computer operator classification.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make computer operator Robert McGraw whole for any loss of wages or other benefits, and the Union whole for any loss of dues, suffered as a result of its failure to comply with its collective-bargaining agreement with the Union, in the manner set forth in the remedy section of the decision.

(b) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Post at its main store in McKeesport, Pennsylvania, copies of the attached notice marked "Appendix."[3] Copies of the notice, on forms provided by the Regional Director for Region 6, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[3] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to recognize International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) as the exclusive representative of the computer operator classification.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL make computer operator Robert McGraw whole for any loss of wages or other benefits, and the Union whole for any loss of dues, suffered as a result of our failure to include him in the bargaining unit, plus interest.

KEYSTONE AUTO PARTS, INC.

Laszlo and Paulette Fono d/b/a Paprikas Fono *and* Hotel and Restaurant Employees and Bartenders Union, Local 2, AFL–CIO, Petitioner. Case 20–RC–15534

31 December 1984

DECISION, ORDER, AND DIRECTION OF SECOND ELECTION

BY CHAIRMAN DOTSON AND MEMBERS HUNTER AND DENNIS

Pursuant to a Stipulation for Certification Upon Consent Election executed by the parties, and approved by the Regional Director for Region 20 of the National Labor Relations Board on 13 August 1982, an election by secret ballot was conducted on 30 September 1982 among the employees in the stipulated unit. On conclusion of the balloting, the parties were furnished with a tally of ballots which shows that, of approximately 67 eligible voters, 66 cast ballots, of which 29 were for, and 15 against, the Petitioner; there were 21 challenged ballots, a number sufficient to affect the election results, and 1 ballot was declared void. Thereafter, the Employer and the Petitioner each filed timely objections to conduct affecting the results of the election. The Employer then withdrew three of the objections it had filed on 22 October 1982. Subsequently, on 1 December 1982, the Petitioner withdrew all its objections to the election.

In accordance with the Board's Rules and Regulations, the Regional Director for Region 20 conducted an investigation and, on 10 December 1982, issued and duly served on the parties his Report on Objections and Challenged Ballots. In his report, the Regional Director directed that a hearing be held to resolve all issues raised by the Employer's remaining objections and the determinative challenged ballots.

On 11, 12, 17, 20. 21, and 24 through 27 January 1983 a hearing was held to determine the merits of the Employer's objections and the eligibility of the challenged voters. During the course of the hearing, on 17 January 1983, the Regional Director issued his Supplemental Report on Objections in which he found that the Employer's supplemental objections filed that day also raised issues which could best be resolved by a hearing, and he directed that they be heard at the hearing then in progress. Thereafter, on 5 April 1983, the hearing officer issued his Report on Objections and Challenged Ballots in which he recommended that the Employer's objections, as well as the challenges to the ballots of employees Thomas Corning, T. L. Du, Juanita Lee, Manual Y. Lee, Marguerita S. Lee, Rosario Lee, R. Huang, Y. Huang, Z. Huang, Qui Cong Luu, Y. Tam, Y. Yee, M. Bogert, H. K. Troung, J. Mendoza, M. Trieu, and L. H. Szeto, be overruled, and that the challenges to the ballots of employees David Johns,[1] Aleta Valdez, Debra Lee, and Shu Wai Ma be sustained. Thereafter, the Employer and the Petitioner filed timely exceptions to the hearing officer's report and supporting briefs, and both parties submitted briefs in response to the other party's exceptions.

On the entire record in this case, the Board finds:

1. The Employer is engaged in commerce within the meaning of the National Labor Relations Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.

2. The Petitioner is a labor organization claiming to represent certain employees of the Employer.

3. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

4. The parties have stipulated, and we find, that the following employees constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time employees employed by the Employer at its restaurant at 900 North Point, San Francisco, California; excluding office clerical employees, guards and supervisors as defined by the Act.

5. The Board has considered the hearing officer's report, the exceptions and briefs, and the entire record in this case, and adopts the hearing officer's findings and recommendations only to the extent consistent herewith.

The Employer in essence contends in its Objection 49 that the Regional Office's handling of determinative challenged ballots following the election was improper under Section 11344 of the Board's Casehandling Manual. Although he agreed with the Employer that the Regional Office had not fully complied with the procedures set out there, the hearing officer nevertheless recommended that this objection be overruled. The hearing officer found, quoting from *Polymers, Inc.*, 174 NLRB 282 (1969), that the applicable standard for considering the Employer's objection "is whether the manner in which the election was conducted raises a reasonable doubt as to the fairness and validity of the election." Based in substantial part on the lack of evidence in this case that the Region tampered with any of the challenged ballot enve-

[1] The parties have stipulated that Johns is a supervisor as defined by the Act.

lopes, the hearing officer concluded that the Employer had not demonstrated a reasonable possibility of irregularity within the meaning of *Polymers*, supra. We find merit in the Employer's exceptions to these findings for the reasons set forth below, and we shall sustain its Objection 49.

The record evidence here discloses that the election was over at 7 p.m. According to the Board agent in charge of the election, after the 21 challenged ballots proved determinative of the election results, he placed these envelopes in the case file which he took to the Regional Office. On arriving there, the Board agent left the case file in his office, which he locked, and went home. The next day, he put all the challenged ballots in a large manila envelope, attached a cover sheet listing the names of the challenged voters, sealed that envelope with tape, and wrote a signature across the tape. The Board agent then placed the large envelope in the Regional Office's election safe which was located in his office.[2]

The Employer subsequently alleged, inter alia, in its objections that the Board agent had interfered with the election by failing to ensure that the challenged ballot envelopes were properly sealed before he put them in the ballot box. The Regional Director, as noted, directed a hearing on all issues raised by the Employer's objections as well as the challenged ballots. Thereafter, while meeting about 5 days before the hearing began, the regional attorney and counsel for the Region in this matter decided to determine whether any of the challenged ballot envelopes were crumpled, written on, or improperly sealed as alleged in affidavits the Employer had submitted to support its objections. Thereafter, counsel for the Region, with the permission of the Assistant Regional Director, asked the Board agent who had conducted the election to give him the sealed envelope containing the challenged ballots. The Board agent then removed the large envelope from the safe and handed it to counsel for the Region, who opened the envelope and inspected, but did not open, the challenged ballot envelopes that were contained inside. After counsel for the Region had returned these items to his office, the Board agent put the challenged ballots in another large envelope that he sealed and placed in the election safe.

Subsequently, during the course of the hearing, the parties discovered that the Regional Office had opened the large envelope that contained the challenged ballots. The Employer immediately filed supplemental objections alleging that this conduct interfered with the election process.

[2] There is no evidence, however, that the Board agent stored the challenged ballots in this safe the previous evening.

Section 11344 of the Board's Casehandling Manual reads, in pertinent part, as follows:

> *Challenged Ballots and Impounded Ballots*: The following procedures with respect to the storage of uncounted determinative challenged ballots and uncounted impounded ballots must be observed by all Regions, Subregions, and Resident Offices.
>
> *Determinative Challenged Ballots*: The envelopes containing determinative challenged ballots will be placed, in the presence of the parties' representatives, in a large envelope or envelopes (Form NLRB–5126). After sealing the large envelope(s), the Board agent and the parties' representatives should sign their names across the flap and the flap should be secured with transparent tape in such a manner as to insure against accidental opening. The case name and number, the election date, a description of the contents of the envelope, the total number of large envelopes when more than one is used, and the name of the Board agent who sealed the envelope must be included on the face of Form NLRB–5126.
>
> The envelope(s) must be stored in the office safe.
>
> A photocopy of the face of the envelope(s) and a memorandum stating where the ballots have been stored will be placed in the *R* case file.
>
> The Regional Director, Officer-in-Charge, or Resident Officer is the custodian of the safe. The Assistant to the Regional Director, Regional Attorney, Deputy Regional Attorney, or Deputy Officer-in-Charge may be designated as agent for this purpose but the ultimate responsibility remains with the Regional Director, Officer-in-Charge, or Resident Officer.
>
> A log should be maintained by the Regional Director, Officer-in-Charge, or the duly designated agent concerning the challenged ballots which are stored in the safe. If a designated agent is appointed, the Regional Director should set forth the name of the designated agent in this log and this designation should be signed by the Regional Director.
>
> When the large envelope(s) containing ballots is removed from the safe, the Regional Director, Officer-in-Charge, Resident Officer, or designated agent will make an entry in the log showing the removal and this removal entry will be signed by one of the aforementioned persons. The log should indicate the reason for

> the removal, the date of the removal, the Board agent to whom the envelope is released, and the nature of the contents authorized to be removed; e.g., all determinative challenged ballots or the identity, as shown on the large envelope, of the challenged ballots which are authorized to be removed. In addition, when some, but not all, of the challenged ballots are removed from the large envelope for the purpose of counting, such removal shall be done at the count in the presence of the parties' representatives and the Board agent shall put a memorandum in the case file recording the number of ballots removed, their identity, their disposition, and the number of ballots remaining in the large envelope. A copy of the memorandum is to be placed in the large envelope which should again be secured in the manner described above by the Board agent and the parties' representatives at the count and placed in the safe.

There is no doubt here that the Board agent who conducted the election deviated from the instructions promulgated by the General Counsel for the proper conduct of elections in his handling of the determinative challenged ballots at the election site. On conclusion of the election, according to his testimony, the Board agent did not, as directed by the Casehandling Manual, immediately place the challenged ballots in a large envelope sealed with tape over the signatures of the parties' representatives. Rather, he put the challenged ballots in a large envelope the following day when the parties could not verify that he had followed the proper procedures. Even more serious, in our view, was the Regional Office's subsequent conduct in opening the large envelope to inspect the condition of the challenged ballot envelopes. While the Casehandling Manual is not clear on this point, we conclude that the Regional Office should not have undertaken this examination in the absence of an opportunity by all parties' representatives to be present. Examining these ballots is particularly troublesome since here the Regional Office—long after a hearing had been directed on the Employer's objections—decided to determine on its own whether the Board agent had engaged in objectionable conduct.

The Board, through its entire history, consistently has gone to great lengths to assure that its role in the conduct of elections is not subject to question.[3] Board election procedures are designed to ensure both parties an opportunity to monitor the conduct of the election, ballot count, and determinative challenge procedure. When such opportunity to monitor is denied as it was here, where the normal procedures for handling determinative challenges were not followed and the procedures followed did not permit the parties to assure themselves that the challenge envelopes were secure, we consider the manner in which the election was conducted to raise a "reasonable doubt as to the fairness and validity of the election" under the standard set forth in *Polymers, Inc.*, supra.[4] We are not questioning the integrity or neutrality of the Regional Office personnel involved here. Rather, the appearance of irregularity created by the procedures used and the impact of that appearance on the election's validity lead us to conclude that this election must be set aside.[5]

We therefore are satisfied that there are sufficient grounds to warrant setting aside this election. Our dissenting colleague, however, like the hearing officer, apparently would require actual evidence that the challenged ballots were tampered with or mishandled before she would reach a similar result. The dissent's approach to this issue, in our view, would detract significantly from the election standards that the Board has promulgated. Our colleague fails to recognize that, if this Agency is to maintain the public's confidence in its election processes, it is imperative that the Board act dutifully to set aside elections whenever there is any appearance of irregularity in the handling of ballots.

[3] See *Glacier Packing Co.*, 210 NLRB 571, 573 (1974); *Tidelands Marine Services*, 116 NLRB 1222, 1223 (1956).

[4] Contrary to the hearing officer and our dissenting colleague, we find that the court's decision in *Skyline Corp. v. NLRB*, 613 F.2d 1328 (5th Cir. 1980), is inapposite here. The employer there contended that the election should be set aside because the Board did not follow certain procedures, then in effect, for the proper handling of challenged ballots in that the envelopes containing the challenged ballots were not sealed with tape, there was no label with the name of the person who sealed the envelope, and no memo was placed in the file stating where the challenged ballots were stored. Put simply, we find that the conduct complained of in this case was more serious than that in *Skyline Corp.* Critically, on the record evidence here, we cannot say that the determinative challenged ballots were adequately "secured, safeguarded" as the Board concluded in *Skyline*.

We stress that we are not setting aside the election simply because the Casehandling Manual was not followed, i.e., not every failure to follow the Manual will warrant setting aside the election. Rather, reviewing all the facts in this case, we find the particular conduct involved sufficiently serious to set aside the election.

[5] We reiterate that we do not question the Region's impartiality. But we are concerned with other aspects of this case. Thus, we note that, before the Board agent testified that he did not put the challenged ballots into a sealed envelope at the election site, the parties stipulated that when the election was over the Board agent had handled the ballots in the manner prescribed by the Casehandling Manual. This unexplained discrepancy on a critical matter creates uncertainty regarding the whole proceeding.

We further note that it appears it was the Employer's attorney who raised the question of whether the Regional Office had opened the large sealed envelope containing challenged ballots. It does not appear from the record that, absent the Employer's concerns, the Region would have informed the parties of its action. In all these circumstances, a second election is the better course.

Here, in finding no merit to the Employer's objection, the dissent emphasizes the lack of evidence that any party had unsupervised access to the ballots.[6] While it may be true that this factor "typically" is present in cases in which the Board has set aside an election based on the appearance of impropriety in the handling of ballots, this is not the only situation in which we have sustained such objections. We note that after a mail ballot election in *New York Telephone Co.*, 109 NLRB 788 (1954), the parties met at the Regional Office to determine the results. It became apparent during the count that a serious discrepancy existed between the number of returned ballots (slightly under 4500) and the then tallied votes (slightly over 3700). Thereafter, a search by Board personnel of the counting room, which apparently took place on the next working day, uncovered a box containing exactly the number of missing ballots. Although the counting room had been locked in the interim and it did not appear that there had been any tampering with the ballots, the Board directed a new election in order to maintain its strict election standards. The Board concluded that the "irregularity" occurring in that case, which involved a sufficient number of ballots to affect the election results, raised a reasonable doubt as to the validity of the election processes. We find that the same is true in this case.

We also conclude that our colleague's reliance on *N. Sumergrade & Sons*, 123 NLRB 1951 (1959), as support for her position here is misplaced. The conduct in *Sumergrade* was not "essentially the same" as here, contrary to our colleague's claims. In that case, the Board agent had placed numerous challenged ballots in a cardboard carton that he then sealed with tape and had the parties initial. During its investigation of these challenged ballots, the Regional Office, without notifying the parties, opened the sealed carton to compare the names on the envelopes with the employer's payroll list and to put them in alphabetical order. The Board there rejected a claim that the unilateral opening of the carton was objectionable conduct. Differentiating that case, we note first that at least there the box was sealed in the parties' presence and initialed by them. That was not done here, according to the Board agent's own testimony. Next, when *Sumergrade* was decided, there was no provision in the Casehandling Manual *directing* Board agents to place determinative challenged ballots in a sealed envelope or box. In fact, the Board emphasized in *Sumergrade* that these measures had been performed "gratuitously." Also, it is clear that the opening of the cardboard box was done there solely for administrative purposes. In this case, however, the Regional Office took such action to investigate the condition of the individual envelopes based on an objection involving alleged Regional mishandling of them that had already been set for hearing. In these circumstances, there was no warrant for opening the sealed envelope containing the challenged ballots. Lastly, we note that the decision in *Sumergrade* was rendered over the strenuous objection of two Board Members.

Accordingly, contrary to the hearing officer's recommendation, we shall sustain the Employer's Objection 49, set aside the election held on 30 September 1982, and direct a second election.[7]

ORDER

It is ordered that the election previously conducted herein on 30 September 1982 is set aside.

[Direction of Second Election omitted from publication.]

MEMBER DENNIS, dissenting.

I cannot agree with my colleagues that the manner in which Regional Office personnel handled determinative challenged ballots in this case raises "a reasonable doubt as to the fairness and validity of the election" under the standard of *Polymers, Inc.*, 174 NLRB 282 (1969). Accordingly, I would not set aside the election on this ground.

There is no dispute that the Board agent who conducted the election failed to secure the challenged ballot envelopes, which already had been individually sealed, in accordance with Section 11344 of the NLRB Casehandling Manual. It is also undisputed that counsel for the Region, with the Regional Director's permission, inspected the challenged ballot envelopes for irregularities without affording the parties' representatives the opportunity to be present. Although the Casehandling Manual's guidelines for the handling of determinative challenged ballot envelopes do not expressly require counsel for the Region to notify the parties in these circumstances, I agree with the majority that it would have been better procedure for him to have done so. As to the challenged ballot envelopes themselves, there is no suggestion that

[6] Contrary to our colleague, we do not require evidence that only a "party to the election" have unsupervised access to the ballots before sustaining an objection alleging the mishandling of ballots. Rather, in striving to maintain the Board's strict election standards, we would set aside the election whenever there has been *any* unsupervised access to the ballots. Furthermore, we note that the dissent has chosen to ignore the fact that in the present case counsel for the Region certainly would be a party at least to the hearing on objections.

[7] Because we are directing a second election in this case, we find it unnecessary to pass on the hearing officer's other recommendations concerning the Employer's objections and the determinative challenged ballots.

anyone opened or tampered with them after they were sealed at the voting site. There is no reason to believe that the security of the determinative challenged ballot envelopes was breached or compromised in any way.

In my colleagues' opinion, the election must be set aside because of the "appearance" the Regional Office's handling of the challenged ballot envelopes created, and the effect of this "appearance" on the election's validity. While they are careful not to impugn the integrity or neutrality of the Regional Office personnel involved, they find that by departing from "normal" procedures the Region made it impossible for the parties to monitor the determinative challenged ballot procedure and to assure themselves that the challenged ballot envelopes were secure, thereby raising reasonable grounds for concern about the Board's role in the election.

I am mindful that the absence of evidence that the challenged ballot envelopes were opened or tampered with is not in itself controlling because the conduct of Regional Office personnel is at issue. The Board has held that any act in the conduct of an election "which tends to destory confidence in the Board's election process, or which could reasonably be interpreted as impugning the election standards we seek to maintain, is a sufficient basis for setting aside that election.[1] Contrary to my colleagues, however, I do not believe that the manner in which Regional Office personnel handled the challenged ballot envelopes reasonably can be found either to have raised questions concerning the Board's neutrality or to have undermined the parties' confidence in the regularity of Board-conducted elections. Besides the Board agent's and counsel for the Region's departure from certain optimal procedures in their handling of the challenged ballot envelopes, there is no independent evidence that either of these individuals, or any other individual in the Regional Office, handled the envelopes in a manner even suggesting the appearance of an irregularity sufficient to affect the integrity of the Board's election process.

The "appearance" of impropriety in the handling of ballots has typically been found when a party to the election appeared to have the opportunity of unsupervised access to the ballots. See, e.g., *Tidelands Marine Services*, 116 NLRB 1222 (1956). In the instant case, however, from the time the Board agent placed the challenged ballot envelopes in the case file, there is no evidence whatsoever that the parties had access to them. Since the election, the challenged ballot envelopes have remained inside, and in the custody of, the Regional Office.

In *N. Sumergrade & Sons*, 123 NLRB 1951 (1959), the Board agents sealed the challenged ballot envelopes in a cardboard carton and had the parties initial the carton. The carton remained in the Regional Director's custody. While investigating the challenged ballots, Board agents, without notifying the parties, opened the sealed carton to check the names on the envelopes. The parties were present at the count, however, and at that time witnessed the opening of the sealed challenged ballot envelopes.

The union filed an objection raising issues similar to those which the objection raises in this case. The union contended that, by opening the sealed carton in private, the Board agents cast doubt on the integrity of the Board's election processes. The Board disagreed. It reviewed the agents' conduct, albeit without the benefit of Section 11344 of the Casehandling Manual, not yet in effect, and found that it would have been better practice not to have opened the carton without notifying the parties. The Board concluded, however, that the conduct, which essentially was the same as that of counsel for the Region in this case, did not warrant invalidating the election. The Board stated:

> The Regional Office at all times had custody of the sealed envelopes and in the absence of any showing to the contrary, we find that the sealed envelopes opened in the presence of the observers had not been previously opened or tampered with. We therefore overruled the Intervenor's objections.[2]

In *Polymers, Inc.*, supra, the Board acknowledged that for various reasons the election procedures the General Counsel or a Regional Director prescribes may not always be followed to the letter. Thus, each case involving a challenge to the conduct of an election requires the Board to make a practical judgment after reviewing all the facts to determine whether the essential election standards were met.

Here, Regional Office personnel failed to follow the optimal procedures for handling determinative challenged ballots. There is no evidence, however,

[1] *Athbro Engineering Corp.*, 166 NLRB 966 (1967), vacated sub nom. *Electrical Workers IUE v. NLRB*, 67 LRRM 2361, 57 LC ¶ 12,440 (D.C. Cir. 1968), acquiesced in 171 NLRB 21 (1968), enfd. 423 F.2d 573 (1st Cir. 1970).

[2] 123 NLRB at 1952. *Skyline Corp. v. NLRB*, 613 F.2d 1328 (5th Cir. 1980), on which the hearing officer relied, is very similar factually to this case. In *Skyline Corp.*, although the Region failed to adhere rigidly to the Casehandling Manual's instructions, the evidence demonstrated that the ballots were secured, safeguarded, and untampered with. The same is true in this case.

New York Telephone Co., 109 NLRB 788 (1954), cited by the majority, involved far more suspicious circumstances. The Regional Office's inability to locate 729 mailed ballots during the count necessarily cast doubt as to who had access to them while they were missing. In this case, as in *Skyline* and *Sumergrade*, the Regional Office could account for the challenged ballots at all times.

that the challenged ballot envelopes were opened or tampered with. The challenged ballot envelopes never left the custody of Regional Office personnel, and neither of the parties had access to the envelopes after the election. Further, there is no reason even to suspect that the envelopes were mishandled. On these facts, there is no basis for questioning the Board's neutrality in the election.[3] From a practical standpoint, therefore, the procedures in question did not raise a reasonable doubt as to the election's fairness and validity.

A majority of the employees voted for the Petitioner, and it would be a serious disservice to deprive them of their chosen representative because of the Board agent's insignificant deviation from the Casehandling Manual's procedures. In *Midland Life Insurance Co.*, 263 NLRB 127 (1982), we relaxed our standards for setting aside elections based on campaign misrepresentations. An important reason for the change was to "insure the certainty and finality of election results, and minimize unwarranted and dilatory claims attacking those results."[4] I continue to value these policy considerations. Accordingly, I would overrule the Employer's objections.

[3] The majority refers in fn. 5 to the parties' stipulation that, when the election was over, the Board agent handled the ballots in the manner prescribed by the Casehandling Manual. The Board agent later testified, however, that he had not complied with the Casehandling Manual's directive to place challenged ballots in a sealed envelope at the election site. Without further explanation, the majority asserts that "[t]his unexplained discrepancy on a critical matter creates uncertainty regarding the whole proceeding."

In my view, the majority seriously overstates the mattter's significance. The parties' erroneous stipulation was nothing more than an innocuous mistake. It does not support the majority's ill-advised decison to set aside the election.

[4] 263 NLRB at 131.

Physicians Memorial Hospital *and* Physicians Memorial Hospital Staff Nurses' Association *and* Elaine Johns. Case 5–CA–13846(E) and 5–CA–13899(E)

8 January 1985

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS HUNTER AND DENNIS

On 16 July 1984 Administrative Law Judge Richard A. Scully issued the attached supplemental decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

The Board has considered the supplemental decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent's application for an award of attorneys fees and expenses is dismissed.

[1] In recommending that the Respondent's application for an award under the Equal Access to Justice Act, 5 U.S.C. § 504 (1982), be dismissed, the judge found it unnecessary to examine the adequacy of the General Counsel's investigation. While we emphasize that the General Counsel's investigation normally should include interviews with all important available witnesses, we agree with the judge's findings in the particular circumstances of this case. Thus, even assuming as true the Respondent's assertion that the General Counsel failed to interview Supervisors Blair and Stallman during the investigation, such circumstances would not affect the result here. In this regard, we conclude that, whether or not the General Counsel obtained during the investigation the testimony the supervisors later gave at the hearing, he would have been substantially justified in issuing the complaint.

SUPPLEMENTAL DECISION

[Equal Access To Justice Act]

RICHARD A. SCULLY, Administrative Law Judge. Counsel for the Respondent Physicians Memorial Hospital filed an application for attorneys fees and expenses pursuant to the Equal Access to Justice Act (EAJA)[1] following the entry of an Order by the National Labor Relations Board on May 24, 1983, adopting the findings, conclusions, and recommended Order of the administrative law judge in the underlying unfair labor practice proceeding. The consolidated complaint alleged that the Respondent had violated Section 8(a)(1) and (3) of the National Labor Relations Act (the Act), by requiring certain day-shift nurses to work night shifts on certain dates (in retaliation for union activities on the part of two of these nurses) and by the alleged resulting constructive discharge of one of the nurses who refused to work these night shifts for health reasons. It was also alleged that the Respondent violated Section 8(a)(5) of the Act by implementing a wage increase to newly employed nurses without bargaining with the Physicians Memorial Hospital Staff Nurses' Association (the Union), the exclusive bargaining representative of the nurses employed by it. The decision of the administrative law judge found that the Respondent had violated Section 8(a)(5) of the Act, as alleged, but recommended dismissal of all allegations concerning violations of Section 8(a)(3). No exceptions to the decision or recommended Order were filed by any party.

Having prevailed on significant, discrete portions of an adversary adjudication, the Respondent may be entitled to an award of compensation for certain fees and expenses pursuant to EAJA unless the General Counsel establishes that the Government's position in the underlying litigation was substantially justified, "by showing that its position in the proceeding was reasonable in law and fact," or unless "special circumstances make the award sought unjust."[2]

The General Counsel has filed a motion to dismiss the Respondent's application on the grounds that the Government's position in the litigation was substantially justified and that the application is otherwise defective. In its opposition to the General Counsel's motion to dismiss, the Respondent argues that the motion should be granted only if it could prove no set of facts which would entitle it to relief and that the motion should be denied and an answer to the application filed. The General Counsel's argument in support of its contention that its position in the underlying litigation was substantially justified is fully stated in the motion to dismiss and I find nothing would be served by requiring the filing of an answer restating that argument. The Board's Rules and Regulations contemplate that the determination on an application for an award of expenses under EAJA will ordinarily be made on the basis of the record in the underlying proceeding.[3] I find that no further proceedings are necessary in order to make a determination in this case, notwithstanding the Respondent's allegations that the Board's investigation which led to the filing of the consolidated complaint was deficient. I find that the record in the underlying case is sufficient to make the determination as to whether there was substantial justification for the position taken therein by the General Counsel.[4]

[1] 5 U.S.C. § 504 (1982).

[2] 29 CFR § 102.144.

[3] 29 CFR § 102.144(a).

[4] In its application the Respondent alleges that the Board's investigation in this matter was deficient because of the failure to interview Supervisors Virginia Blair and Lois Stallman concerning the decision to require the day-shift nurses to work nights. The General Counsel responds that "the Region interviewed all witnesses presented by Respondent during the course of the investigation, and that it is Respondent's obligation to present all relevant evidence in response to the charge." At the trial, the General Counsel called both Blair and Stallman as witnesses and questioned them extensively about the decision to rotate the day-shift nurses to nights. Under the circumstances, the trial record is complete and provides the basis for determining whether there was substantial justification for the General Counsel's position. An inquiry into the mechan-

Continued

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The determination of whether or not the General Counsel's position is substantially justified is to be made on a case-by-case basis.[5] The fact that the General Counsel did not prevail in this litigation does not raise a presumption that its position was not substantially justified, nor must it be established that the decision to litigate was based on a substantial probability of prevailing.[6] Likewise, the fact that the General Counsel failed to establish a prima facie case is not determinative for purposes of an award pursuant to EAJA.[7]

After examining the record of the underlying case in its entirety, I conclude that the position of the General Counsel was reasonable in law and in fact. The record clearly established that Hospital Administrator William Meyer harbored animus toward the Union and towards its President Teresa Boone because of her union activities and that Meyer had disparaged and sought to undermine the Union's leadership through comments made at employee meetings and published in a series of memos, entitled "Arbitration Update," directed to the hospital staff. The declaration of the "staffing emergency" on October 14, 1981, which resulted in Mrs. Boone and two other day-shift nurses being required to work nights, came within five days of a particularly acrimonious confrontation concerning arbitration of unresolved collective-bargaining issues in which Meyer accused Boone of "lying," being "lazy," and delaying the arbitration process. The timing of an adverse action can be persuasive evidence of the employer's motivation.[8] Invocation of extraordinary and rarely used "staffing emergency" procedure, which caused Boone, a permanent day-shift nurse, to have to work some nights, coming as it did on the heels of the Meyer-Boone confrontation on October 9, could reasonably support the inference that the rotation of Boone and the other day-shift nurses was motivated by antiunion considerations. This was particularly true where one of the "staffing emergency" prerequisites, no nurses on vacation during the period in question, had not been met. My conclusion that the General Counsel had not made a prima facie case was based, in part, on the credited testimony of Supervisors Blair and Stallman which convinced me that Meyer was not involved in the decision to declare the "staffing emergency," that it was Blair's decision alone, that antiunion considerations were not involved, and that it was not a pretext. Absent that credited testimony, I would have necessarily found that the General Counsel had met the burden prescribed in *Wright Line*,[9] for establishing a prima facie case.[10]

I do not find the General Counsel's refusal to accept the Respondent's self-serving denials of unlawful motivation in declaring the "staffing emergency" to be unreasonable in law or in fact. Few principles are more established than, as stated in *Shattuck Denn Mining Corp. v. NLRB*,[11] that:

> Actual motive, a state of mind, being the question, it is seldom that direct evidence will be available that is not also self-serving. In such cases, the self-serving declaration is not conclusive; the trier of fact may infer motive from the total circumstances proved. Otherwise no person accused of unlawful motive who took the stand and testified to a lawful motive could be brought to book.

The fact that I found the testimony of Blair and Stallman to be convincing and, based on their demeanor and the totality of the evidence, accepted it as establishing that the Respondent's motivation was not unlawful does not mean that the General Counsel must agree or that not to have done so was unreasonable. Nor was it unreasonable to have inferred that union animus, as demonstrated by Meyer, was involved. Meyer's duties at the hospital were such that he could have had a role in the decision to declare the "staffing emergency," as evidenced by Blair's testimony that she informed Meyer that she was considering such action and he told her that she should make the decision. Also, the fact that Blair was present at the employee meetings at which Meyer disparaged the union leadership and at his confrontation with Boone on October 9 could reasonably support the inference that Blair was acting consistent with and in furtherance of her supervisor's antiunion posture and at his explicit or implicit direction. I find that the General Counsel's position that the rotation of the day-shift nurses to the night shift was discriminatory and a violation of Section 8(a)(3) had a reasonable basis in law and fact.

Insofar as this litigation also involved the allegation that Nurse Elaine Johns was constructively discharged in violation of Section 8(a)(3), I also find that the General Counsel's position was substantially justified. Johns resigned rather than work the night shifts she was assigned when the "staffing emergency" was declared because she felt it would be injurious to her health to work nights. Johns had served as an officer of the Union and her position was listed on notices displayed on a bulletin board at the hospital. Inasmuch as Johns was rotated to the night shift in the course of the same "staffing emergency" discussed above, the justification for the General Counsel's position with respect to Johns was the same whether she be considered an innocent victim of the alleged discriminatory action directed against Union President Boone or as a target of discrimination herself. Johns' case might even be considered stronger since the Respondent failed to offer a compelling reason why it rejected Johns' request to be excused from night-shift duty which she claimed would be harmful to her health. As I noted in

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ics of the investigation in this matter is neither warranted nor necessary as there is no indication that the investigation could or should have developed any more information than is available in the trial record.

[5] *Exerhaul, Inc.*, 263 NLRB 890 (1982), reversed 710 F.2d 748 (11th Cir. 1983).

[6] S. Rep. 96–253 at 7; H.R. Rep. 96–1418 at 11; *Westerman, Inc.*, 266 NLRB 799 (1983).

[7] *Wolf Street Supermarkets*, 266 NLRB 665 (1983).

[8] *Limestone Apparel Corp.*, 255 NLRB 922, 936 (1981).

[9] 251 NLRB 1083 (1980).

[10] While I do not agree with the General Counsel's argument that in determining whether a prima facie case had been established I should not have considered the testimony of Blair and Stallman, presented as a part of the General Counsel's case-in-chief, to the extent that it supported Respondent's defense, it is a moot point.

[11] 362 F.2d 466, 470 (9th Cir. 1966).

the underlying decision, Blair took what appeared to be a rather hard-line approach in refusing Johns' request. There was a substantial amount of conflicting testimony by Johns, her physician Dr. Burke, Stallman, and Blair as to what transpired after Johns was informed of the schedule changes occasioned by the "staffing emergency." Had the testimony of Johns and Burke been credited over that of Blair and Stallman, the result in this case may well have been different. In any event, it cannot be said that the General Counsel's position in attributing the Respondent's actions in this matter to union animus was unreasonable.

Considering all of the circumstances, I find that the General Counsel's position with respect to each of the 8(a)(3) allegations was substantially justified and that the Respondent's application pursuant to EAJA should be denied.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[12]

ORDER

The Respondent's application for an award of attorneys fees and expenses is dismissed.

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[12] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

Texaco, Inc. *and* Oil, Chemical & Atomic Workers International Union, AFL–CIO. Case 14–CA–13419

8 January 1985

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS HUNTER AND DENNIS

On 8 December 1980 Administrative Law Judge Thomas R. Wilks issued the attached decision. The Respondent filed exceptions and a supporting brief.

The Board has considered the decision and the record in light of the exceptions and brief[1] and has decided to affirm the judge's rulings, findings,[2] and conclusions only to the extent consistent with this Decision and Order.

As stated in detail in his decision, the judge found that at the commencement of an economic strike on 8 January 1980[3] the Respondent withheld accident and sick benefit plan payments (A & S benefits) from 13 eligible employees based solely on the fact that the remaining work force of approximately 400 employees engaged in strike activity, and that it continued to withhold such A & S benefits for the duration of the strike. On 29 January the Union filed the instant unfair labor practice charge with Region 14 alleging that such actions were unlawful.

On 10 April the Respondent and the Union reached agreement on the issues covered by these negotiations and those created by the strike and executed a memorandum of agreement and a strike settlement agreement. According to the terms of the memorandum of agreement, all unit employees received increases in wages and benefits, including a lump sum payment of $150 plus medical coverage payments for the months of January and March. These documents also included express provisions requiring the Union to withdraw charges pending before the Board relating to the benefit plans including A & S benefits.[4]

Thereafter, in fulfillment of its obligations under these agreements, the Union on 14 April requested the Regional Director for Region 14 to approve its withdrawal request regarding the present unfair labor practice charge. The Regional Director denied the request on 30 April and issued a complaint on 15 May. The hearing was conducted on 24 and 25 June.

The Respondent contended before the judge that the Regional Director erred in not granting the Union's withdrawal request, and that in any event it had engaged in no unlawful conduct. The judge found no merit in either of the Respondent's arguments, relying on the Board's decision in *Emerson Electric*.[5] In that case, the Board adopted the administrative law judge's conclusion that a strike settlement agreement by which the union agreed to withdraw charges pending before the Board did not divest the Board of its statutory authority to resolve the issue before it. The rationale for not deferring to the terms of that settlement was as follows:

> The Board acts in the public interest to enforce public, not private, rights. *National Licorice Company v. N.L.R.B.*, 309 U.S. 350 (1940); *Amalgamated Utility Workers v. Consolidated Edison Company of New York, Inc.*, 309 U.S. 261 (1940); *Agwilines, Inc. v. N.L.R.B.*, 87 F.2d 146 (5th Cir. 1936). "Whenever private contracts conflict with its functions, they obviously must yield or the Act would be reduced to a futility." *J. I. Case Company v. N.L.R.B.*, 321 U.S. 332 (1940).
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> Section 10(a) of the Act explicitly provides that the Board's power to prevent unfair labor practices "shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise . . . ." Accordingly, the "parties cannot by contractual agreement divest the Board's function to operate in the public interest." *Boire v. International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America [Pilot Freight Carriers, Inc.]*, 479 F.2d 778 (5th Cir. 1973). [Id. at 1149.]

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[1] The Respondent has requested oral argument. The request is denied as the record, exceptions, and brief adequately present the issues and the positions of the parties.

[2] Although no exception was taken, we note that Judge Wilks inadvertently stated in his decision that employee Joles was medically released to report for work on 14 January. The date should have been 14 April.

The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[3] All dates are 1980.

[4] The strike settlement agreement stated in part:

> It is further understood that: (1) each party will dismiss any and all litigation now pending against the other or its agents, i.e., injunctions, damage suits, etc., (including arbitrations, unfair labor practice charges, lawsuits and grievances related to any of the benefit plans); . . . and (3) that it is agreed that no new litigation growing out of or related to the strike will be filed.

The memorandum agreement stated in part:

> Lump sum payment [is] in consideration of the Union's agreement to withdraw all contractual grievances and NLRB charges and court proceedings arising out of the Company's administration of the employee benefit plans during the strike and the Union's agreement not to institute any further actions arising out of said circumstances. . . .

[5] *Emerson Electric Co.*, 246 NLRB 1143 (1979), enfd. as modified 650 F.2d 463 (3d Cir. 1981).

The Board further held that, under the facts presented, the Respondent Employer had unlawfully withheld A & S benefits from eligible employees at the commencement of a strike.

In its exceptions before the Board, the Respondent again argues that the Regional Director should have approved the Union's withdrawal request and that the withholding of A & S benefits was lawful. For the reasons set forth below, we agree with the Respondent's first contention that the Regional Director erred when he refused to grant the Union's request to withdraw its unfair labor practice charge, and that on this basis the complaint should be dismissed.[6]

We agree fully with the general principles quoted above from the judge's decision in *Emerson Electric* that the Board's primary responsibility is to enforce the public rights which underlie the National Labor Relations Act. Missing from that general statement, however, is any analysis of how a lawful and voluntary strike settlement agreement such as that at issue here may impact, adversely or favorably, on such public rights. We are convinced that the public rights expressly stated in the Act are better served by upholding the integrity of this strike settlement agreement than by disregarding it.

Section 1 of the Act lists the various ways by which commerce is obstructed as a result of strikes and less severe manifestations of industrial strife. It further recognizes that the flow of commerce is promoted by encouraging practices fundamental to the friendly adjustment of industrial disputes and by protecting the rights of employees to bargain collectively. With this background, Section 1 then states:

> It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and *to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining* . . . . [Emphasis added.]

Both the Union and the Respondent recognized their joint responsibility to engage in collective bargaining. Notwithstanding these efforts, an economic strike ensued and for over 4 months essentially all unit employees who were capable of working withheld their services. The parties subsequently negotiated a strike settlement agreement and a memorandum agreement resolving the disputed bargaining issues and other differences arising during the strike. On this basis, the Union agreed to end the strike and withdraw all charges before the Board and the employees returned to work. This settlement has been deemed satisfactory by the parties to the agreement, and no employee has indicated disagreement with its terms, by which each employee received wage and benefit increases and at least $150 in settlement of outstanding contractual claims. Notwithstanding this voluntary resumption of labor peace between the parties, the Regional Director and the General Counsel rejected the withdrawal request herein,[7] apparently contending that litigation of a public right must in this instance take precedence over the parties' desire to settle their dispute by their own voluntarily negotiated agreement. We disagree. This resistance to "the practice and procedure of collective bargaining" is directly contrary to Section 1 of the Act. Given a setting of resumed labor relations peace with negotiated benefits provided for employees, a clear and unequivocal waiver of pending unfair labor practices claims by the Union, and no other unfair labor practice charges extant, we see no sufficient reason for the Board to disregard the withdrawal request and intrude on such a cooperative environment in order to determine whether 13 of 400 unit employees were unlawfully deprived of a particular contractual benefit during the duration of an economic strike.

The withheld A & S benefits were based solely on a contractual commitment negotiated between the Union and the Respondent. However, the withholding of this benefit did not interfere with the employees' basic employment rights, and the benefit itself appears to be no more than a contractual term or condition which subsequently was negotiated away in good faith by the Union and the Respondent under the overall terms of the strike settlement agreement.[8] Under the above facts, it appears that the primary interest served by continued litigation would be the private contractual rights of these few employees, rather than public rights under the Act.

Were we to give paramount concern to these private contractual rights which no employee has sought to litigate, the resulting irony would be that the Board would interfere with the peaceful resolution of labor disputes. Such interference would be most disruptive where the strike settlement agreement is conditioned on the withdrawal of the unfair labor practice charge, and the Board's refus-

[6] Accordingly, we find it unnecessary to consider the Respondent's second defense that the withholding of A & S benefits was lawful.

[7] We are administratively advised that the Union's requests to withdraw similar charges arising in connection with the same nationwide strike were granted by other Regional Directors.

[8] In passing, we note that such a reduction in contractual benefits is not essentially different from midcontract negotiations which generally serve to freeze, increase, or reduce previously negotiated wage or benefit levels. In either case the parties, on negotiation and agreement, should be allowed to alter existing contractual terms.

al to approve the withdrawal request voids the strike settlement.[9] However, even where there is no such condition, the parties may be reluctant to settle a strike absent resolution of all issues in dispute. In order to promote the parties' desire to resolve their dispute voluntarily, we should provide every reasonable encouragement that their disputes be resolved on as comprehensive a basis as their strike settlement agreement would indicate.

Under all the circumstances, we are of the opinion that it will best effectuate the policies of the Act to honor the terms of the strike settlement agreement, by which the Union has requested the withdrawal of the unfair labor practice charge, and not involve the Board in further proceedings in this matter.

ORDER

The complaint is dismissed.

[9] See *Clear Haven Nursing Home*, 236 NLRB 853 (1978), and Members Penello's and Murphy's vigorous dissent therein.

DECISION

STATEMENT OF THE CASE

THOMAS R. WILKS, Administrative Law Judge. Pursuant to an unfair labor practice charged filed by Oil, Chemical & Atomic Workers International Union, AFL–CIO (the Union) against Texaco, Inc. (the Respondent) and a complaint issued by the Regional Director for Region 14, a hearing was held in St. Louis, Missouri, on June 24 and 25, 1980. The issue litigated was whether the Respondent violated the Act by announcing to employees its intention to discontinue accident and sick benefits then being paid to medically excused employees upon the commencement of a strike by the Union and by in fact discontinuing such benefits to employees upon the commencement of a strike by the Union.

On and shortly before September 10, 1980, the parties submitted briefs. On the entire record in this case, including my observation of the witnesses and their demeanor and in consideration of the oral argument made at the hearing and the briefs, I make the following

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT

The Respondent, an Illinois corporation with an office and place of business in Lawrenceville, Illinois (the Lawrenceville refinery), is engaged in the processing, nonretail sale and distribution of petroleum and related products. During an annual period of time representative of its operations, the Respondent sold and distributed at its Lawrenceville refinery products valued in excess of $50,000 which were shipped to points outside the State of Illinois.

It is admitted and I find that the Respondent is an employer engaged in commerce within the meaning of the Act.

II. THE LABOR ORGANIZATION

It is admitted and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICE

A. *Facts*

The Respondent and the Charging Party have maintained a bargaining relationship for many years. There are 406 employees in the bargaining unit. In November 1979, pursuant to its terms, the current collective-bargaining agreement was reopened for negotiations regarding wages, vacations, and health care benefits. Negotiations occurred on various dates in December 1979. At the negotiation meeting of January 7, 1980, the Union announced that if no agreement were reached by 4 p.m. on January 8, a strike of all unit members would be called. During the afternoon session of the January 8 negotiation meeting the Respondent distributed a printed statement to the Union's bargaining committee including the employee members thereof. That statement entitled "Employee Benefits Procedures in Case of a Strike" provided, inter alia, for the suspension of employer contributions or payments to certain employee benefit plans including payment of accident and sick benefits (A&S benefits). Only the reference to and conduct regarding A&S benefits is at issue in this proceeding. That reference stated as follows:

> *Accident and Sick (A&S) Benefit Plan*
> Upon commencement of a strike, all A&S benefits will be discontinued, except in those cases involving industrial accident or injury. A&S benefits will be continued to those employes [sic] who are disabled due to industrial injury until medically released by their doctors or until expiration of such benefits in accordance with the Plan's benefit schedule, whichever occurs first.
>
> Decision will be reserved regarding the payment of A&S benefits upon termination of the strike for employes [sic] who become disabled during the strike and whose disability continues beyond the termination of the strike.
>
> Decision will also be reserved regarding the resumption of A&S benefits which were discontinued at the beginning of the strike for those employes [sic] who are still disabled after the termination of the strike.
>
> Under no circumstances will A&S benefits by payable if they would not have been payable in the absence of a strike.

The afternoon bargaining session proved to be unfruitful and at 3 p.m. official strike notice was served by the Union, and at 4 p.m. a strike commenced and picket lines were established at the several entrances to the Law-

renceville refinery. All but two employees actively employed on January 8 ceased work and joined the strike which lasted for 4 months. Only one of those was a union member. The plant, however, continued to operate 24 hours a day with supervisory personnel. Work was available for any union member who desired to work. Only one member did so.

On January 8 there were 13 employees, members of the Union, who were absent from work on such leave and who had been receiving A&S benefits. The Respondent immediately discontinued payment of these benefits for the duration of the strike. The Respondent did so because it assumed that those employees would have withheld their services in support of the strike had they been physically able to do so. The Respondent contends that such assumption was justified in view of the Union's strike notice which in effect warned that all unit employees and members would "leave the plant at 4:00 p.m." on January 8 and because the unit employees and union members had historically given near unanimous support to past strike activity.

Having assumed that the 13 sick or disabled employees would not work even if they had been able, the Respondent therefore concluded that the absence of these employees on and after January 8 was due not only to their physical incapacity but also was due to their support of the Union. Accordingly, the Respondent decided that they did not qualify for A&S benefits inasmuch as such benefits consisted of a continuation of wages, in whole or in part depending upon length of absence and years of service, and were conditioned on an absence from service solely because of sickness or illness.

At the commencement of the January 8 strike the Respondent had not been aware of any statement or overt action by any of the 13 recipients of A&S benefits which indicated that they supported the strike. However, none of the 13 employees disavowed the strike. Furthermore, the Union did not advise the Respondent that the incapacitated employees were not on strike. Nor did it immediately demand that the A&S benefits be continued. However, on January 17, at one of the negotiation meetings, in a written statement of position, the Union objected to a cessation of all benefit plan contributions and payments including A&S benefits.

At a meeting of about 50 members conducted by the Union on January 7, the employees were advised of the procedures to be followed in picketing. They were also told that sick persons were not expected to engage in any picketing. No explicit reference was made to A&S benefits. Commencing on February 1, and continuing on each Saturday thereafter, the Union disbursed "grocery money" to any member who appeared at the Union's downtown office to receive these strike benefits. The money was tendered without any questions asked or conditions expressed. The sick and disabled employees, or their representatives, received payment of weekly grocery money from the Union.

During the course of the strike, at varying points in time, all but 2 of the 13 sick and disabled employees joined the strike and engaged in picketing. Those that joined the strike testified that they did so at the point in time when they were recovered from their illness or disability. Most of them testified that they did not report to work when able because they supported the Union. Some testified that because of their illness or disability they gave little or no thought to the strike and had made no decision nor had taken any overt action to support the strike prior to their full physical recovery, although many of them characterized themselves as loyal union members who do not cross picket lines. The only area of factual dispute in this case relates to whether some of these employees engaged in conduct which indicated their support of the strike prior to their physical recovery and ability to work. This will be discussed at length following an analysis of the basic legal issue.

Agreement was finally reached on the issues of the strike, and on April 10, 1980, a "strike settlement agreement" was executed. Simultaneously, the Respondent and the Union executed a memorandum of agreement under which, in effect, the Union agreed to withdraw all unfair labor practice charges. The Respondent, inter alia, agreed to and subsequently did pay each unit employee approximately $150 as reimbursement for certain hospitalization and dental plan premiums for the months of January and March. The strike ended April 11, 1980. By letter dated April 14, 1980, pursuant to the "strike settlement agreement" the Union requested the Regional Director to approve the withdrawal of the underlying unfair labor practice charge. The employees who were deprived of A&S benefits during the strike were not compensated for the loss of those benefits. On Arpil 30, 1980, the Regional Director denied the withdrawal request.

The Respondent contends that it acted lawfully in announcing and in actually terminating the A&S benefits inasmuch as it was not required to finance a strike against itself. It argues that the A&S benefits amounted to a wage continuation plan and it was not required to continue the payment of wages to strikers including those employees who, although incapacitated for work, were assumed to have supported the strike. Secondly, it argues that the 13 pre-January 8 A&S recipients affirmatively allied themselves with the strike after the strike commenced and should accordingly be disqualified from receipt of A&S benefits not only at the point when they joined or affirmatively supported the strike but also ab initio when the strike started. As indicated, there is a factual issue as to precisely when each of the 13 A&S recipients affirmatively joined or supported the strike.

In *Southwestern Electric Power Co.*, 216 NLRB [illegible] (1975), the majority decision of the Board held that where a strike was effective an employer could reasonably assume that union members on sick leave supported the strike. Furthermore, subsequent ratification of the strike by those persons was recognized as evidence of the reasonableness of that assumption as was the failure of employees to protest nonpayment and their testimony that they would have supported the strike had they not been disabled. Accordingly, the Board concluded that the employer was not required to subsidize a strike by continued disability payments.

The rationale of that decision was explicitly rejected by the Board in *Emerson Electric Co.*, 246 NLRB 1143

(1979), wherein the Board held that an employer may not rely on speculative grounds in concluding that medically excused employees support a strike; that such employees have a right under Section 7 of the Act to refrain from declaring their position on a strike while they are medically excused; and that an employer may no longer require its disabled employees to disavow the strike in order to receive disability benefits which would be due them had it not been for the strike of fellow employees. The cessation of such benefits to incapacitated employees because of the strike activities of other employees, the Board observed, served as a punishment of employees who had "not yet acted in support of the strike." Accordingly the inconsistent holdings of the *Southwestern Electric Power Co.* decision were overruled as the Board stated:

> Accordingly, we now hold for an employer to be justified in terminating any disability benefits to employees who are unable to work at the start of a strike it must show that it has acquired information which indicates that the employees whose benefits are to be terminated has affirmatively acted to show public support for the strike. [Id. at 1144.]

The Board also held:

> For all practical purposes, any employee, disabled or sound, who affirmatively demonstrates his support of the strike by picketing or otherwise showing public support for the strike, has enmeshed himself in the ongoing strike activity to such an extent as to terminate his right to continued disability benefits. [Id. at 1144.]

However, the Board observed that a showing of participation in the strike by medically excused workers subsequent to the inception of the strike "does not justify *post hoc* Respondent's initial termination of benefits to these employees," and "The employee's action in support of this strike, however, may not be used to deprive them of any benefits for the time away from work *prior* to their supportive action." [Id.]

The Respondent disagrees with the Board's holding in the *Emerson* case, but the Board's language is clear, and I find dispositive of the basic issues in this case. I do not agree that the facts of this case are distinguishable from the *Emerson* case as is ultimately argued by the Respondent. The facts of the *Emerson* case are similar if not identical with those found herein. In the *Emerson* case the Board concluded that the Respondent had not sufficient bases to assume that medically excused employees supported the strike from its inception. Unlike this case the Employer in the *Emerson* case terminated the benefits in the face of a protest from the Union that the beneficiaries were not participants in the strike. Furthermore, in this case no beneficiary protested the cancellation of benefits. However, like the *Emerson* case, the Respondent herein announced its decision to terminate A&S benefits prior to the onset of the strike and before it had any objective basis to conclude that the A&S beneficiaries would join or support the strike.

Respondent's reliance upon history is not justified. During a very lengthy history of a bargaining relationship only one prior strike had occurred in 1969. Although that strike was supported by all of the unit employees, it forms an insufficient premise for a conclusion that in 1980 all unit employees also would join the strike. The Union's strike notice amounted to no more than an announcement that all unit employees and members would be called upon to strike. Certainly every strike notice constitutes either an explicit or implicit warning that all unit employees will loyally support the Union. However, without a more definitive historical context, such a call for support is not evidence that unanimous support would ensue. Although a majority of employees voted for a strike, that vote occurred in the fall of 1978, there is no evidence that the vote was unanimous, or that the A&S beneficiaries had voted.

Accordingly, I conclude that on January 8 the Respondent's assumption that A&S beneficiaries would join and support the strike was no less speculative than that of the employer's assumption in the *Emerson* case.

The evidence of the subsequent action of employees in joining or supporting the strike and testimony revealing the subsisting union loyalty of many of the A&S recipients I find to be of no relevance in light of the Board's clear pronouncement that it will look to whether the beneficiaries had "affirmatively acted to show public support" and whether the Respondent "acquired information" of such affirmative acts prior to the initial termination of benefits. Furthermore, subsequent enmeshment in the strike will disqualify an employee only prospectively from the point of enmeshment. Therefore, inquiry as to the employee's state of mind at the time of the onset of the strike is irrelevant except perhaps for the purpose of evaluating the nature of his subsequent ambiguous conduct.[1]

With respect to the nature of the A&S benefits, Respondent herein argues, as was similarly argued by the Employer in the *Emerson* case, that such benefits constitute nothing more than a wage continuation solely conditioned upon medical excuse from work. Evidence was adduced as to the nonfunded, nonvested nature of the A&S benefits which were paid "out of pocket" to duplicate in whole or in part the employees' normal wages. However, as in the *Emerson* case, the A&S benefits herein and the scope of such benefits were in direct ratio to the employee's past services and tenure, and were thus earned by the employee by his past services. Physical illness or disability was a condition for receipt of the A&S benefits, but employees were not paid because they stayed home and recuperated. Rather, they were paid because of their past services. The continued payment of A&S benefits cannot be construed to be payment of services rendered during the strike, nor as payment for a willful refusal to render services.

As to the Respondent's argument that A&S benefits are conditioned on absence for the sole reason of physical impairment whereas a subsisting sympathy for the

[1] See Chairman Fanning's dissent in the *Southwestern Electric Power Co.*, case which forms the nucleus of the *Emerson* decision rationale.

strike adds a second disqualifying reason for absence from work, the evidence fails to demonstrate that at the time of the termination of benefits that the Respondent was aware of any affirmative support of the strike by the A&S recipients, nor was it aware of any subjective decision that the disabled employee would join or aid the strike if he could. Moreover, even if the disabled employee had made a decision to support the strike, that decision, like a decision to refuse to support the strike and to return to work, could not be executed because of medical reasons. Such a subjective decision by the employee would be at most a potential or inchoate reason for absence but it could not be an active cause of absence because it was incapable of realization. Clearly then, until the A&S beneficiary regained his physical abilities, he was absent solely because of disability, never mind that he might have longed to have been absent for other reasons. He can only withhold services when able to do so, and he can only enmesh himself in the strike when he is able to engage in some act which constitutes enmeshment.

I conclude therefore that, like the sick and accident benefits in the *Emerson* case, the A&S benefits herein were benefits due the recipients for past services, but which were denied because of the strike activity of other employees. I conclude that the announcement of the suspension of such benefits by the Respondent interfered with employees' rights to engage in protected strike activity and thus violated Section 8(a)(1) of the Act. I conclude that the Respondent's termination of A&S benefits for the 13 recipients on January 8, 1980, tended to punish them because of the strike activity of other employees and constituted discriminatory conduct violative of Section 8(a)(3) and (1) of the Act.

The Respondent contends that the complaint in this case ought to be dismissed inasmuch as the parties, i.e., the Respondent and the Union, had entered into a strike settlement agreement and the Union had accordingly requested withdrawal of the unfair labor practice charges. The Respondent raises a variety of arguments in support of this contention, e.g., failure to honor the withdrawal request constitutes a rewriting of the collective-bargaining agreement; the Respondent ought not be denied the benefit of its bargain; the Union is obliged to honor its collective-bargaining agreement including the strike settlement agreement upon which the contract was conditioned; the Board is not empowered to amend the strike settlement agreement; the General Counsel is estopped from prosecuting the complaint because the Respondent had fulfilled its obligations under the settlement agreement; and finally, the General Counsel/Regional Director ought to be estopped from prosecuting this case because similar complaints in numerous other Regions of the Board were withdrawn with approval by the respective Regional Directors of those Regions.

The strike settlement agreement issue, with the exception of the last contention of Respondent enumerated above, is identical to the strike settlement issue resolved in the *Emerson* case which I find to be dispositive. In that case Administrative Law Judge Thomas A. Ricci denied the motion to dismiss and stated:

> The Board acts in the public interest to enforce public, not private, rights. *National Licorice Co.* v. *N.L.R.B.*, 309 U.S. 250 (1940); *Amalgamated Utility Workers* v. *Consolidated Edison Company of New York, Inc.*, 309 U.S. 261 (1940); *Agwilines, Inc.* v. *N.L.R.B.*, 87 F.2d 146 (5th Cir. 1936). "Whenever private contracts conflict with its functions, they obviously must yield or the Act would be reduced to a futility." *J.I. Case* v. *N.L.R.B.*, 321 U.S. 332 (1940).
>
> Section 10(a) of the Act explicitly provides that the Board's power to prevent unfair labor practices "shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise . . . ." Accordingly, the "parties cannot by contractual agreement divest the Board's function to operate in the public interest." *Boire* v. *International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Pilot Freight Carriers, Inc.)*, 479 F.2d 778 (5th Cir. 1973) supra, at 1149.

The Board adopted his ruling without further elaboration.

With respect to Respondent's allusion to the conduct of other Regional Directors with respect to similar settlement agreements, at the hearing I ruled that evidence of such conduct was irrelevant to the issues before me and therefore inadmissible. I remain convinced of the propriety of that ruling. It is well settled that the issuance of a complaint is within the purview of the General Counsel. For a variety of reasons, a Regional Director, acting on behalf of the General Counsel, may acquiesce in a private adjustment of an unfair labor practice charge. The ultimate objective of course is the achievement of the basic policies of the Act. That goal may very well be achieved through the application of pragmatism and prudence. However, in this particular case the issuance of a complaint was premised upon the breach of the Act by the Respondent. Although the Respondent and the Charging Party Union adjusted what they considered to be the fundamental and overriding dispute between them, their settlement provided no meaningful remedy for those employees whose rights were violated and who were adversely affected by the loss of benefits to which they were entitled. Under such circumstances and in light of the Board's decision on the *Emerson* case, I conclude that the Respondent's motion to dismiss the complaint, or in the alternative to withhold any remedial order, is without merit and is hereby denied.

B. *A&S Recipients' Subsequent Strike Involvement*

For the foregoing reasons I conclude that those 13 recipients of A&S benefits who had received A&S benefits on and before January 8, 1980, were entitled to continued A&S benefits until such time as they became enmeshed in the strike by actively participating in the strike or by otherwise affirmatively demonstrating support of the strike to such an extent as to terminate their right to continued A&S benefits.

1. Mary A. Brashear

From October 29 to January 8, Brashear received A&S benefits. Although Brashear was a union steward and had been "Recording Secretary" of the Union she was opposed to the strike prior to its inception and she did not appear at the picket line, nor did she engage in any conduct in support of the strike until after her physician medically released her on Friday, January 18. She engaged in picketing at her first opportunity thereafter, Monday, January 21. Accordingly, she is entitled to all A&S benefits which she would have received from January 8 through 18, had it not been for the strike activity of other employees.

2. Harold N. Chansler

Chansler, a union member, received A&S benefits from December 6 to January 8. On Monday, January 21, he was given a medical release by his physician. Chansler did not return to work but rather he joined the strike and engaged in picketing on at least 15 occasions thereafter. Between January 8 and 21, he engaged in no conduct supportive of the strike. Accordingly, Chansler is entitled to all A&S benefits he would otherwise have received from January 8 to 21.

3. John Dickerson

Dickerson, a union member, had reinjured his back in a nonjob-related incident on January 4. On January 21 he was able to return to work and perform some of his duties but instead he joined the strike and commenced picketing activities, i.e., he admittedly joined the picketing by sitting in his truck at the picket line. He considered himself to be a picket. It was common for the pickets to sit around a temporary picket's shack near the plant entrance rather than to engage in ambulatory to and from picketing. Another picket joined Dickerson in the cab of his truck. Later, when Dickerson was fully recuperated, he engaged in picketing by standing with the other pickets. He engaged in no other overt conduct supportive of the strike. I agree with the General Counsel that he is entitled to A&S benefits he otherwise would have received from January 8 to 21.

4. John R. Hixon

Hixon, a union member, received chemical burns on his hands in a domestic accident on January 4. He was released to work on January 28. Hixon admitted that he actively picketed sometime in January before the end of the month and picketed with regularity thereafter. I credit the somewhat more certain testimony of Foreman Carl Jarrell that Hixon picketed as early as January 13. Hixon testified that on Monday, January 7, he visited the plant and was examined by the plant physician who stated that he should not report to work but that he should report to the plant on January 10 presumably to be examined again. Hixon appeared at the plant entrance on January 10, but he observed the picketing and decided that he would honor the picket line. Accordingly, he departed without making any attempt to visit the plant physician. I conclude that by publicly appearing at the picket line and refusing to cross the picket line on January 10, Hixon manifested sufficient overt support of the strike to disqualify himself from any A&S benefits otherwise due him thereafter. I conclude that he is only entitled to whatever benefits he would have received up to January 10, had it not been for the strike activities of other employees.

5. George Grigsby

Grigsby, a union member, suffered a heart ailment on November 7, 1979. He was not medically released until February 28, 1980. He received the union strike benefits but until March 3 he engaged in no overt conduct supportive of the strike. On and after March 3, he admittedly picketed by sitting in his parked truck near the pickets with a picket sign placed adjacent to his truck. He did not report for work on February 29, because he decided to honor the picket line and to support the strike.

I conclude that Grigsby is entitled to A&S benefits he would otherwise have received from January 8 to February 29, had it not been for the strike activities of his fellow workers.

I do not conclude that Grigsby's receipt of strike benefits before February 29, i.e., the "grocery money," disqualified him for A&S benefits as I do not view the receipt of such subsistence as enmeshment in the strike or as a public avowal of support for the strike. The disbursement of "grocery money," i.e., $30–$35 commenced on February 1 and 9 and continued weekly thereafter. To obtain "grocery money" a member was merely required to appear at the downtown union hall, which is distant from the remotely situated plant, and stand in line until the money was disbursed. No questions were asked of the person who sought these funds. No conditions were attached and no expressions of strike support were asked or offered. Having been denied A&S benefits, Grigsby, like the other A&S recipients, with the exception of Zehner, was deprived of his only income source. The money was tendered without condition. It was there for the asking. Because this pittance was received from the Union rather than from a public institution or a private charitable organization does not render receipt as an expression of support of the strike.

6. Joe D. Johnson

On January 4, Johnson, a union member, had undergone minor nonwork-related surgery. He was medically released for work on January 28. Shortly thereafter, he engaged in regular picket duty. He did not report for work on January 29, because he chose to honor the strike. He engaged in no overt actions supportive of the strike prior to January 29, and he is therefore entitled to A&S benefits that he would have otherwise received from January 8 to January 29.

7. Joseph L. Joles

Joles, a union member, was hospitalized for a nonwork related illness on January 6. He spent 14 days in the hospital and another 20 days in domestic confinement. On Thursday, February 10, he was medically released to report for work on Monday, February 14. During the strike he received "grocery money" from the Union.

In-Mid February Joles was driven to the temporary union storefront headquarters across the roadway from the pickets' shanty. He did so because he was told by an unidentified person that he ought to read a posting on the union bulletin board. That posting consisted of a newspaper article which described the Board's *Emerson* decision. Joles read that notice and departed. He engaged in no other conduct arguably supportive of the strike. While hospitalized he was visited by his foreman. During conversation with his foreman he voiced no opinion with respect to the ongoing strike.

I do not conclude that Joles' brief visitation to read a posting on the union bulletin board at strike headquarters was sufficient enmeshment in strike activities such as to disqualify him from the receipt of A&S benefits. Accordingly he is entitled to A&S benefits that he would otherwise have received from January 8 to April 10, had it not been for the strike activities of his coworkers.

8. Allen W. Morris

Morris, a union member, sustained an ankle injury on December 13 and immediately took sick leave. He was medically released on February 11 and on the next day, instead of reporting to work, he joined the strike and picketed regularly thereafter according to a schedule of picketing devised by the Union. Prior to his medical release, he received strike benefits, i.e., "grocery money," but took no action which evidenced his support of the strike. I conclude that he is entitled to A&S benefits which he would have received from January 8 to February 11, had it not been for the strike.

9. Charles R. Rogers

Rogers was hospitalized on December 7, 1979, and afterward released from the hospital as an outpatient but thereafter readmitted for surgery on his neck on January 8. He was subequently medically released on May 12, 1980. During the strike he also received strike benefits from the Union. Additionally, he admittedly appeared at the picket line. He testified that on occasions he was driven to the picket line by a striking employee who went there to obtain a picketing assignment. Rogers testified that he merely went "to get out . . . a little bit," pursuant to his doctor's suggestion. He testified that he sat in the car at the picket line while his friend obtained a picketing assignment; and that "a couple of times" he got out of the vehicle to display to the pickets the scar on the back of his neck. He testified that he walked with the pickets "not in the activity part" but "just across back on the road there."

Rogers also testified that he was driven down to the picket line "a couple of times" by his neighbor so that Rogers could locate "a guy to build me a porch." During one of these visits, according to Rogers, one or more of the pickets shouted out to him that he ought not picket because he was sick and that he was not "allowed" to picket. Rogers testified that on one of his picket line visitations he was handed a newspaper clipping account of the *Emerson* decision, by an unidentified person who stated, "This pertains to you. I wouldn't show my face down here."

K.D. Wood, a staff assistant to the supervisor of employee relations, and Louis Butcher, an engineering assistant, were responsible for monitoring and supervising the maintenance of a record of picket line conduct during the strike. I credit their certain, responsive, and convincing testimony. Wood observed Rogers walking with picket Preston at the pickets' shanty near the main plant entrance on January 27. One of Preston's duties was to ascertain whether the Union was in compliance with a court order limiting the Union to two pickets at each gate. He recorded in a log maintained by the Respondent only the names of Preston and Rogers as pickets at that gate. Butcher observed Rogers on February 20 walking back and forth on the picket line, in the company of other pickets, for a substantial period of time.

It is my conclusion that Rogers' presence at the picket line on January 27 and thereafter in the manner described above constituted a manifestation of public support for the strike sufficient to disqualify him from the receipt of A&S benefits. I conclude that Rogers is only entitled to the receipt of A&S benefits he would have otherwise received from January 8 through January 26, had it not been for the strike activities of other unit employees.

10. Kenneth L. Shaffer

Shaffer, a union member, was on medical leave from December 14 until he was medically released on April 15, 1980. He received strike benefits from the Union as did other A&S recipients, by appearing in person or by representative at the downtown union hall. On one or more occasions when he collected strike benefits he conversed with union officers and inquired as to the course of the strike and how long it was expected to endure. He engaged in no other conduct which could arguably be characterized as supportive of the strike. I concluded that Shaffer's mere inquiries fall short of a public expression of support for the strike. I therefore find that Shaffer is entitled to A&S benefits which he would have otherwise received had it not been for his coworkers' strike activities for the period of time from January 8 to April 11, 1980, i.e., the end of the strike.

11. Donald B. Waggoner

Waggoner, a union member and welder, became ill after breathing sulphuric fumes on the January 2 night shift. He was on sick leave thereafter and received A&S benefits on January 7 and 8. On January 7 he was examined by the plant physician and told to report back on January 14. Waggoner testified that he did not report back to the plant physician on January 14 because he still felt ill. However, Waggoner admitted that on some occasion prior to January 16 he appeared at the temporary union strike headquarters near the picket shanty to read the posted picket schedule so that he could determine when to commence picketing. He testified that his posted assigned date for picketing was January 10, but that he was still ill on January 10 and therefore did not report for picket duty on that date. Waggoner testified that he commenced regular picketing duties on January 16.

It is apparent from Waggoner's testimony that he had decided to support the strike as soon as he felt able to be present on the picket line. Inasmuch as he admittedly appeared on the picket line to ascertain that his prospective picketing duty was scheduled for January 10, he must have presented himself at the strike headquarters on January 9. Furthermore, since he presented himself at the temporary strike headquarters, i.e., 15–20 feet from the actual picket line, and for the purpose of reading the posted picket schedule to ascertain his tour of picket duty, I conclude that he enmeshed himself in the strike to an extent that he is disqualified from the receipt of any A&S benefits after January 8.

12. Joe Weger

Weger, an employee of 15 years' tenure, had experienced reoccurring medical problems with respect to his inner ear over a period of 10 years. From January 7 through January 8 he received A&S benefits while on sick leave. He testified that he joined the strike on January 13 and commenced picketing duties. Weger engaged in no conduct supportive of the strike prior to January 13.

It appears that there is a factual dispute as to whether Weger was so ill as to have precluded him from working between January 8 and January 13. The examining physician executed a report dated January 4 which suggests that it was not recommended that Weger refrain from working. The Respondent takes the position that Weger was erroneously paid A&S benefits on January 7. His benefits were terminated, however, because of the strike activities of other employees. The Respondent at no time made a determination that Weger was not able to perform his work duties from January 7 through January 13, and refrained from making such determination because of the pendency of this unfair labor practice charge. Inasmuch as the evidence is insufficient to make any such determination herein, I conclude only that Weger was entitled to A&S benefits that he would have received from January 8 to January 13 had it not been for the strike activities of his fellow workers. I leave to the compliance stage of these proceedings the resolution of whether he would have been precluded from A&S benefits for any other reason.

13. Clarence Zehner

Zehner, a union member, suffered what appeared to be the symptoms of a heart ailment on January 2, 1980. He went on sick leave and received A&S benefits. After taking a "treadmill" test on January 11, he was medically released to work as of January 14. Instead of reporting to work on January 14 he joined the strike and commenced picketing on a regular basis. Prior to January 14 he was physically unable to picket. He engaged in no conduct supportive of the strike prior to January 14. I conclude that he is entitled to A&S benefits that he would have otherwise received from January 8 to January 14 had it not been for the strike action of other employees.

Conclusions of Law

1. The Respondent is an employer engaged in commerce within the meaning of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. On January 8, 1980, the Respondent notified employees that accident and sickness benefits for union members would be discontinued upon the commencement of a lawful strike and thereby interfered with its employees' rights under the Act in violation of Section 8(a)(1) of the Act.

4. On January 8, 1980, the Respondent discontinued accident and sickness benefits for employees who were members of the Union and who had been receiving said benefits prior to a lawful strike engaged in by other employees represented by the Union, and of whom the Respondent had no information that they had shown public support for the strike; and by such conduct the Respondent interfered with its employees' rights to engage in protected concerted and union activities thereby violating Section 8(a)(3) and (1) of the Act.

5. The above-described unfair labor practices affect commerce within the meaning of the Act.

The Remedy

It having been found that the Respondent unlawfully withheld accident and sickness benefits to employees referred to in this decision, it is recommended that the Respondent be ordered to pay each of them whatever accident and sickness benefits were due to them from January 8, 1980, to the date of their recovery or the date they actively participated in strike activity or publicly supported the strike, whichever was sooner, with interest, had their fellow employees not engaged in a strike.

[Recommended Order omitted from publication.]

City Cab Company of Orlando, Inc.; Yellow Cab Company of Orlando, Inc. d/b/a Yellow Cab Company and Dixie Cab Company *and* Yellow, City, Dixie Independent Cab Drivers Association. Cases 12–CA–8705 and 12–CA–9788

9 January 1985

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS HUNTER AND DENNIS

On 26 August 1983 Administrative Law Judge Howard I. Grossman issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

The Board has considered the decision and the record in light of the exceptions[1] and briefs[2] and has decided to affirm the judge's rulings, findings,[3] and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, City Cab Company of Orlando, Inc., Yellow Cab Company of Orlando, Inc. d/b/a Yellow Cab Company and Dixie Cab Company, Orlando, Florida, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

[1] We note that the Respondent does not attempt to relitigate in this proceeding the status of its drivers as employees within the scope of Sec. 2(3) of the Act.

[2] The Respondent has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

[3] In the penultimate paragraph of sec. III,A,3(b) of his decision, the judge states that Union Secretary Angelo Spedale testified that there were two other cab companies in Orlando. The record establishes that this evidence was introduced through the testimony of Respondent's night manager Duane Johnson. Also, in the first paragraph of sec. III,B,4 of his decision, the judge states that the Respondent's argument that the complaint is defective because not based on timely filed charges is "expressly linked" by the Respondent to its argument that the settlement agreement was improperly set aside by the Regional Director. However, in its posthearing brief to the judge, and again in its brief in support of its exceptions, the Respondent did assert, as an alternative argument, that even if the settlement agreement had been properly set aside, the complaint would still be barred by Sec. 10(b). We reject the Respondent's arguments in this regard. In affirming the judge's finding that the settlement agreement was properly set aside, we find it unnecessary to address the issue of whether the complaint would have been barred by Sec. 10(b) if the settlement agreement had *not* been properly set aside.

DECISION

STATEMENT OF THE CASE

HOWARD I. GROSSMAN, Administrative Law Judge. The charges in this proceeding were filed on dates described hereinafter by Yellow, City, Dixie Independent Cab Drivers Association (the Charging Party or the Union). A consolidated complaint issued on September 1, 1982, alleging that City Cab Company of Orlando, Inc., Yellow Cab Company of Orlando, Inc. d/b/a Yellow Cab Company and Dixie Cab Company (collectively Respondent) changed the cab rental fees paid by, or the working conditions of, its drivers, in 29 separate instances: 6 on May 1, 1979, 9 in the last 4 months of 1979, 10 in 1980, and 4 in 1981. The complaint alleges that these acts were engaged in without giving the Union prior notice and an opportunity to bargain, and were therefore violative of Section 8(a)(1) and (5) of the National Labor Relations Act (the Act).

A hearing was held before me on these matters in Orlando, Florida, on November 15 and 16, 1982. On the entire record, including my observation of the demeanor of the witnesses, and consideration of briefs filed by the General Counsel and Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The various companies collectively designated as Respondent are affiliated business enterprises with common officers, ownership, directors, management, supervision, a common labor policy, and shared common premises and facilities. They have provided services for each other, have interchanged personnel with each other, and have held themselves out to the public as a single integrated enterprise. Because of these factors, Respondent constitutes a single employer within the meaning of the Act. During the calendar year preceding issuance of the complaint, Respondent derived gross revenues in excess of $500,000 and purchased and received at its Orlando, Florida facility parts and supplies valued in excess of $10,000, which were shipped directly to it from points located outside the State of Florida. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The complaint alleges and the answer denies that the Union is a labor organization. However, on October 26, 1977, the Union was certified by the National Labor Relations Board (the Board) as the exclusive representative of Respondent's drivers (G.C. Exh. 14). Thereafter, the Board found with judicial approval that the Union is a labor organization within the meaning of the Act. *City Cab Co. of Orlando*, 242 NLRB 94 (1979), enfd. 628 F.2d 261 (D.C. Cir. 1980). I reaffirm these prior findings.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Factual Summary*

1. The allegations of unilateral changes in Case 12–CA–8705 and the settlement agreement

After the Union's certification in 1977 as described above, the parties bargained, and entered into an interim collective-bargaining agreement in March 1978. Thereafter, based on a judicial decision in another case finding

certain taxi drivers to be independent contractors, Respondent withdrew recognition from the Union in November 1978. The Union filed a charge in December 1978 (Case 12–CA–8436) and, following the General Counsel's Motion for Summary Judgment, the Board's Decision and Order issued in May 1979, finding that Respondent had violated Section 8(a)(5) and (1) by refusing to bargain with the Union. *City Cab Co. of Orlando*, supra. Respondent thereafter filed a petition for review of that decision, and the Board filed a cross-application for enforcement. The Union made a written request that Respondent bargain with it, and the Company answered with a written refusal (G.C. Exhs. 4 and 5).

On July 3, 1979, 2 months after issuance of the Board's decision in the first case, the Union filed the charge in Case 12–CA–8705, and complaint issued on July 25, 1979, alleging six instances of unilateral changes in the terms and conditions of the drivers' employment on May 1, 1979, in violation of Section 8(a)(5) and (1). In general, these constituted increases in the Company's charges to the drivers for leasing a cab, or as the Company put it, "selling services" to the drivers.[1]

The following month, August 1979, the parties entered into an informal settlement agreement with the approval of the Regional Director for Region 12. The agreement itself is on one of the Board's standard forms for such purposes, which include a provision that the charged party will "make whole the employees named below by payment to each of them of the amount set opposite his or her names." No employees are so named in the agreement, but the parties included a clause in the backpay section that "[b]ackpay will be computed in accordance with established agency policy" (G.C. Exh. 3(a)). Union President Cruz testified that he understood that the agreement required the Company to compensate the drivers for all monetary losses from 1979 until the date of an agreement on rental rates.

The agreement also requires the charged party to post a notice, and to comply with its terms and provisions. In the notice Respondent states that it will if necessary make whole any employees who have incurred monetary loss as a result of "any" unilateral changes in terms and conditions of employment (G.C. Exh. 3(c)). A further clause in the agreement specifies that execution of the agreement does not constitute an admission that the charged party has violated the Act (G.C. Exh. 3(a)).

At the same time, the parties and the Regional Director for Region 12 entered into a stipulation providing that the settlement agreement would be null and void if the reviewing court in the first case rejected the Board's position that the drivers were employees as defined in the Act. On the other hand, if the court rejected Respondent's position that the drivers were independent contractors, then Respondent agreed "to remedy the violations alleged in the instant case by immediately abiding by and giving full force and effect to the Attached Informal Settlement agreement" (G.C. Exh. 3(e)).

During the remainder of 1979 and the first part of 1980, Respondent pursued its appeal from the Board's decision in the first case. The decision of the Court of Appeals for the District of Columbia Circuit, enforcing the Board's Order, issued on July 30, 1980 (id.). Respondent filed a petition for rehearing in August 1980, and this was denied in September 1980.

2. The bargaining history, and Respondent's objections to Union President Cruz

William Cruz,[2] the Union's president, had worked for and had been discharged by Respondent. Cruz filed an unfair labor practice charge and then withdrew it. He thereafter drove a cab, and was active in the organization of an "Independent Taxi Owners Association" (IATO). In July 1980 he issued a notice to members of the association, in which he referred to the members as "we (Independent Owners)" (R. Exh. 3). Cruz drove a cab for another company, but was not an owner of the company according to the credible testimony of Angel Santiago. Nor was he a member of IATO since his wife owned the cab which he drove.

Following denial of Respondent's request for rehearing in September 1980, the Union's attorney sent a letter to Respondent's attorney in November 1980 requesting bargaining "after three years of litigation" (G.C. Exh. 9). On the same day, Respondent's attorney wrote a letter to Cruz asserting that the Company was not obligated to bargain with a committee of which Cruz was a member, because of his "past conduct" as a driver for the Company and his "present position with another competitive taxicab company" (G.C. Exh. 8). Nonetheless, Cruz was present as a member of the union negotiating team when the parties commenced bargaining in January 1981.

The court's decision in the first case shows that Respondent had 115 out of a total of 127 taxicab permits issued by the city of Orlando (*City Cab Co. of Orlando*, 628 F.2d 261 (D.C. Cir. 1980)). Cruz spoke with the city's mayor in favor of "deregulation," the issuance of additional permits, and what he called the "free enterprise" system. The principal proponent of deregulation was the city attorney, according to Company President Mears. In February 1981, Cruz testified at a meeting of the Orlando city council, and opposed the system of rental fees charged to drivers by Respondent (R. Exh. 4). In March the city increased the allowable number of permits to 220, which posed a threat to Respondent according to Mears. He protested Cruz' actions, and, in April 1981, filed a charge against the Union alleging violation of Section 8(b)(3) (R. Exh. 5). Cruz then voluntarily withdrew from the contract negotiations pending disposition of the charge.

On June 12, 1981, the Regional Director for Region 12 dismissed the 8(b)(3) charge. His letter of dismissal indicates that Respondent had made a number of allegations.

[1] The Company also employs "commission drivers," who are paid a commission on all fares. They are not involved in this proceeding. As indicated in the prior record, the Company attempted to change from commission drivers to contract drivers, whom it called independent contractors. Company President Mears testified in the instant proceeding that this was not entirely successful, because the contract drivers would refuse to accept a call if they considered it unprofitable. The Company was therefore unable to provide complete service. Accordingly, it now retains a limited number of commission drivers, whom it may order to take calls, according to Mears.

[2] Cruz' full name is William Cruz Pizzaroz.

In response, the Regional Director stated that "there is no evidence that Cruz has operated a business in competition with the Employer or has been affiliated with any competitor of the Employer." As for the evidence that Cruz supported deregulation which would hurt Respondent economically, the dismissal letter observes that "the union represents commissioned drivers of the Employer whom deregulation would help, as well as salaried drivers. Cruz' pursuit of the interests of those bargaining unit employees whose interests do not totally coincide with the Employer's is deemed insufficient to bar him from bargaining with the Employer on behalf of all unit employees" (R. Exh. 6).

Cruz thereafter returned to the negotiations, and was present on July 21, 1981, when the parties reached agreement on cab rental rates, including a $42 daily rate. This was incorporated in a collective-bargaining agreement which the parties executed on February 2, 1982 (G.C. Exh. 7).

3. The Region's efforts to secure compliance with the settlement agreement

As these events were taking place, the compliance officer for Region 12 was attempting to obtain compliance with the settlement agreement in Case 12–CA–8705, following the court's denial of Respondent's petition for rehearing in September 1980. Respondent did post the notice set forth in the agreement. However, the Region was unsuccessful in getting Respondent to undertake the additional action which, the Region believed, was required by the settlement agreement.

a. *The backpay issue*

Robert R. Morley, an experienced compliance officer, testified that Respondent owed "substantial backpay" under the settlement agreement. He computed the amount due under existing Board policy, utilizing three different time periods. The amounts under these three alternative calculations were $200,000, $400,000, and $800,000, respectively. In making these computations, Morley used the drivers' records of their trips, since the Company contended that it did not keep such records beyond 90 days.

Morley was unable to obtain agreement on backpay from Respondent and, following a conference with the Regional Director in September 1981, Respondent delivered a letter to the Regional Director setting forth the conclusion that it did not owe any backpay, with the following arguments.

1. The Company has not increased the rental rates charged to drivers since the date of the court's decision, and therefore owes no backpay. (This argument implies that the settlement agreement requires compliance only from the date of the court's decision.)

2. There could have been no bargaining with the Union from August 1979 until September 1980 because the Union was "defunct," and its president Cruz was attempting to destroy Respondent's business.

3. The settlement agreement only contemplated backpay as a result of "monetary loss" sustained by the drivers. Even if there had been "improper 'unilateral changes,'" there was no such loss for reasons which are "a bit complex." The taxicab business is "volatile," and is related to seasonal changes. "When the rates are increased some drivers leave, thus leaving more business for the remaining drivers." Respondent supplied data purporting to show an increase in rental rates from 1978 through 1980, and an increase in drivers' net income. Accordingly, it argued in its letter, additional backpay to the drivers would provide them with a "windfall" (G.C. Exh. 15).

On the other hand, compliance officer Morley, who examined the tax records of some the drivers, testified that most of them asserted their income had declined after the rental changes. Union Vice President Robert Harris gave similar testimony. As for any causal relationship between the rental changes and what the Company contended were increases in net driver income, Mears agreed that there was one minor fare increase allowed by the city during the period covered by his figures. He also stated that his computations did not include the price of gasoline purchased by the drivers.

In July 1982, Respondent delivered a letter to Regional compliance officer Morley offering to pay "50% of the amount computed per driver for period involved" (G.C. Exh. 16).[3] The Region considered this offer to be unacceptable.

b. *Respondent's rationale for rental increases*

Mears provided a rationale for higher rental fees charged to the drivers. Thus, he contended that the higher fees reduce the number of drivers willing to pay it, and thus increases the amount of business available to the remaining drivers. He was asked whether these remaining drivers had to work harder in order to make the same income they had earned at the lower rental fees. Although Mears contended that they did not have to work any "longer," he agreed that they had to make "more trips." In general, Mears argued that the Company had to "walk a fine line" in providing needed revenue for the Company, a fair living for the drivers, and adequate taxicab service for the city. Accordingly, he asserted that the rate changes were in accordance with past practice and were economically justifiable.

Mears stated that the "history of rates has generally been higher not lower." He said there were "seasonal adjustments" and "technical adjustments." As an example of the latter, the company president testified that it is difficult to get drivers to work on holidays. Accordingly, he reduces the rates during these periods to induce more

[3] The offer was introduced by the General Counsel during redirect examination of compliance officer Morley. During cross-examination, Respondent's counsel had asked Morley about their "many discussions" of the backpay issue, including the nature of "any offers or proposals" made by Respondent. In response, Morley made reference to a "letter" from Respondent. On redirect examination he identified the Company's July 1982 letter as the one he was referring to on cross-examination. The document was received over Respondent's objection on the ground that the General Counsel had the right on redirect examination to introduce evidence pertaining to matters brought up on cross-examination. My ruling included the provision that receipt of the document was not for the purpose of establishing any backpay obligation or the commission of an unfair labor practice.

drivers to take out cabs. Other factors taken into account are consumer demand, and changes in the rates which the city allows the drivers to charge the customer. If that rate goes up, then, as Mears frankly conceded, the Company wants a share of the increase. He defended an "airport surcharge" added to the fares of airport customers. In general, according to Mears, the Company seeks to meet the demand for taxicab services with the least possible number of cabs on the street. It also tries to limit the mileage driven by the cabs, by use of any daily mileage surcharge.

Mears noted that, although there were rental changes subsequent to the date that the court denied Respondent's request for a rehearing (September 1980), none of these changes went above the rate then in effect, $36, until the date the parties agreed on a $42 rate in July 1981.

Other witnesses gave different versions of the rate changes. Angelo Spedale, a union official, said that Mears changed the rates so often that the drivers could not keep up with them. Duane Johnson was a former union president who was replaced by Cruz. Called as a witness by Respondent, he affirmed on cross-examination that the Union was formed because Respondent was changing the rates "unpredictably," that the drivers did not know what to expect, and that a few of them were forced out of business by the changes. Although there were two other small cab companies according to Spedale, they had only about 12 cabs, and Respondent was the only employer who, as a practical matter, was available to an individual who wanted to drive a cab.

Robert Harris, vice president of the Union, denied that the Union's agreement to the $42 rate in July 1981 was occasioned by agreement that a higher rate would result in larger earnings for drivers. Although there were seasonal fluctuations, the drivers lost money during a 2-year period. The Union agreed to the $42 rate in July 1981 because they were already being charged a mileage charge which brought the previous $36 rate up to about $40, and because the city had just granted a fare increase to which the drivers were "held hostage" (because the Company wanted a share of the higher fare). Harris opposed the airport surcharge as coming out of the tip which the driver could expect. If the surcharge is not collected from the customer, the driver has to pay it.

c. *Continued unilateral changes*

The parties stipulated that Respondent engaged in five of the six changes on May 1, 1979, alleged in the complaint in Case 12–CA–8705. They also stipulated to 10 additional such changes in 1979, 5 in 1980 (including 3 after September 1980, the date of the court's denial of Respondent's petition for rehearing), and 4 in 1981. One of the latter, reinstatement of a daily mileage surcharge on July 13, 1981, was the subject of a new unfair labor practice charge in Case 12–CA–9788. Fifteen of the changes increased the charges, surcharges, or late penalties which the drivers were required to pay, while one altered the bidding procedure, and another increased the minimum number of shift assignments to warrant issuance of a cab to a driver. Seven of the changes reduced the charges to the drivers.

Cruz testified that Respondent did not give the Union notice of these changes or an opportunity to bargain over them. Mears contended that the changes were posted on the bulletin board, that Cruz must have known of them, and that the Union never requested bargaining concerning the changes. Mears agreed that he had about two meetings with drivers to discuss changes and that he did not invite union officials.

d. *Setting aside the settlement agreement, and issuance of the consolidated complaint*

By letter to the parties dated August 26, 1982, the Regional Director for Region 12 set aside the settlement agreement because it had "failed in its purpose and because of allegations of post-settlement violations of the Act" (G.C. Exh. 3(f)). Thereafter, as indicated above, the consolidated complaint issued on September 1, 1982.

B. *Legal Conclusions*

1. Interpretation of the settlement agreement

Respondent contends that the settlement agreement requires it to remedy only the violations alleged in the complaint in Case 12–CA–8705, i.e., the unilateral changes on May 1, 1979. "[T]here was no promise to refrain from making future changes except one that by the terms of the settlement would not take effect until the appellate court had issued its ruling."

I conclude that this argument is erroneous. The settlement agreement requires Respondent to comply with the terms of the notice, and the latter requires the Company to make employees whole for monetary loss suffered as a result of "any" unilateral changes in terms and conditions of employment. When Respondent executed the stipulation, it agreed to "give full force and effect" to the settlement agreement upon losing its appeal, and thereby undertook to make whole employees suffering monetary loss as a result of "any" unilateral changes.

As a corollary argument, Respondent seizes on the requirement in the stipulation that it give full force and effect to the settlement agreement "immediately" (on loss of its appeal), and argues that this shows that prior violations—other than those allege in the complaint—were not included. This is not a reasonable interpretation of the language in the stipulation. The word "immediately" describes when it is that Respondent shall comply with the settlement agreement, i.e., without delay on loss of its appeal. It does not specify the actions required to constitute compliance with the settlement agreement. Having been charged with unfair labor practices, and having conditionally agreed in August 1979 to remedy "any" such practice upon rejection of its position by the court, Respondent committed additional such practices at its peril.

This dispute has limited relevance in any event, since it pertains only to the unilateral changes taking place after May 1, 1979, and before July 30, 1980, when the court issued its "rulings" in September (in the language of Respondent's brief). Respondent admits that the agreement covers the May 1, 1979 changes, and all those taking place after the court's "ruling." As the record

shows, Respondent committed further violations after the court issued its ruling, and, indeed, committed seven of them after September 1980, when Respondent's petition for rehearing was denied.

2. Setting aside the settlement agreement

a. *The continuing unilateral changes*

Respondent's continued unilateral changes, which I conclude hereinafter were unfair labor practices, are sufficient to justify setting aside the settlement agreement. Respondent argues to the contrary, citing *Radio Station KHMO*, 102 NLRB 26 (1962); *Deister Concentrator Co.*, 253 NLRB 358 (1980); and *Utrad Corp.*, 185 NLRB 434 (1970). Respondent apparently relies on *KHMO* because of its asserted belief that the unilateral changes herein did not violate the settlement agreement. This is clearly incorrect, and *KHMO* actually supports the General Counsel's position. *Deister* is not on point, because the postsettlement violations therein were unrelated to the presettlement violations, whereas they are closely related in the case at bar. Indeed, they are identical in nature. *Utrad* is also inapposite, because the postsettlement violations were remote in time and did not affect the remedial order, whereas the unilateral changes herein continued in an unbroken sequence and directly affect the remedial order. Authority for the Regional Director's withdrawal of the settlement agreement herein may be found in *Sheet Metal Workers Local 80 (Sise Heating Co.)*, 236 NLRB 41 (1978); and *Laborers (Joseph's Landscaping Service)*, 154 NLRB 1384 (1965).

b. *The absence of agreement on backpay*

The language of the settlement on backpay appears to indicate that Respondent agreed to pay backpay to its employees "in accordance with established agency policy." It is also clear from Cruz' testimony that the Union expected the Company to pay backpay to its employees. As an additional undoubted fact, Respondent and Region 12 could not agree on an appropriate backpay formula or amount. Indeed, at one point in the negotiations, the Company contended that it did not owe any backpay, because the drivers had not suffered any "monetary loss." Respondent continues this argument in its brief herein. Respondent's only offer—"50% of the amount computed per driver for period involved"—is so vague as to be meaningless. In similar circumstances the Board has concluded as follows:

> It appears obvious . . . that there was no meeting of the minds when the settlement agreements were executed. . . Respondent expected a liability substantially less than . . . the amount ultimately computed by the Regional Director. And the Regional Director was apparently faced with uncertainty as to the choice of formula for making his determination. In such circumstances, we believe that it would be inequitable to hold the parties to the commitments contained in the settlement agreements, and we find that the Regional Director did not commit reversible error in withdrawing approval of the settlement and reopening the case for further proceedings. While settlement agreements are entitled to be treated with sanctity and should not be lightly set aside, we recognize that circumstances can exist which warrant permitting withdrawal from a settlement agreement. Such is the case here. [*Motion Picture Photographers (MPO-TV of California)*, 197 NLRB 1187 (1972).]

I conclude that the same principle is applicable in this case, and constituted further warrant for the Regional Director's setting aside the settlement agreement.

3. Respondent's unilateral changes of its drivers' working conditions

"Initially, it is well settled that unilateral changes in the terms and conditions of employment, as admitted herein, without bargaining with a union certified as exclusive representative of the unit employees, violates Section 8(a)(5)." *Amsterdam Printing Corp.*, 223 NLRB 370, 372 (1976).

Respondent, however, argues that "changes which are continuations of past and established practices do not violate Section 8(a)(5) even in the absence of bargaining . . . . Quite simply, the law is that where changes are a normal and established fact of life for the employer and its employees, then the existence of an obligation to bargain does not require a change in that pattern." Respondent relies on two decisions by the Court of Appeals for the Fifth Circuit, *NLRB v. Phil-Modes*, 406 F.2d 556 (5th Cir. 1969), enfg. in part 162 NLRB 1435 (1967), and *NLRB v. Southern Coach & Body Co.*, 336 F.2d 214 (5th Cir. 1964), denying enf. of 141 NLRB 80 (1963). In *Phil-Modes*, where the employer shifted from a piecework to an hourly rate of compensation during sample-making periods, the court's decision reads in relevant part as follows:

> We cannot agree from the record before us that a unilateral change in the wages of employees was shown. The evidence shows that the shift to hourly pay during the sample-making period had been effected every year that the respondents had been in operation. While the sample-making period lasted for different lengths of time each year, the beginning, duration, and end of the period were "triggered" each year by the demands of customers, which in turn depended on whether the season for the coats manufactured by the respondents was early or late. There has been no finding that the hourly rate paid during the sample-making period of the year in question was different from that paid in the sample-making period of any other year or even that the total compensation during the sample-making period had varied. [Id. 406 F.2d at 557.]

In *Southern Coach & Body*, where the employer followed past practice in giving automatic wages to new employees 3 and 6 months after they began work, and in paying employees according to the operation they performed, the court states:

> [T]he Supreme Court clearly indicated in both the *Crompton-Highland*[4] and *Katz*[5] cases that a mere continuation of the status quo during the bargaining period cannot constitute a disparagement of the bargaining process; there must be an actual *change* in working conditions. Therefore, as to the three-month and six-month automatic increases, there is no evidence on which to base a conclusion that section 8(a)(5) was violated.
>
> An additional number of wage increases resulted from the company's established policy of paying an employee the wage rate applicable to a new operation when it was necessary that he perform that operation. . . . There is no indication in the record that the promotions deviated from past company policy, or that there was any motive other than economic necessity. None of the rates themselves were altered in any fashion[.] [T]he Board argues that the company was required to consult the union about each of these changes because each involved an element of discretion which precluded the union from ascertaining whether there had been a deviation from past company policy. In support of this contention, the Board relies on *NLRB v. Katz*, supra, which held, inter alia, that the granting of individual merit increases without consultation with the bargaining agent constituted an 8(a)(5) violation. We feel that there is a distinction between individual merit increases and the promotions which were made in the instant case. Individual merit increases are discretionary increases in pay based upon management's assessment of the performance of an individual employee. They are not motivated by economic necessity, but are a means of rewarding favored employees. The promotions involved here, on the other hand, were necessitated by the strike, and did not involve discretionary raises in pay. Hence, we do not feel that section 8(a)(5) precludes an employer from making the necessary adjustments in his work force which were made here in the absence of some evidence that he has deviated from established company policy or has refused to bargain with respect to the standards to be used for promotion. [Id. 236 F.2d at 217–218.]

The Court of Appeals for the District of Columbia Circuit addressed the same problem as follows:

> In *Katz* the Supreme Court held that an employer cannot unilaterally change conditions of employment during the course of negotiations with a union; if the company desires to alter a preexisting practice, it must give the union an opportunity to bargain over the change. The Court applied this principle to distinguish between automatic wage increases to which the employer has already committed itself and wage increases that are "in no sense automatic, but [are] informed by a large measure of discretion." 369 U.S. at 746, 82 S.Ct. at 1113. The employer would be required to grant the automatic wage increase unless it notified the union that it wished to make a change in the existing conditions of employment and gave the union an opportunity to bargain over the change. However, the employer could not unilaterally grant a nonautomatic, discretionary wage increase since "[t]here simply is no way in such a case for a union to know whether or not there has been a substantial departure from past practice." Id. Thus, the union could "insist that the company negotiate as to the procedures and criteria for determining such increases." [*NLRB v. Blevins Popcorn Co.*, 659 F.2d 1173 (D.C. Cir. 1981)].

I conclude that the record in this case does not justify Respondent in making unilateral changes in its employees' working conditions under the criteria set forth by the Supreme Court in *Katz* and explicated by the courts cited above. Respondent had not committed itself to any fixed practice, such as shifting employees from piecework to hourly compensation during sample-making periods, giving new employees automatic increases after specific periods of employment, or changing employees' pay in accordance with the operation they were performing.

If Respondent had any practice, it was simply one of constant change, caused by a multiplicity of factors. Some of these, such as the totality of consumer demand and the amount of fares allowed by the city, were beyond Respondent's control. Others, particularly the number of drivers willing to work for Respondent, were directly controlled by Respondent's rental rates. The evidence shows that this factor was one of the most if not the most significant of the factors which Respondent considered. To argue, as does Respondent, that its changes in rental rates were merely an impersonal response to the market, i.e., the supply of drivers available at specific rates, overlooks the fact that it is *this* market, found in the employer-employee relationship and the terms and conditions of employment, which Federal labor policy seeks to control, and in which an employer is subject to legal restraints.

Mears agreed that he had to walk "a fine line" in juggling the demands of the city, the financial needs of his company, and the demands of his employees. He thus exercised a high degree of discretion in changing the rental rates. He did so without giving notice to the Union, and held meetings with employees on the increases without inviting the Union.

Respondent argues that the Union failed to protest the changes for an inordinate period of time. This argument turns the entire settlement procedure upside down. The Union *had* alleged unlawful unilateral action in the first charge, and the Region was attempting to get Respondent to comply with its promise not to engage in any further changes. It would have been useless for the Union to have protested each additional change under these circumstances. As to each change, the Union "was presented with a *fait accompli*, making a request to bargain about it a futile and unnecessary gesture." *Peat Mfg. Co.*, 261 NLRB 240 fn. 2 (1982).

[4] *NLRB v. Crompton-Highland Mills*, 337 U.S. 217 (1948).
[5] *NLRB v. Katz*, 369 U.S. 736 (1962).

I therefore find that, by engaging in the above-described unilateral changes in its employees' terms and conditions of employment, Respondent thereby violated Section 8(a)(5) and (1) of the Act.

4. Respondent's additional arguments

Respondent presents an elaborate argument to the effect that the complaint is defective because it is not based on a charge filed within 6 months of the alleged unfair labor practices, and is therefore contrary to the mandate of Section 10(b) of the Act. However, this argument is expressly linked by Respondent to its contention that the settlement agreement was improperly set aside—an argument I have rejected. The complaint herein was clearly warranted on the basis of the two charges which were filed, under applicable law.

Respondent also argues that the receipt into evidence of details of the settlement discussions prejudiced its case because "the Judge has heard that the companies were willing to pay some money to settle the case." Accordingly, Respondent argues, a new trial is required.

This argument has no merit. Testimony with respect to Respondent's willingness to pay backpay was directly related to its undertaking to do so in the settlement agreement, and to the issue of whether that agreement had properly been set aside. The evidence of Respondent's negotiations with the compliance officer showed that it *denied* that it had any obligation to pay backpay. The only evidence of its willingness to do so is its letter of July 1982—a document submitted by the General Counsel on redirect examination of compliance officer Morley after Respondent initially raised the subject on cross-examination. As noted above, the letter was received with the express provision that it was not to be considered evidence of any unfair labor practice.

Respondent also presents an argument based on the conduct of Union President Cruz, which requires no comment in light of the facts set forth above.

In accordance with my findings above, I make the following

CONCLUSIONS OF LAW

1. City Cab Company of Orlando, Inc., Yellow Cab Company of Orlando, Inc. d/b/a Yellow Cab Company and Dixie Cab Company together constitute a single employer engaged in commerce with the meaning of Section 2(6) and (7) of the Act.

2. Yellow, City, Dixie Independent Cab Drivers Association is a labor organization within the meaning of Section 2(5) of the Act.

3. The following unit is now and has been at all times material herein an appropriate unit for the purpose of collective-bargaining within the meaning of Section 9(c) of the Act:

> All regular and part-time taxi drivers at Respondent's West Gore Street, Orlando, Florida, facility, including contract drivers and Winter Garden drivers; excluding all other employees, dispatchers, starters, office clerical employees, guards, and supervisors as defined in the Act.

4. On October 14, 1977, a majority of the employees in the unit described above, by secret-ballot election conducted by the Board, selected the above-named Union as their representative for the purpose of collective bargaining with Respondent, and, on October 26, 1977, the Board certified the Union as such exclusive representative.

5. At all times since October 26, 1977, and continuing to date, the Union has been and is the exclusive representative of the employees in the unit described above for the purpose of collective bargaining with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment.

6. By engaging in unilateral changes in the terms and conditions of its employees' employment on 24 separate occasions from 1979 through 1981, without notice to the Union or an opportunity for it to bargain concerning those changes, Respondent thereby committed unfair labor practices in violation of Section 8(a)(5) and (1) of the Act.

7. On August 30, 1979, a settlement agreement entered into by Respondent and the Union, intended to remedy some of the practices described above, was approved by the Regional Director for Region 12.

8. On August 26, 1982, the Regional Director for Region 12 appropriately set aside the aforesaid settlement agreement, because it had failed in its purpose and because of postsettlement violations of the Act.

9. The foregoing unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

10. Respondent has not violated the Act except as specified.

THE REMEDY

It having been found that Respondent has engaged in certain unfair labor practices, it is recommended that it be ordered to cease and desist therefrom and take certain affirmative action designed to effectuate the purposes of the Act. Thus, I shall recommend that Respondent cease and desist from engaging in unilateral changes in the terms and conditions of its employees' employment, that it notify the Union in advance of any contemplated changes and give it an opportunity to bargain concerning them.

It is also appropriate that Respondent be required to make whole, with interest, all employees who may have suffered losses in earnings as a result of said unilateral changes in their terms and conditions of employment. *El Centro Mental Health Center*, 266 NLRB 1 fn. 1 (1982). Accordingly, I shall include such a provision in my recommended Order.[6]

The General Counsel also appears to request issuance of a general bargaining order. It should be noted that the violations herein took place prior to the parties' execution of a collective-bargaining agreement. There is no allegation that Respondent is failing to abide by the terms

[6] The General Counsel does not request a specific backpay order, nor would one be warranted on the basis of the pleadings and evidence in this case.

of this agreement and, accordingly, I consider issuance of a general bargaining order to be inappropriate.

I shall also recommend that Respondent be required to post appropriate notices.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[7]

ORDER

The Respondent, City Cab Company of Orlando, Inc., Yellow Cab Company of Orlando, Inc. d/b/a Yellow Cab Company and Dixie Cab Company, Orlando, Florida, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Unilaterally changing the rental rates or other terms and conditions of employment of their drivers, without giving advance notice thereof to Yellow, City, Dixie Independent Cab Drivers Association, and affording it an opportunity to bargain concerning any such changes.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make whole its drivers for any loss of earnings they may have suffered, with interest thereon, as a result of Respondent's unilateral changes in the rental rates and other terms and conditions of employment of its drivers.[8]

(b) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Post at its Orlando, Florida facility copies of the attached notice marked "Appendix A."[9] Copies of the notice, on forms provided by the Regional Director for Region 12, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint be dismissed insofar as it alleges violations of the Act not specifically found herein.[10]

[7] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[8] Interest on amounts due under this paragraph shall be computed in the manner prescribed in *Florida Steel Corp.*, 231 NLRB 651 (1977). See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962).

[9] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

[10] The General Counsel's unopposed motion to correct transcript, attached as "Appendix B," is granted. [Appendix B has been omitted from publication.]

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT unilaterally change the rental rates or other terms and conditions of employment of our drivers, without giving advance notice thereof to Yellow, City, Dixie Independent Cab Drivers Association and affording it an opportunity to bargain concerning any such changes.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of rights guaranteed under Section 7 of the Act.

WE WILL make whole our drivers for any loss of earnings they may have suffered, with interest, as a result of our unilateral changes in their rental rates and other terms and conditions of employment.

CITY CAB COMPANY OF ORLANDO, INC.,
YELLOW CAB COMPANY OF ORLANDO
D/B/A YELLOW CAB COMPANY AND DIXIE
CAB COMPANY

Robins Federal Credit Union *and* Retail Clerks Union Local No. 1063. Case 10–CA–19842

9 January 1985

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS HUNTER AND DENNIS

On 20 July 1984 Administrative Law Judge Lawrence W. Cullen issued the attached decision. The General Counsel filed exceptions and a supporting brief and the Respondent filed an answering brief.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts as its Order the recommended Order of the administrative law judge and orders that the Respondent, Robins Federal Credit Union, Warner Robins, Georgia, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

[1] The General Counsel has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

DECISION

LAWRENCE W. CULLEN, Administrative Law Judge. This case was heard before me on February 14 and 15, 1984, in Warner Robins, Georgia, pursuant to a complaint filed by the Acting Regional Director for Region 10 of the National Labor Relations Board (the Board) on January 13, 1984. The complaint, as amended at the hearing, alleges a violation of Section 8(a)(1) of the National Labor Relations Act (the Act) by the unlawful interrogation of an employee by Respondent Robins Federal Credit Union (Respondent) and a violation of Section 8(a)(3) and (1) of the Act by the unlawful discharge of an employee because of her engagement in protected concerted activities. The original charge was filed on December 5, 1983, by the Retail Clerks Union Local No. 1063 (the Union). Respondent by its answer filed on January 20, 1984, as amended at the hearing, has denied that it has committed any violations of the Act.

After due consideration of the evidence presented at the hearing and the briefs filed by the General Counsel and counsel for the Respondent, I hereby make the following recommended:[1]

[1] The following includes a composite of the testimony of the witnesses at the hearing.

I. JURISDICTION

The Business of Respondent

The complaint alleges, Respondent admits, and that Respondent is and has been at all times mate private nonprofit corporation chartered by the Na Credit Union Administration, with an office and pl business located in Warner Robins, Georgia, wher engaged in the extension of consumer credit to m civilian and military personnel of the United States ernment; that during the past calendar year (prior filing of the complaint), a representative period spondent purchased and received at its office in W Robins goods and services valued in excess of $50,0 rectly from suppliers located outside the State of gia; and that Respondent is, and has been at all time terial, an employer engaged in commerce withi meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION

The complaint alleges, Respondent admits, and that the Union is, and has been at all times mate labor organization within the meaning of Section 2 the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES[2]

A. *Background*

This case involves the discharge of Debra Montf loan officer of Respondent, who had been employ Respondent for 10-1/2 years prior to her dischar October 19. The General Counsel contends that ford was discharged because of her engagement i tected concerted activities in organizing on behalf Union and that Respondent thereby violated S 8(a)(3) and (1) of the Act. The Respondent while ting knowledge of Montford's union activities co that the General Counsel has failed to prove a facie case as it has failed to prove union animus part of the Respondent or that the reason given f discharge was pretextual. Specifically, Respondent tends that Montford was discharged for cause beca her violation of a written policy of Respondent pr ing the issuance of loans to relatives by loan office engaging in "self dealing." Also alleged as a violat Section 8(a)(1) of the Act is the interrogation of a ployee concerning the union campaign by a supervi Respondent on November 19 following the dischar Montford.

B. *The Discharge of Debra Montford*

Montford initially became a loan officer wit spondent in 1981, having previously filled several positions in her employment with Respondent incl that of loan clerk. A loan officer has the responsibi interviewing applicants for loans of various type signature loans, automobile loans), taking the loan ground and information required to determine if

[2] All dates are in 1983 unless otherwise stated.

should be made, and either making a decision to issue the loan or referring the loan decision to the credit committee of Respondent which then passes on the loan decision. Respondent's written loan policy provided to loan officers and to credit committee members states in part that

> Credit Committee and Loan Officers will *not* [emphasis in original] process or act on applications submitted by their relatives or members of their families, and
>
> Credit union officials and employees have an obligation to the members to avoid all self-dealing and self-serving.

After a loan has been approved by a loan officer, the file is put on a stack to be processed by the loan clerks who prepare the documentation, check the application, and issue the check to the borrower and/or to the seller of the item being financed (i.e., an automobile). The loan clerk also has the responsibility for calling the sellers of the motor vehicles and verbally informing them of Respondent's lien and arranging for the title to be processed through the State reflecting the purchase and the lien of Respondent.

On April 19 Michael Driggers, who is married to a cousin of Montford, applied for a loan of $6000 with Respondent to buy a 1983 truck for $7500 from Dixie Truck & Parts Co. The truck had been damaged shortly after it had been sold as a new vehicle by Youman Chevrolet to a Jim W. Renters. The truck had been "totaled" for insurance purposes and repurchased by Youman Chevrolet as a trade-in from Renters who ordered another new truck from Youman to replace the damaged vehicle. The amount of the damage to the truck paid by the insurer was $2900. The original suggested retail purchase price of the truck at the time of its purchase from Youman Chevrolet by Renters was $10,500. Youman Used-Car Manager William Durban testified that he called several wholesale used car dealers and agreed to sell the damaged vehicle to Dixie Truck & Parts Co. (a/k/a Dixie Motors), the highest bidder. Dixie Motors contacted Jimmy Sims of H & S Wholesale Motors, who purchases damaged vehicles for repair and resale. Sims is an uncle of Debra Montford and the father-in-law of Driggers. Sims and Driggers testified that Sims told Driggers of the truck, and Driggers agreed to purchase it for his own use. When Driggers applied for the automobile loan, he was interviewed by Debra Montford and the loan was issued that date by Montford. Montford also called Dixie Motors to secure Respondent's lien, although this is normally done by the loan clerk rather than by the loan officer. The truck was (according to the testimony of Sims and Driggers) repurchased by Sims from Driggers as Driggers decided he could not make the payments and the truck was resold by Sims to C. E. Edwards in May 1983. However, Respondent was not informed of this transaction, nor was the loan repaid until July when it was paid off by Sims rather than Driggers. During this period, Respondent did not have a secured lien as title had never been applied for by Dixie Motors or conveyed to Driggers by Dixie Motors. Nor had notice been sent to the Georgia State Department of Revenue Motor Vehicle Division to register the title in Driggers' name with a lien on behalf of Respondent.

It was not until September 20, 1983, when Barbara Marcu, a title clerk employed by Respondent, began a routine telephone followup on titles which had not been received by Respondent with Dixie Motors to ascertain the reason for the delay in receiving the title that Respondent was apprised that the vehicle had been sold. Marcu and Edward Levins, Respondent's assistant manager in charge of administration, testified that following the issuance of a loan by the loan officer (such as Debra Montford), the loan clerk has the responsibility for calling the seller (in this case Dixie Motors) and obtaining the title number of the vehicle and informing the seller of Respondent's lien. In this case, Montford (the loan officer) made the call although normally (but not in every case) the loan clerk makes the call which is her responsiblity. The seller is then responsible for sending the title to the State of Georgia Motor Vehicle Unit to have the title changed to show the new ownership by the purchaser and Respondent's lien thereon. As a result of delayed processing by the State of Georgia Motor Vehicle Unit and, as the result of the failure of certain sellers to send the application for title changes and information to the state office, titles are often delayed and Respondent may not receive them for a period of 3 to 6 months. Respondent maintains a list of sellers with whom it has had trouble in the past in this regard. Neither Youman Chevrolet, Dixie Motors, nor H & S Sales was on this list of sellers. Marcu maintains a late title file and routinely follows up with sellers and the State on titles which have not been received for 90 days or more after the issuance of the loan. She follows up on these late titles by the issuance of form letters and by telephone inquiries to the seller.

On September 20 she contacted the title clerk of Dixie Motors concerning the title of the vehicle on which the loan had been made to Driggers. The title clerk told her she would have to call her back concerning the title. Marcu then received a telephone call from Debra Montford, who told her that the truck had been wrecked and repaired and resold and that the loan had been repaid and that Respondent would not receive a title. When Marcu inquired as to the need of Driggers for a title, she was told not to worry about the title as Driggers was a part owner of H & S Motors according to the testimony of Marcu. Marcu testified that when she put down the phone, she exclaimed aloud, "That's not right," whereupon Pat Parkerson, who is employed as an in-house auditor, and who reports directly to Respondent's board of governors, was walking by and asked Marcu what was not right, whereupon Marcu advised her of the conversation. Parkerson advised Marcu to inform the management. Marcu then reported it to Assistant Manager Edward Levins. Levins told Marcu to do nothing but to reduce what had occurred to writing. At Levins' request Marcu called Dixie Motors the following day. Marcu did so and spoke to Phillip Sullivan who told her he thought the truck had been "wrecked" and told her to speak with an employee of H & S Wholesalers who was with him at

the time. Sullivan then put J. S. Sims on the telephone and Sims told Marcu that the credit union (Respondent) knew that the truck had been wrecked and that Montford was to have called her concerning the title and Respondent should not worry about it. He also told her that the truck had been sold to C. E. Edwards. Levins launched an investigation into the matter, asked Marcu to write the State concerning the transfer of the title to the vehicle, and Levins contacted the used-car sales manager of Youman Chevrolet, the original purchaser of the vehicle, Renters, and the then-current owner of the automobile, Edwards, who had ultimately purchased the vehicle from Sims in May. During the course of this investigation, Parkerson checked the loans made by Montford and also those in which Dixie Motors and H & S Sales had been the seller. She discovered that on at least one other occasion Montford had made a loan to Driggers who was a frequent borrower. Sims was not a member of the credit union and was thus ineligible to make a loan from Respondent. In response to a letter request for a vehicle title search of September 21 by Marcu to the Georgia State Motor Vehicle Unit, Respondent received a response approximately October 6 or 7 that showed an application for a title on the vehicle had been made and then canceled on behalf of Renters and that an application for title had been made on behalf of Edwards reflecting no lien or security holders.

During the period of his investigation, Levins informed Respondent's manager C. S. Moore of its ongoing status. On October 12 Levins advised Moore that he was ready to meet and discuss the matter. Levins, Moore, and Henry Johnson, the assistant manager who is in charge of the loan department, met on that date in the afternoon and reviewed the above and at that time Levins recommended that Montford be terminated for having made a loan to a relative in violation of Respondent's loan policy and that it had been made on a wrecked vehicle and that the loan had never been secured. According to the testimony of Levins, he and Moore and Johnson agreed but delayed the termination of Montford as she was gone for the day at the time of the meeting. Johnson also testified that as Montford was a long-term employee, Manager Moore wanted to discuss the matter with Respondent's attorney. Moore, Johnson, and Levins had been scheduled to attend a state credit union meeting at Jekyll Island, Georgia, the next day, October 13, and ending on Sunday, October 16.According to the testimony of Levins, on the morning of October 13 prior to his leaving for work, he was informed by Manager Moore of the advent of union activities by some of the employees of Respondent. Moore instructed Levins to meet with the management employees and inform them to do nothing concerning the union activities but to continue their work and insure that the operations of the credit union were carried on. Levins went to the office, met individually with the management employees in small groups, conveyed this information to them, and left for Jekyll Island that afternoon. No discussion of the Montford matter took place during the weekend. Levins testified that he and Manager Moore discussed the matter with Respondent's attorney who recommended that a labor law practitioner in Atlanta be consulted. This was done by Moore and Levins. On the afternoon of October 19, Montford was called to a meeting by Johnson. In attendance were Moore, Johnson, and Levins. Manager Moore told Montford he had something unpleasant to discuss with her to which Montford replied, "It usually is." He then reviewed the Driggers' loan situation with her. According to her testimony, she denied knowledge that the prohibition against making loans to relatives applied to other than members of the immediate family and contended she was unaware of the other transactions concerning the vehicle. At that time Manager Moore signed her termination notice, which had already been filled out, and directed Johnson to go with her to clean out her desk and leave. Prior to her departure, she turned to Levins and Johnson and asked, "After ten and a half years, do you think this is fair?"

Montford testified she was unaware that the prohibition against loans to relatives applied to relatives as distant as the husband of her cousin, denied knowledge of the damaged status of the automobile or any of the other transactions involving it until she received a telephone call from Sims on September 20 who informed her that the vehicle had been damaged, the loan repaid, the vehicle resold, and that Respondent would not get a title. She testified she verified that the loan had been repaid in July and then called Marcu and informed her of the above and that Marcu acted curious. She denied having told Marcu that Driggers was part owner of H & S Sales. Montford testified further that she had initially contacted the Union in 1981, but had done nothing further in this regard until August 1983 when, at the request of another employee, she again contacted the Union, met with union officials, signed a union card, and solicited several union authorization cards of other employees and set up a meeting between the employees and the Union which was scheduled for October 20. Employee Susan Curtis testified she was initially informed of the union campaign by Montford in October 1983.

Analysis

I find that the General Counsel has failed to prove a prima facie case of a violation of Section 8(a)(3) and (1) of the Act by Respondent's discharge of Montford. In making this determination, I have considered all of the facts and circumstances leading up to the termination in this case including the timing of the discharge of Montford after the advent of the union campaign and on the eve of the scheduled union meeting with Respondent's employees. I find that the testimony of Respondent's witnesses Levins, Marcu, Johnson, and Parkerson should be credited concerning the events that led up to the termination of Montford as set out above. I find their version of the sequence of events that led up to the termination of Montford to be credible, logical, and supported in part by documentary evidence of their research into the matter. I find the transactions engaged in by Sims and Driggers in the absence of Respondent's knowledge appear to have been highly irregular. The sale of the vehicle by Driggers to Sims and then by Sims to Edwards at a time when the vehicle was to be titled in the name of Driggers with a security interest to be filed on behalf

of Respondent placed Respondent in a vulnerable position with an unprotected security interest. The careful investigation by Levins of this matter after it was called to his attention by Marcu, which included writing to the State for the required information and contacting the original and ultimate owners of the vehicle, as well as the used-car manager, but not contacting Dixie Motors, H & S Sales, and Driggers, does not appear an unreasonable course to pursue. I cannot accept the arguments of the General Counsel that the length of time to investigate this case by Respondent was unreasonable or indicated Respondent's lack of concern with the matter. This is a far different case than one in which a seller has been delinquent in conveying the title information to the State or in which the State has not processed the title and sent it to a respondent. Under these circumstances I find that Respondent was legitimately concerned about Montford's part in this transaction and the violation of its stated policy prohibiting its loan officers from making loans to relatives and engaging in self-dealing. Montford's telephone call to Marcu informing her that no title would be forthcoming would understandably have given rise to a suspicion by Respondent as to her involvement in the matter.

I further find, as contended by Respondent, that the General Counsel has failed to prove animus on the part of Respondent against the Union in this case. Rather, I credit the testimony of Levins that Montford's union activities were not known by Respondent prior to his recommendation of her termination on October 12 and that he was only initially informed of union activities of the employees on the morning of October 13 and was told to and did instruct the supervisors to carry out the business of Respondent and not to become involved with these activities. I do not find the interrogation of employee Curtis by Supervisor Brand[3] following the discharge of Montford sufficient to prove animus toward the Union by Respondent as this was an isolated act of interrogation by a single supervisor which was unaccompanied by threats. I find that the General Counsel has failed to prove that Respondent's discharge of Montford was motivated by her union activities rather than by its concern for her alleged violation of its policy against making loans to relatives, and self-dealing and the irregularities of the transactions following the issuance of the loan to Driggers. *Meyers Industries*, 268 NLRB 493 fn. 23 (1984).

Although the sequence of events in this case, particularly the timing of the discharge of Montford and the method by which she was summarily dismissed when she was called into the termination meeting and presented with a typed termination notice, give rise to a suspicion as to whether Respondent terminated her because of her union activities, mere suspicion is not sufficent to support a violation of the Act. See *Spearin, Preston & Burrows Inc.*, 248 NLRB 1384 (1980), and *Royal Coach Sprinklers*, 268 NLRB 1019 (1984).

I have also considered Respondent's termination of a long term supervisor which occurred after the discharge of Montford for a violation of its loan policy to relatives and Respondent's actions in permitting her to resign at her request rather than be discharged as was Montford. When the General Counsel sought to introduce this evidence, Respondent initially objected and then withdrew its objection and the testimony in this regard was received. I find the evidence to be of questionable relevance as it occurred substantially after the discharge of Montford. However, assuming its relevance hereto, I would find it supportive of Respondent's position that it regarded the violation of this policy as a dischargeable offense rather than evidence of disparate treatment, as I regard the distinction between Respondent's discharge of Montford and its allowance of its supervisor to resign upon her request rather than be discharged to be of little moment insofar as Respondent was concerned although I recognize that the difference can be substantial to the employee involved. I credit the testimony of Levins that the supervisor requested permission to resign and was permitted to do so whereas Montford made no such request.

Accordingly, I find that the General Counsel has failed to prove a prima facie case of a violation by Respondent of the Act by its termination of Montford. Assuming that a prima facie case was established, I find that Respondent has rebutted that case by the preponderance of the evidence. *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989; *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). In making the determinations set out above, I have not found that Montford was engaged in any wrongful activity nor that Respondent's interpretation of the loan to Driggers by Montford as a violation of its policy against loans to relatives and self-dealing was necessarily correct or the only interpretation as to whether "relative" included the husband of a cousin. Rather, I have found that Respondent's concern about the perceived violation of its policy by Montford and the irregularities of the transactions involved following the loan to Driggers were the motivating factors in its discharge of Montford. It is a sad matter to see an employee of over 10 years' experience, who has progressed to a substantial position, be terminated under these circumstances, but I do not find a violation of the Act was committed by the Employer by reason of her termination. Nor have I found that Montford did in fact violate Respondent's policy or that she was engaged in any irregular or fraudulent transactions as contended by Respondent in its brief.

C. *The Interrogation of Employee Susan Curtis by Supervisor Brand*

Susan Curtis, a loan clerk employed by Respondent, testified that the union campaign began in October, that she signed an authorization card and solicited other cards from Respondent's employees on behalf of the Union, that she had initially been informed of the union campaign by Montford and was informed of the union meeting scheduled for October 20 "a couple of days" before Montford's discharge. Curtis testified that "a few Saturdays after Debra (Montford) was fired," Supervisor Ronnie Brand asked her "how we were coming along on

[3] Brand's supervisory status was admitted by Respondent at the hearing.

that." She inquired, "What? Do you mean the Union?" and Brand "kind of laughed" and she told him, "Well, if you mean the Union, we're coming along, but these things take time." She testified further that he asked how many cards had been signed, and she replied she did not know as the cards were given to the Union and that the Union kept track. Brand then asked her how many cards were required, and she told him it "depended on who would vote in the election."

Analysis

I credit the testimony of Curtis which is unrebutted as Brand did not testify. I find the interrogation of Curtis by Brand was violative of Section 8(a)(1) of the Act and went beyond a casual question but was a pointed effort to discover the Union's progress in its campaign. I find this type of questioning to have been inherently coercive.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICE

The unfair labor practice of Respondent as found in section III, in connection with Respondent's operations as found in section I, has a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States, and tends to lead to labor disputes burdening and obstructing the flow of commerce.

CONCLUSIONS OF LAW

1. Respondent Robins Federal Credit Union is an employer within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. Respondent did not violate Section 8(a)(3) and (1) of the Act by its discharge of Debra Montford.
4. Respondent violated Section 8(a)(1) of the Act by the interrogation of its employee Susan Curtis by its supervisor Ronnie Brand.
5. The aforesaid unfair labor practice has a close, intimate, and substantial effect on the free flow of commerce within the meaning of Section 2(2), (6), and (7) of the Act.

THE REMEDY

Having found that Respondent has violated Section 8(a)(1) of the Act, I shall recommend that it cease and desist therefrom and post the appropriate notice.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended:[4]

ORDER

The Respondent, Robins Federal Credit Union, Warner Robins, Georgia, its officers, agents, successors, and assigns, shall

1. Cease and desist from unlawfully interrogating its employees concerning their union activities in violation of Section 8(a)(1) of the Act.
2. Take te following affirmative action necessary to effectuate the policies of the Act.

(a) Post at its facilities in Warner Robins, Georgia, copies of the attached notice marked "Appendix."[5] Copies of the notice, on forms provided by the Regional Director for Region 10, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director in writing within 20 days from the date of this Order what steps Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed with respect to the allegations of a violation of Section 8(a)(3) and (1) of the Act by Respondent's discharge of Debra Montford.

[4] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[5] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all parties participated, the National Labor Relations Board has found that we have violated the National Labor Relations Act. We have been ordered to post this notice and abide by its terms.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT unlawfully interrogate our employees concerning their union activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

ROBINS FEDERAL CREDIT UNION

International Brotherhood of Electrical Workers Local Union #46, affiliated with the International Brotherhood of Electrical Workers, AFL–CIO (PAC, Inc.) ***and*** **Robert Witty.** Case 19–CB–4917

10 January 1985

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS HUNTER AND DENNIS

On 26 June 1984 Administrative Law Judge Roger B. Holmes issued the attached decision. The Respondent filed exceptions and a supporting brief, the Charging Party filed an answering brief, and the General Counsel filed a brief in support of the judge's decision.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings,[1] findings,[2] and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, International Brotherhood of Electrical Workers Local Union #46, affiliated with the International Brotherhood of Electrical Workers, AFL–CIO, Seattle, Washington, its officers, agents, and representatives, shall take the action set forth in the Order.

[1] We agree with the judge's conclusion that the Respondent's discipline of PAC President Robert Witty, then a member of the Union, violated Sec. 8(b)(1)(B) of the Act because it had the foreseeable effect of interfering with Witty's duties as PAC's representative, and thereby tended to coerce PAC in the selection of its representatives for the purposes of collective bargaining or the adjustment of grievances. We also agree with the judge's ruling excluding evidence of an alleged alter ego relationship between PAC, Inc. and CEC, Inc. and we deny the Respondent's request for a remand.

The Respondent, inter alia, contends the excluded evidence is relevant to its argument that Witty is an "employer" at PAC rather than an "employer representative" within the meaning of Sec. 8(b)(1)(B). By asserting Witty did not deny owning an interest in CEC, the Respondent implies that Witty may hold a financial interest in CEC, and consequently may be the "employer" at PAC if PAC is CEC's alter ego. The Respondent, however, never sought to lay this foundation for the excluded evidence at trial. Having failed to make an offer of proof that Witty held a financial interest in CEC, the Respondent cannot now claim prejudicial error if it is asserting evidence of such an interest exists. We further observe that the Respondent does not on brief claim there is any such evidence, newly discovered or in the record.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

DECISION

STATEMENT OF THE CASE

ROGER B. HOLMES, Administrative Law Judge. The original unfair labor practice charge in this case was filed on September 16, 1983, by Robert Witty. The amended unfair labor practice charge in this case was filed on October 4, 1983, by Witty.

The General Counsel's complaint was issued on October 11, 1983. The General Counsel amended the complaint at the trial. The General Counsel's complaint alleges that International Brotherhood of Electrical Workers Local Union #46, affiliated with the International Brotherhood of Electrical Workers, AFL–CIO, has engaged in unfair labor practices within the meaning of Section 8(b)(1)(B) of the Act. As amended at the trial, the General Counsel's complaint alleges in paragraph six the following:

> (a) On or about July 20, 1983, Respondent, acting through its Executive Board and Michael L. Dilworth, at Seattle, Washington, voted to process internal union charges against Witty because Witty was and is employed by PAC, which does not have a collective-bargaining agreement with Respondent.
>
> (b) On or about August 2, 1983, Respondent, acting through its Executive Board and Michael L. Dilworth, at Seattle, Washington, had a trial in Seattle, Washington regarding the charges referred to above in paragraph 6(a).
>
> (c) On or about August 3, 1983, Respondent, acting through its Executive Board and Michael L. Dilworth, at its Seattle, Washington location, fined Witty because he performed supervisory functions for PAC, which operates without a collective-bargaining agreement with Respondent.

In the answer to the General Counsel's complaint, the Respondent denies that it had committed the alleged unfair labor practices.

The trial in this proceeding was held on March 29 and 30, 1984, at Seattle, Washington. The time for the filing of posttrial briefs was extended to May 11, 1984. A motion to Stay, or in the alternative, a motion to reopen hearing, was received on May 10, 1984, from the Respondent. An order to show cause was issued on that same date whereby the other parties to the proceeding were given the opportunity to show cause, if any, by May 24, 1984, why the Respondent's motions should not be granted. Furthermore, the Respondent was afforded an opportunity to file a response to those oppositions by June 1, 1984. The positions of the parties have been considered and will be discussed in sections 3 and 10 of this decision.

FINDINGS OF FACT

1. JURISDICTION

The jurisdiction of the Board over the business operations of the employer is an issue in this proceeding. PAC, Inc. is an electrical contractor incorporated in the

State of Washington. Its place of business is located in Seattle, Washington. PAC provides services for general contractors, but PAC does not provide services for individual members of the public. During the period from May 1983 to the date of the trial in this proceeding on May 29 and 30, 1984, PAC's gross revenue was approximately $1.3 million.

At the trial, the General Counsel made a request that judicial notice be taken that certain entities were engaged in interstate commerce. (Tr. 79–90.)

Under Rule 201 of the Federal Rules of Evidence, judicial notice has been taken of the fact that the operations of the State of Washington annually have exceeded the Board's $50,000 direct inflow and direct outflow jurisdictional standards. That fact, in my view, comes within the requirement of Rule 201(b) of the Federal Rules of Evidence that, "A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court. . . ." While the State of Washington is exempt from the Board's jurisdiction under Section 2(2) of the Act, the value of PAC's services performed for the State of Washington may be considered for jurisdictional purposes. In its decision in *Southern Alleghenies Disposals Services*, 256 NLRB 852 (1981), the Board held:

> It is well established that the Board will assert jurisdiction over a nonretail enterprise which has an annual outflow or inflow, direct or indirect, across state lines of at least $50,000. *Siemons Mailing Service*, 122 NLRB 81, 85 (1958). As enunciated by the Board in *Siemons*, indirect outflow refers to sales of goods or services within the State to "users" meeting any standard except solely an indirect inflow or indirect outflow standard. Further, the Board stated that it would continue to define as "users" enterprises which themselves were exempted from the Board's jurisdiction but whose operations were of a magnitude that the Board would assert jurisdiction if they were nonexempt.
>
> Here, although the city of Johnstown is exempt from the Board's jurisdiction under Section 2(2) of the Act, the magnitude of its operations would clearly warrant our assertion of jurisdiction over it if it were nonexempt. Accordingly, because Respondent's sales of services to the city of Johnstown are in excess of $50,000, the indirect outflow standard has been met.[4] We therefore find that it will effectuate the purpose of the Act to assert jurisdiction herein.[5]

[4] We thus find it unnecessary to address the General Counsel's alternative argument for assertion of jurisdiction over Respondent based on Respondent's services to other enterprises which are directly engaged in interstate commerce.

[5] We expressly disavow the Administrative Law Judge's characterization of Respondent's operation as a purely local function which does not affect interstate commerce. See *Carroll–Naslund Disposal, Inc.*, 152 NLRB 861 (1965); *Nichols Sanitation, Inc.*, 230 NLRB 834 (1977).

During the period of time from May 1983 to the time of the trial on March 29 and 30, 1984, PAC performed services for the Department of General Administration of the State of Washington in the amounts of $228,000 for a relighting project and $17,000 for an underground conduit. Based on the value of the services performed for the State of Washington by PAC, I conclude that PAC's business operations meet the Board's indirect outflow jurisdictional standard. *Siemons Mailing Service*, 122 NLRB 81 (1958). Accordingly, I further conclude that the Board has jurisdiction in this proceeding.

In addition to the foregoing, PAC also has performed services during the period from May 1983 to the time of the trial for the following entities in the amounts indicated: Berkley Structures, $60,000 for the renovation of the Eddy Power Building, which was a time and material contract, and an unspecified amount for the renovation of the Old Western Farmer Building, which was another time and material contract and it was still in progress at the time of the trial; Bourgault Construction, $126,000 for an urban and planning building; Leo Finnegan Construction, $400,000 for the Rainier School, and $148,000 for the Graham Safeway; Jones & Roberts, $509,000 for the Lewis County Jail; Keta Construction, $113,000 for a Safeway Store; Lease–Crutcher, $286,000 for the Boeing Space Center, Building 1841; Pease & Sons, $88,000 for the Kenmore Pump Station; Puget Power and Kitsap Regional Library, $72,000 for relighting the library; and Turnkey Construction, $738,000 for the Leavenworth High School.

II. LABOR ORGANIZATION

The status of the Respondent as being a labor organization within the meaning of Section 2(5) of the Act is not an issue. Such status was admitted in the pleadings.

III. THE WITNESSES AND CREDIBILITY RESOLUTIONS

Only two persons appeared as witnesses during the trial of this proceeding. They are: Robert Witty, who is the Charging Party in this case, and Michael L. Dilworth. Compared to the testimony given by Witty, the testimony of Dilworth was relatively brief. (Tr. 294–299.)

In considering the credibility of Witty's testimony, I have read the Respondent's motion to stay, or in the alternative, motion to reopen hearing, and the supporting documents, as well as the oppositions filed by the General Counsel and the Charging Party to the Respondent's motions and the Respondent's reply. In support of its posttrial motions, the Respondent submitted a copy of a letter dated April 24, 1984, from the Respondent's attorney to the Regional Director for Region 19 of the Board, and a copy of an unfair labor practice charge filed by the Respondent against Commercial Electrical Contractors, Inc. (CEC) and Power Authority Construction, Inc. (PAC). The Respondent alleges in the letter to the Regional Director that there are contradictions between certain matters related by Witty in his testimony at the trial in this proceeding and certain matters previously represented in December 1983 by CEC's attorney, which had led to a settlement of an earlier unfair labor practice charge filed by the Union in Case 19–CA–15831.

The matters on which a settlement of the earlier unfair labor practice charge allegedly were based, and which

are alleged by the Respondent to be in contradiction of Witty's testimony, were not made a part of the record during the trial in this proceeding. Those earlier matters cannot be considered at this stage of this proceeding to be newly discovered evidence or evidence which was previously unavailable to the Respondent at the time of the trial on March 29 and 30, 1984. Accordingly, I conclude that a basis has not been shown for reopening the record in this proceeding to consider matters which were within the knowledge of the Respondent at the time of the trial, but which were not offered into evidence at that time. Respondent had the opportunity at the trial to introduce matters affecting the credibility of Witty and to cross-examine Witty with regard to the testimony given by Witty at the trial, which the Respondent urges is inconsistent with the earlier matters. While the Respondent's affirmative defense of an alter ego relationship between CEC and PAC was found at the trial not to be a defense to the General Counsel's complaint allegations, the Respondent had the opportunity to cross-examine Witty with regard to the other matters covered during the direct examination of Witty and matters which affected the credibility of the witness. For convenience at the trial, matters regarding the credibility of Witty were referred by the shorthand reference of being issue number one, while the alter ego affirmative defense was referred to as issue number two.

Both the General Counsel and the attorney for the Charging Party made objections to questions posed by the attorney for the Respondent during his cross-examination of Witty. Both at the trial and in his posttrial brief, the attorney for the Respondent urges that the objections made by his opponents and their arguments with regard to those objections to questions during his cross-examination of Witty prevented him from effectively cross-examining Witty, and therefore, denied due process to the Respondent. In considering the argument raised by the Respondent, I note initially that the General Counsel and the attorney for the Charging Party differed with the attorney for the Respondent with regard to the legal issues in this case, and in particular the Respondent's affirmative defense that CEC and PAC are alter egos. Understandably, all of the parties wanted to preserve on the record their legal positions and arguments in support of their legal positions, not only on the alter ego issue, but with regard to other matters as well. In some forums, the failure of an attorney to raise a timely objection at the point in time at which evidence is offered at the trial may be deemed to be a waiver of the party's right to object to such evidence at a later point in time. (Fed. R. Evid. 103.) Witty was asked on five different occasions during the course of his testimony to step down from the witness stand and leave the hearing room so that the attorneys could argue more freely outside of his presence. (Tr. 105–111; 118–126; 133–149; 196–213; and 241–247.)

After reviewing the record, I conclude that the Respondent did have an opportunity to cross-examine Witty with regard to the subject matters of his direct examination and with regard to matters affecting the credibility of the witness. (See Fed. R. Evid. 611(b).)

At the trial, Witty acknowledged that certain portions of his pretrial affidavit had been deleted from his statement at the time he gave that statement to the General Counsel. For example, a portion of his statement which had read, "Sabey is the majority stockholder of PAC, Inc.," had been lined out of his pretrial statement. (Tr. 247.) Witty explained at the trial that the reason for the deletion of that sentence was, "Because I don't know that for a fact." Witty also said that it "didn't seem relevant, and I wasn't . . . an authority on it. I mean, I didn't . . . see the paper, or the documents, or anything like that." (Tr. 248.) However, Witty stated at the trial that Sabey had told him that Sabey was the owner of PAC, and Witty had no reasonable basis at the time that he gave his statement to the NLRB agent for disbelieving Sabey's claim. When Witty was questioned at the trial as to whether anyone had told him anything differently, Witty said that he had heard rumors. (Tr. 248.)

Witty also acknowledged at the trial that the following portion of his pretrial statement had been lined out at Witty's direction at the time he gave his pretrial statement: "I felt the problem arose out of employment with him. He said to collect all the relevant papers. . . ." (Tr. 238–239 and see sec. 7 herein regarding the intraunion charges against Witty.) Witty explained at the trial: "At the time, I was trying to recall what exactly happened and it had been some months before, and I was going through my papers, anyway, as I had recalled it, and as she had written it down, and I went back over it again, that was not exactly what—that was not what had happened." (Tr. 239.) In contrast, Witty explained at the trial the reason why another part of his pretrial statement had been left in his statement and not lined out. The sentence was, "I knew he had attorneys who were knowledgeable concerning labor disputes." (Tr. 252.) Witty explained that the statement was true based on conversations Witty had with other persons, but not with Sabey himself. Witty said that while he was working as an electrician for CEC, he got that information from CEC's operations manager and from Berkley's general superintendent Danny Recard.

Another portion of his pretrial statement, which had been lined out at the time he gave his statement, was "I gathered my papers (the copy of the withdrawal and union correspondence) and took it to George Sigalas, the President of Commercial Electric on August 9th at about 10 a.m." (Tr. 249.) At the trial Witty explained that the reason for lining out that sentence in his pretrial statement was, "I had gotten that confused with another situation." (Tr. 249.) Witty said the earlier situation had occurred while Witty was working for CEC and that matter pertained to a lien problem.

At the trial, Witty also explained a sentence in his pretrial statement which he had given in September 1983, and which reads, "I am presently a member of IBEW Local 46." (Tr. 263.) Witty stated at the trial that he did not consider himself to be a member of the union at that in time, because he had submitted a resignation, but Witty made that statement in his pretrial affidavit, "Because I had received a letter from the Union saying that I couldn't resign." (Tr. 263.) Witty further explained at

the trial, "I believe the Local 46 considers me a member, even though I've tried to resign." (Tr. 265.) Witty acknowledged at the trial, "I would say, recalling right now, the word 'presently' would have been inaccurate in my own mind." (Tr. 269.)

Finally, with regard to his pretrial statement, Witty acknowledged the following during his cross-examination at transcript 270:

> By Mr. Hafer:
>
> Q. Were you confused about anything when you gave your statement?
>
> A. Yes.
>
> Q. What were you confused about when you gave your statement?
>
> A. This is the first time I had ever been through anything of this nature.
>
> Q. First time you had ever had any dealings with lawyers and legal affairs and so on?
>
> A. No. It's the first time I had ever had anything to do with the NLRB and the first time that I had ever been personally involved with it.
>
> Q. Okay. But, in terms of the particulars of this statement, you reviewed it three times in the last 30 days, I believe you told us. You have looked at portions of it today, certainly when you gave the statement. Was there anything you were confused about insofar as the points—
>
> A. Not that I recall.
>
> Q. You don't feel now, looking back on that, that—that there was any confusion in your mind about what you were telling Miss Cottrell and what she was writing; correct?
>
> A. Correct.

It was disclosed at the trial that Witty was in error during his direct examination when he referred to PAC employee Gene Pullen as being an apprentice. During his cross-examination, Witty corrected himself to state that Pullen was an electrical trainee. I consider the foregoing to be merely a minor inaccuracy in his testimony on direct examination.

I have reviewed Witty's testimony regarding a telephone conversation about 2 weeks before the trial between Witty and a person who identified himself to Witty as being an IBEW local union business agent in Wenatchee, Washington. However, Witty had not spoken previously with that person; did not recognize the person's voice; and had no other contact with the person who telephoned him on that occasion. Under these circumstances, I find that Witty's account of the telephone conversation lacks genuine probative value for the purpose for which the testimony was offered. The testimony was not offered to prove the truth of the matter asserted by the out-of-court declarant, yet the true identity of the caller in these circumstances depends upon accepting as truthful the caller's assertions regarding his name and union position. As discussed at the trial, this is unlike a situation where a witness describes on the stand a telephone call the witness made to a certain number. (Tr. 284–293 and Fed.R.Evid. 901.)

After considering all of the foregoing—the demeanor of the witnesses, established facts, inherent probabilities, and documentary evidence—I have decided to credit the testimony given by Witty, as well as the testimony given by Dilworth. Accordingly, I will rely on portions of the testimony from both witnesses in making the findings of fact to be set forth herein.

IV. THE EVENTS IN APRIL 1983

Witty had become a member of the Respondent Union in 1980. Introduced into evidence as General Counsel's Exhibit 2 was a copy of a request by Witty for a "participating" withdrawal of his membership in the Respondent Union. The document shows that his request was made on April 15, 1983, and it appears that the request was approved by the executive board on April 17 or 19, 1983. In his request, Witty indicated that he would be employed as office operations manager by Commercial Electrical Contractors. Witty also indicated on his withdrawal request that he would not be working with tools.

Also on April 15, 1983, Witty informed George Sigalas that Witty intended to resign from CEC effective May 14, 1983.

V. THE EVENTS IN MAY 1983

As far as Witty knew, Dave Sabey owned PAC. (Tr. 235.) According to Witty, Sabey also owned CEC and Berkley Structures. It was Witty's understanding that George Sigalas ran CEC for Sabey. (Tr. 163.) According to Witty, Mike Dunn runs Berkley Structures in its day-to-day operations.

Witty discussed with Dave Sabey his going to work for PAC. It was Witty's idea to go to work for PAC, rather than Sabey's idea. Witty stated: "I simply offered to work at PAC for him." (Tr. 167.)

Witty began his employment with PAC on May 15, 1983. Witty is the president of PAC, and he also holds the title of operations manager/administrator. Witty does not own any portion of PAC, and Witty does not share in any of PAC's profits. With regard to his duties, Witty testified at transcript 24:

> Q. What are your duties as President and operations manager?
>
> A. I oversee the office, or operations, the project managers. I'm also a project manager myself. I handle the majority of the hiring and firing and employment transferring. If there is any problems in the field, adjusting wages, or if there's complaints, things like that, I generally handle that.
>
> Q. Complaints from who and concerning what?
>
> A. Oh, for example, if there's differences between a foreman and an electrician, or foreman and an apprentice, they can't handle it themselves, then I'm usually the one that has to take care of it.

Witty receives a salary from PAC. Witty stated, "I told Dave Sabey how much I wanted to make." (Tr. 256.) Sabey told Witty that was fine. Witty's salary has remained the same during the entire time of his employment by PAC. Witty stated, "Essentially, I was to run the company for him." (Tr. 168.)

During the time of his employment by PAC, Witty has possessed the authority to negotiate a collective-bargaining agreement on behalf of PAC with a labor organization. Witty has also possessed the authority to sign such a collective-bargaining agreement on behalf of PAC.

Since Witty has been the president of PAC, Witty: (1) has established the labor relations at PAC; (2) has set the wage rates paid by PAC; (3) has determined the hours of employment of employees of PAC; (4) has determined the benefits to be given to employees of PAC; and (5) has addressed problems on behalf of PAC concerning wage claims or discrimination claims.

With regard to the hiring of employees at PAC, Witty makes that decision. Witty explained: "In part, it's on referral. Electricians know other electricians, and we'll interview them. Usually, I'll interview the electricians. Also we'll receive resumes, we'll solicit resumes." (Tr. 281.)

With regard to determining which employees are to be laid off from work at PAC, Witty said, "It pretty much comes as a consensus among the three of us, my two project managers and myself, but if there—I generally have the last word." (Tr. 280–281.)

Witty gave the following description of PAC's grievance procedure at transcript 28:

> A. If any employee on the job has a problem or a complaint, he directs that to the immediate foreman. If he is dissatisfied with that, then each job has an assigned project manager, and he can direct his complaint to the project manager. If he is unsatisfied with that, then he can direct his complaint to me, and I'd be the final.

At the time of the trial, PAC had three project managers and one field superintendent.

With regard to his weekly staff meetings, Witty testified at transcript 279 and 280:

> A. The Monday morning staff meetings, my two project managers, George Rutherford and Don Robertson, are present; and Tony Pena, my estimator; and then, usually we leave the door open so that the receptionist can hear what's going on, or we can get ahold of her pretty easily. And, essentially what we do is we review the—the job progress on each job. We determine what the financial status is, whether it's making money, or losing money, whether we can readjust our budget, our projected budget for the job. Also, we determine what direction we want to take with the company.
>
> For example, last week we decided that we wanted to go into—pursue more service work that would involve the purchase of another truck. And also, we discuss manpower requirements. At this time, it gives us a chance to brainstorm and see if there is any way that there can be some overlap of material, transfers, and we also look for suggestions as to ways the jobs can be better run. Sometimes one manager from one area has a good idea that might apply to another job. So, that's the reason for the meeting.

Witty is in charge of the day-to-day operations of PAC. Witty is listed as the administrator for PAC. He stated at transcript 281:

> It's—in the State of Washington, every contractor has to have a State-recognized administrator who is legally responsible for the installations on that job. So, I am legally responsible, or held accountable for the proper installation on every job that's performed by PAC.

Witty's name also is listed on PAC's business licenses to operate in the city of Seattle.

After Witty was employed by PAC, Witty set up PAC's lines of credit with PAC's suppliers. Dave Sabey's name appears on the credit applications as the principal owner of PAC. However, Witty's signature appears on the credit applications. With regard to an arrangement whereby PAC could borrow money from a bank for business purposes, Witty acknowledged at the trial, "I don't know all of the details of that particular aspect of the business." (Tr. 187.)

When Witty began working for PAC, he did not know what the dollar value of the assets of PAC was. At that time, an accountant was putting information regarding that into a computer. Witty testified at transcript 216, "I worked with him as far as setting up what went into the computer and what I wanted out." It was about 2 months before Witty first saw the computer printouts. He acknowledged at the trial that during those first 2 months he had no idea of what PAC was worth or what its assets were because Witty did not have access to the company's books. According to Witty, "the computer was located in Redmond with the bookkeeping pool that also handled Berkley Structure's books." (Tr. 214.)

Bills were received at Witty's office at PAC. Witty "vouchered them" and then sent the vouchers "to accounts payable, which is part of the bookkeeping pool." (Tr. 217.) PAC pays for the services performed by the bookkeepers. Witty had talked with Sabey with regard to using Berkley Structures bookkeeping pool to perform bookkeeping work for PAC. Witty explained at transcript 220, ". . . I checked with a couple other accounting, bookkeeping firms who would do the same thing and Berkely's price was quite a bit cheaper. So, that was one of the big determining factors." In addition, Witty previously had met the accountant at Berkley structures while Witty was working for CEC, which was doing work for Berkley at that time. The other reason given by Witty for selecting Berkley Structures was, "[I]t was more a matter of convenience. That was the most convenient." (Tr. 220.) While Witty said that Sabey owned Berkley Structures, and that Sabey did have the authority to fire Witty from PAC, Witty said at the trial that he did not feel pressured to use Berkley's bookkeeping pool to perform the computer work for PAC. (Tr. 221–223.)

Witty performed the task of preparing bids for contracts on behalf of PAC. Sabey did not establish any

guidelines or limitations for Witty to follow in bidding work for PAC. Prior to making a bid, Witty did not consult with Sabey with regard to the price to be used on the bid for the work to be performed. However, Witty did discuss the price for time and materials work that PAC was going to perform for Berkley Structures. Witty suggested the price to Sabey. Witty testified, "[H]e was hesitant, but he accepted." (Tr. 186.) In addition, Witty talked with Sabey about every 2 or 3 weeks after Witty began working for PAC. Sometimes their conversations were on the telephone, and sometimes they met in person at Sabey's office at Berkley Structures. At his meetings with Sabey, Witty said that the topics discussed were: "essentially the financial situation of the company and the progress of the jobs, our billing, job status, whether they're making a profit or losing money, and overhead." (Tr. 223.) Sometimes Sabey has asked Witty how much manpower Witty had on a job. Witty testified, "[H]e relies on my judgment for what we need to do, to get a job done." (Tr. 225.)

On May 20, 1983, Witty had a conversation with Respondent's business agent, Leonard Chernoff. An electrician, who was identified only by his first name of Alex, also was present. Witty testified at transcript 35 and 37:

> A. Leonard—Leonard had arrived at the site. At the time, I had just started working for PAC and had previously been working for CEC, and I was still—I had a library and a few personal effects that I had, so I was there, taking them out and that's when Leonard and Alex arrived, and Leonard said that he had heard that I had been working for PAC, and he just wanted to come by and see what was going on. So, I took him over to the PAC offices, which were in the building adjacent, across the parking lot, showed him where we were at, and I explained to him that I was working for PAC and that I had taken a withdrawal so that I could work—well, at the time, it wasn't to work for PAC, but I had taken a withdrawal and when I had spoken to the—to the secretary, her stipulation was that the terms of the withdrawal were that I—
>
> . . . .
>
> A. Anyway, this was all in the conversation with Leonard, that I had understood that as long as I had made the withdrawal and that I was not working with tools, that there was no problem, and he nodded affirmatively. At that time, the conversation kind of lightened up. We went back over to where his car was parked and there was a discussion about the pros and cons of Union workers and things like that, and then one of his pass—one of his parting remarks was that he just kind of stared off; he says, "Yeah, I just might leave the Union myself and start my own business and avoid all the hassles." So, that's essentially how the conversation went.

VI. THE EVENTS IN JULY 1983

Introduced into evidence as General Counsel's Exhibit 3 was a copy of a letter dated July 20, 1983, from the Respondent to Witty. There were two attachments to the Respondent's letter. In part, the letter states:

> You are hereby notified to appear before the Trial Board of Local Union No. 46, I.B.E.W., meeting at 2700 First Avenue, Seattle, Washington on Tuesday, August 2, 1983 at 7:30 P.M., to answer charges filed against you by Brother Leonard Chernoff Card #D382544, for alleged violation of the Local Union by-laws Article XI, Section 1 and Article XVII, Sections 7 and 8; the International Constitution Article XXII, Section 4; Article XXVI, Sections 2 and 5; Article XXVII, Section 1, Subsections 1, 2, 4, 5, 6, 10 and 17.
>
> Enclosed is a copy of the original charges filed against you. You may, if you desire, have an I.B.E.W. member act as your counsel. You may bring witnesses to give evidence in your behalf. You will be afforded the opportunity at the hearing to present any relevant evidence and to cross-examine any witnesses you may desire.

One of the attachments to that letter is a copy of an intraunion charge dated June 9, 1983, by Respondent's member, Leonard Chernoff, against Witty. The intraunion charge alleges that certain sections of the Respondent's bylaws and the Respondent's constitution were violated on Friday, May 20, 1983, at approximately 1 p.m. at the offices of Commercial Electrical Contractors, Inc. The intraunion charge further alleges that:

> Bro. Witty admitted to being employed by P.A.C. Inc., as well as being the registered administrator for this electrical company. P.A.C. Inc. is *not* signatory to an agreement with Local 46, I.B.E.W. Bro. Witty has H. & W. hours reported for April/83 for C.E.C. Inc., has not been terminated, and apparently works for both companies. Witty took a *participating withdrawal* dated Apr. 15/83.

The other attachment to General Counsel's Exhibit 3 was a copy of the withdrawal request which was introduced into evidence as General Counsel's Exhibit 2.

As a result of the letter and the attachments which were received into evidence as General Counsel's Exhibit 3, Witty obtained copies of the Respondent's bylaws and the IBEW constitution in order to study them. Introduced into evidence as General Counsel's Exhibits 4(a) and 4(b) are copies of those documents.

About 2 days before the Respondent Union's trial board hearing was scheduled to take place, Witty telephoned Chernoff. Witty testified at transcript 45:

> A. I told him about the charges. He said that since he was involved, there was nothing he could say, or—say about them to me. He said I would have to get hold of Harry Meyers. I told him that Harry Meyers was out of town, who else could I talk to? And he said he didn't know, and that was pretty much what happened.

VII. THE EVENTS IN AUGUST 1983

On August 1, 1983, Witty hand delivered a "speed message" to the Union. Although the document is dated August 2, 1983, Witty said he delivered the document on

the day before the hearing, which was held on August 2, 1983. (Tr. 45–46.) Introduced into evidence as General Counsel's Exhibit 5 was a copy of that document. It states:

> In preparing my case, I have been unable to contact anyone who is prepared to discuss it with me. Harry Meyers is on vacation, and I am unable to contact anyone else. When I started working for PAC, Inc. on May 16 I was under the impression that I was violating no rules of the agreement. I only recently learned that was not the case. In that case I apparently am guilty as charged on that issue. However, I have decided not to appear at the hearing tonight because I do not feel it will be impartial. This based on prior experiences with the executive board. Plus I was deceived into believing that my meeting of May 20 was friendly and informational, and not with the express intent to file charges. I am confident that you will inform me of your decision.

Witty did not attend the Trial Board hearing on August 2, 1983. Witty testified at transcript 55:

> A. Since I was unable to conduct anybody from the Hall that could give me any information regarding the nature of the hearing, the consequences, or just any information at all, and since I had met with the same individuals, not in a similar circumstance, but I had met with the "E" Board before, I just did not feel that I would get an impartial hearing.

Introduced into evidence as General Counsel's Exhibit 6 was a copy of a letter dated August 3, 1983, from the Respondent to Witty. It states:

> The Executive Board sitting as Trial Board of Local Union No. 46, I.B.E.W. on August 2, 1983, after due consideration of the evidence produced, has acted upon the charges filed against you by Brother Leonard Chernoff. The trial was held in absentia.
>
> The charges alleged you violated the Local Union By-laws, Article XI, Section 1, Article XVII, Section 7 and 8; the International Constitution, Article XXII, Section 4, Article XXVI, Section 2 and 5 and Article XXVII, Section 1, Subsections 1, 2, 4, 5, 6, 10 and 17.

The decision of the Trial Board is as follows:

> M/S/C that Brother Witty be found not guilty of violating the Local Union by-laws Article XVII, Section 8 and the International Constitution Article XXVII, Section 1, Subsections 2, 10 and 17.
>
> MSC that Brother Witty be found guilty of violating the Local Union By-laws Article XI, Section 1, Article XVII, Section 7; the International Constitution Article XXII, Section 4, Article XXVI, Section 2 and 5, Article XXVII, Section 1, Subsections 1, 4, 5, and 6. M/S/C that Brother Witty be fined $2,000 per charge (8) with $1,000 per charge (8) suspended provided that he sign a contract with Local 46 within 30 days and his withdrawal be annulled in accordance with the International Constitution Article XXVII, Section 5.
>
> Any member who claims an injustice has been done him by the Trial Board may appeal. (See Article XXVII of the I.B.E.W. Constitution.) Appeals from the decision of this Trial Board must be directed to International Vice President S. R. McCann, Twin Oaks South Office Complex, 150 No. Wiget Lane, Suite 100, Walnut Creek, CA 94598.
>
> Appeals to the Vice President must state in writing:
>
> 1. Your reasons for claiming an injustice has been done you by the Trial Board.
>
> 2. When assessment exceeds $25.00, $20.00 must be paid directly to this Local Union or mailed with a postmark date within fifteen (15) days from the date of the decision rendered. The Local Union receipt or a copy thereof must accompany the appeal to the International Vice President.
>
> 3. In order to keep the appeal active, additional payments to the Local Union of not less than $20.00 must be paid within each succeeding thirty (30) days period from date of first payment until the decision is rendered by the International Vice President.
>
> 4. Appeals to the International Vice President must be postmarked within forty-five (45) days after our next regular Local Union Meeting which is on the 10th day of August, 1983.
>
> 5. A copy of the appeal sent the Vice President shall be furnished this Local Union office.
>
> 6. For further details, see appropriate sections of the enclosed I.B.E.W. Constitution.

According to Dilworth, Witty was fined, "Because he was operating an apparent double-breasted, non-union shop." (Tr. 297.)

At the trial, Witty acknowledged that he had obtained the legal services of Attorney Judd H. Lees following a conversation between Witty and Sabey. Witty went to see Sabey because Witty felt that he needed an attorney as a result of the Union's charges being filed against him. Witty said, "I knew he knew of good attorneys." (Tr. 229.) Witty further said, "I went to him to find an attorney." (Tr. 231.) Witty testified with regard to his conversation with Sabey on that occasion, "I explained about the union charges and I felt needed legal counsel. This had been the first opportunity to—that I had needed an attorney, either as a representative of PAC or personally, and I asked him who was a good attorney to deal with something like this." (Tr. 232.) Sabey told Witty that Sabey was going to contact Attorney Lees. As a result, Attorney Lees telephoned Witty. According to Witty, PAC is paying the legal fees owed to Attorney Lees.

In response to General Counsel's Exhibit 6, Witty stated at the trial that he had not annulled his withdrawal request nor had he signed a contract with the Respondent Union.

VIII. SUBSEQUENT EVENTS

Around September 1983, a dispute arose between PAC Foreman Charles Nelson and PAC electrical trainee Gene Pullen. The dispute pertained to how a piece of conduit should be installed. Nelson felt it should be installed one way, and Pullen felt it should be installed a different way. As a result, Nelson told Pullen that he did not want him on the job any more. Both Nelson and Pullen called Witty regarding this, and the next morning Witty met with them and PAC Field Superintendent Don Robertson. After a discussion, Witty spoke to Pullen in the presence of the other two persons. Witty testified at transcript 26: "I told him that it was really his responsibility to do what the foreman told him to do, even if he felt that wasn't the best way to do it. The foreman is the one responsible for the job and that's what should be done."

Witty then told Pullen to leave for the moment, and Witty spoke to Nelson. Witty told Nelson that he should watch his temper, and be more flexible in the way he handles things. Witty said that Pullen's way of installing the conduit was probably the best way to do it, but Nelson was too proud to accept that.

Witty gave reprimands to both Nelson and Pullen. Witty transferred Pullen to another job, and Witty assigned another apprentice to Nelson.

Another PAC apprentice named Michael Pullen asked Witty for a raise in pay. Witty told Michael Pullen that he could get a raise when he passed the State of Washington examination to become a journeyman. Subsequently, Michael Pullen took the state exam and he told Witty that he was almost certain that he had passed the examination. As a result, Witty gave Micahel Pullen a $1.50-an-hour increase in pay. However, it later developed that Michael Pullen had failed the examination, and Pullen became concerned about losing his wage increase. Witty decided to let Michael Pullen keep his raise because Witty felt that he was a good worker; he was supposed to take the exam again in another month or so; it would not be in Michael Pullen's best interest or the Employer's best interest to reduce Michael Pullen's wage rate because Witty felt it would be demoralizing.

At the time of the trial, PAC had approximately 35 employees. Witty had hired about 30 of those 35 employees. With regard to the other five employees, Witty stated, "I had told my project managers I was in a hurry. I told them the criteria that I wanted for electricians and to hire somebody." (Tr. 282.) The employees of PAC were not represented by any labor organization at the time of the trial, and PAC was not signatory to any collective-bargaining agreements at the time of the trial.

IX. CONCLUSIONS

Based on the foregoing findings of fact, I conclude that the evidence establishes that PAC is an employer as defined in Section 2(2) of the Act. In addition, I conclude that PAC is an employer in the ordinary sense of the word, that is, PAC is engaged in a business which employs persons to work for wages.

I further conclude that the findings of facts set forth above show that Witty, as the president, operations manager and administrator of PAC, has possessed the authority to negotiate a collective-bargaining agreement on behalf of PAC with a labor organization. I further conclude that the evidence shows that Witty has had the authority to sign such a collective-bargaining agreement on behalf of PAC with a labor organization. The evidence also shows that Witty has established PAC's labor relations policy, including the wage to be paid to employees of PAC; the employees' hours of work; and the employees benefits to be given by PAC. Witty has made the ultimate decisions with regard to the hiring and layoff of the substantial number of persons employed by PAC. Witty also has the authority to adjust employee grievances on behalf of PAC.

I also conclude that the findings of fact establish that Witty does not own any portion of PAC. According to Witty's understanding, Dave Sabey owned PAC, CEC, and Berkley Structures. Thus, Witty is not the "employer himself" as described by the Board in its decision in *Painters Local 1621 (Glass Management Assn.)*, 221 NLRB 509 (1975). In that case the Board held at 512:

> The Board has previously interpreted Section 8(b)(1)(B) of the Act as not protecting a supervisor-member from sanctions against him by his union under circumstances where he is also the sole owner of the employer.[14] The legislative history behind Section 8(b)(1)(B) makes it clear that Congress was only concerned with protecting employers in the selection of their representatives for the two purposes provided therein; there is no indication that Congress intended to protect the employer himself against such fines and sanctions.[15] There is no restraint or coercion against the employer *in the selection of his representatives* for the prohibited objects where the employer himself is acting as the representative for these purposes. This dichotomy in treatment of union sanctions imposed on an employer's supervisors as opposed to those levied directly against the employer himself may also be explained by the fact that it is difficult to envision circumstances where the employer would be greatly influenced in the performance of his grievance-adjustment or collective-bargaining functions where any decision he makes in those respects directly works to his benefit or detriment depending on how he decides it.

[14] See *Local 146, Sheet Metal Workers International Association, AFL–CIO, et al. (Robert Dale Jones d/b/a Aarctic Heating and Cooling Company)*, 203 NLRB 1090 (1973); *Bricklayers, Masons and Plasterers' Union, Local No. 1 (Barr Floors, Inc.)*, 209 NLRB 820 (1974).

[15] This interpretation is also consistent with the Supreme Court's analysis of the legislative history behind Sec. 8(b)(1)(B) in *Florida Power, supra.*

As pointed out by Administrative Law Judge Jerrold H. Shapiro in his decision in *Operating Engineers Local 501 (Peterson Mfg. Co.)*, 269 NLRB 685 (1984), a union's motivation or "good faith" in imposing discipline is immaterial in these circumstances. At 668 footnote 5, Administrative Law Judge Shapiro stated, in part:

> [I]n determining whether a union violates Sec. 8(b)(1)(B) of the Act, the union's good faith or motivation in imposing discipline is immaterial. See *NLRB v. Sheet Metal Workers*, 477 F.2d 675, 677 (5th Cir. 1973). (In finding that the union violated Sec. 8(b)(1)(B), the court held that the union's "good faith" in imposing discipline was immaterial) and *Carpenters (Skippy Enterprises)*, 211 NLRB 222, 227 (1974) ("Respondent's good faith is not involved, for the test of restraint and coercion under Section 8(b)(1)(B) turns not on the union's motive, but on whether the union engaged in conduct which . . . tends to restrain or coerce employers within the intent of that section").

The United States Court of Appeals for the 11th Circuit has held that placing the emphasis on the effect of the union's actions, rather than the union's intent, is more consistent with the purpose of Section 8(b)(1)(B) of the Act. In its opinion in *NLRB v. Electrical Workers IBEW Local 323*, 703 F.2d 501 (11th Cir. 1983), the court held at 507:

> Placing the emphasis on the effect caused by the union's actions, rather than its intent, is more consistent with the fundamental purpose of the statute. Congress' overriding concern in enacting § 8(b)(1)(B) was to insulate an employer's *section* of his collective bargaining or grievance adjustment representative from union influence or interference. See, *e.g., Florida Power & Light*, 417 U.S. at 803, 94 S.Ct. at 2744, 41 L.Ed.2d at 487. An attempt to force a member-supervisor to cease working for a nonunion company demonstrably infringes on the employer's right to choose that person as its representative. *See A.S. Horner*, 177 NLRB at 502. In view of that inevitable result, even a union endeavoring only to enforce an internal regulation, and not primarily motivated to influence an employer's selection, can deprive the employer of the protection afforded by the statute.

The Board's decision in *Typographical Union Local 6 (Clark & Fritts, Inc.)*, 236 NLRB 317 (1978), involved different issues and different facts than are present in the instant proceeding. Administrative Law Judge Julius Cohn stated the issue at 319 as follows:

> The issue is whether Respondent, by engaging in work stoppages in January 1976 and February 1977, forced and coerced the Company to comply with a collective-bargaining agreement it did not execute and further coerced the Company to designate a representative other than of its own choosing for the purposes of collective bargaining. Determinative of these issues is the response to the question whether the Company is bound to the collective-bargaining agreement between Respondent and the League dated October 4, 1975. In the circumstances described above, I find the Company to be so bound.

The judge in that case found at 320:

> I find that the Company was bound by its agreement of 1964 to all modifications, extensions, or renewals of the then existing contract; that since that time it has adopted and abided by the successive collective-bargaining agreements between the League and Respondent; that it failed to respond to the letter of Respondent advising it of the negotiations to be conducted with the League; that despite the protestations of the Company that it is being forced to adhere to the terms of League contracts with Respondent in perpetuity, it could have withdrawn from its arrangement with the Union by timely notice either before or after receipt of the June 20, 1975 letter and by request that the Union bargain separately with it; that, during the course of the 1975 negotiations, the Company's only communication which might barely be considered a protest was made to the League rather than to the Union.

Accordingly, the judge in that case recommended dismissal of the 8(b)(1)(B) and (3) allegations of the General Counsel's complaint. There were also some other 8(b)(1)(A) allegations in that case, but those are not pertinent here.

In adopting the judge's dismissal of the 8(b)(1)(B) and (3) allegations, the Board held at page 317, footnote 1:

> In affirming the Administrative Law Judge's dismissal of those allegations of the complaint alleging that Respondent violated Sec. 8(b)(1)(B) and (3) of the Act, we rely on, in addition to *Resilient Floor and Decorative Covering Local Union No. 1247 of Brotherhood of Painters and Allied Trades, AFL-CIO (Linoleum Studio, Inc.)*, 233 NLRB 980 (1977), cited by the Administrative Law Judge, our Decisions in *Phoenix Air Conditioning, Inc.*, 231 NLRB 341 (1977), and *Ted Hicks and Associates, Inc.*, 232 NLRB 717 (1977). In each of the latter two cases, as in this case, the Board found that an employer, who was not a member of a multiemployer bargaining unit, had signed a memorandum agreement which bound it, absent timely notice to the contrary, to future contracts negotiated by the union and the multiemployer association. We find the rationales set forth in *Phoenix Air Conditioning* and *Ted Hicks and Associates, Inc.*, to be controlling in the case before us.

The *Resilient Floor* case cited above in *New York Typographical Union* involves different facts and issues than are present in the instant proceeding. That case pertained to a strike by the respondent union therein allegedly to compel various employers to sign contracts whereby those employers agreed to abide by the terms of the master labor agreement to be negotiated by the union and four multiemployer associations. In that case the Board stated at page 981:

> The question presented for our consideration herein is whether Respondent engaged in conduct proscribed by Section 8(b)(1)(B) and (3) of the Act by (1) directing a strike against the Employers

> herein notwithstanding their request to bargain on an association or individual basis and/or (2) by its continuing offer to execute interim contracts whereby the Employers agreed to abide by the terms of the master contract negotiated by Respondent and four multiemployer Associations to which none of the Employers belonged.

In that case, the Board held at pages 982 and 983:

> In sum, we find that Respondent's August 2 strike action against the Employers herein was lawfully instituted following timely offers to bargain with all Employers and negotiation to impasse with the Associations. We further find that the Employers' sole bargaining proposal was lawfully rejected by Respondent and, in the absence of any further request to bargain, Respondent's continuing offer to execute interim contracts constituted neither a refusal to bargain within the meaning of Section 8(b)(3) nor an attempt to unlawfully coerce the Employers in the selection of their bargaining representative in violation of Section 8(b)(1)(B). Accordingly, we shall dismiss the complaint in its entirety.

The *Phoenix Air Conditioning* case refered to above in *New York Typographical Union* involved allegations of Section 8(a)(1) and (5) issues, which are different than the issues and facts in the instant proceeding. The Board held in that case at page 342:

> As mentioned above, Respondent attempted to terminate its agreements with the Union by letter sent on July 24. The Union's business agent, William Miller, received the letter on July 28 and called Bob Brooks, an officer of Respondent, on the same day. Miller stated to Brooks that his notice was untimely and that the Union and Respondent still had a valid agreement between them. Brooks replied that the notice was effective and, therefore, all agreements were terminated. In these circumstances, where the notice was clearly untimely, Respondent violated Section 8(a)(5) of the Act by its conduct of attempting to terminate the memorandum and collective-bargaining agreements and thereafter repudiating and refusing to honor said agreement following the Union's demand for continued compliance therewith.
>
> Respondent asserted as a defense its inability to secure the performance bond required by the contract. However, the Board has consistently held that financial hardship is no justification for repudiation or modification of a collective-bargaining agreement or a term thereof. [Footnotes omitted.]

The *Ted Hicks* case referred to above in *New York Typographical Union* also involved allegations of 8(a)(1) and (5) issues, which are different than the issues and facts in the instant proceeding. The Board held in that case at page 714:

> Here, as we found earlier, Respondent, in its memorandum agreement, agreed to be bound by the results of a continuing collective-bargaining relationship between the Union and the AGC. The Union's notice to the AGC did not constitute an end to this relationship. Rather, it merely signaled the termination of the terms set forth in the 1974 contract and the desire to negotiate new terms for the next 2-year period. In these circumstances, Respondent either continued to be bound by the results of the negotiations between the Union and the AGC, or was obligated to give proper notice to the Union that it no longer intended to be so bound. Having falied to give any notice to the Union that it desired to cease giving effect to the memorandum agreement, Respondent is estopped from now asserting that it is not bound by the 1976 agreement.
>
> Accordingly, we find that by unilaterally failing and refusing to implement the existing collective-bargaining agreement between the Union and the AGC, Respondent refused to bargain with the Union in violation of Section 8(a)(1) and (5) of the Act. [Footnotes omitted.]

The ruling that the Respondent's alter ego theory did not constitute a valid affirmative defense to the General Counsel's complaint in this case was not predicated on the fact that an earlier unfair labor practice charge alleging a violation of Section 8(a)(1) and (5) of the Act on an alter ego theory had been filed and withdrawn by the union. (See the discussion at Tr. 133–149 and especially my comments at Tr. 141 and 142.) Thus, the Respondent's alter ego theory as an affirmative defense was not rejected because of administrative action by the Regional Director for Region 19 of the Board in some other case. Therefore, in my view, the ruling at the trial in this case was consistent with the Board's decision in *Hotel & Restaurant Employees Local 274 (Warwick Caterers)*, 269 NLRB 482 (1984), because the alter ego affirmative defense was not rejected because of the administrative action in an earlier unfair labor practice case. However, the unfair labor practice allegations in the *Hotel & Restaurant Employees* case involved Section 8(b)(7)(C) of the Act, and, thus, a remand was necessary in that case in view of the holding that, if the defense had been considered and found to have merit, ". . . all elements of the 8(b)(7)(C) violation would not have been satisfied." Here the General Counsel's allegations involve Section 8(b)(1)(B) of the Act, and, as indicated at the trial and herein, the alter ego theory would not establish an affirmative defense in these circumstances where PAC itself is an employer and Witty possesses authority for the purposes of collective bargaining and the adjustment of grievances on behalf of PAC.

General Counsel's Exhibit 3 and the testimony of Dilworth at the trial revealed that the intraunion charge against Witty, and the fine levied on Witty, was done because Witty was employed by a nonunion employer. General Counsel's Exhibit 6 shows the link, or connection, between the Respondent Union's fine and the collective-bargaining authority of Witty. General Counsel's Exhibit 6 shows that the $16,000 fine levied by the Union against Witty would be reduced to $8000—"pro-

vided that he sign a contract with Local 46 within the 30 days and his withdrawal be annulled in accordance with the International Constitution Article XXVII, Section 5." Considering the link between the substantial reduction in the amount of the fine against Witty, and Witty's exercising his collective-bargaining authority to sign a contract with the Union, I conclude that the evidence establishes that the Respondent Union has engaged in unfair labor practices within the meaning of Section 8(b)(1)(B) of the Act.

With regard to the Respondent's posttrial motion to stay, or in the alternative, motion to reopen hearing, I conclude that those motions lack merit because the Respondent has not shown a basis for staying this proceeding, nor has the Respondent shown that there is newly discovered evidence, or evidence previously unavailable to the Respondent which would be admissible in this proceeding and which would warrant the reopening of the trial.

CONCLUSIONS OF LAW

1. PAC, Inc. is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Respondent is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

3. Robert Witty is, and has been at all times material herein, a representative of an employer, PAC, Inc., for the purposes of collective bargaining and the adjustment of grievances.

4. The Respondent has engaged in unfair labor practices within the meaning of Section 8(b)(1)(B) of the Act by restraining and coercing an employer in the selection of his representatives for the purposes of collective bargaining and the adjustment of grievances by processing internal union charges against Robert Witty; by holding a trial before the Union's executive board on such charges against Robert Witty; and levying a fine against Robert Witty.

5. The unfair labor practices described above affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Since I have found that the Respondent has engaged in unfair labor practices within the meaning of Section 8(b)(1)(B) of the Act, I shall recommend to the Board that the Respondent be ordered to cease and desist from engaging in such unfair labor practices. I shall also recommend to the Board that the Respondent be ordered to take certain affirmative action in order to effectuate the policies of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[1]

ORDER

The Respondent, International Brother of Electrical Workers Local Union No. 46, affiliated with the International Brotherhood of Electrical Workers, AFL–CIO, Seattle, Washington, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Restraining and coercing an employer, PAC, Inc. in the selection of PAC, Inc.'s representatives for the purposes of collective bargaining and the adjustment of grievances by processing internal union charges against Robert Witty; by holding a trial before the Union's executive board on such charges against Robert Witty; and by levying a fine against Robert Witty.

(b) In any like or related manner restraining or coercing PAC, Inc. in the selection of representatives for the purposes of collective bargaining or the adjustment of grievances.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind the fine levied against Robert Witty and expunge from the Union's records all the documents relating to the internal union charge, trial, and fine of Robert Witty.

(b) Notify in writing both PAC, Inc. and Robert Witty that the Union has taken the foregoing action.

(c) Post at its office in Seattle, Washington, copies of the attached notice marked "Appendix."[2] Copies of the notice, on forms provided by the Regional Director for Region 19, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

APPENDIX

NOTICE TO MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT restrain and coerce an employer, PAC, Inc. in the selection of PAC, Inc.'s representatives for the purposes of collective bargaining and the adjustment of grievances by processing internal union charges against Robert Witty; by holding a trial before the Union's executive board on such charges against Robert Witty; and by levying a fine against Robert Witty.

[1] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[2] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

WE WILL NOT in any like or related manner restrain or coerce PAC, Inc. in the selection of representatives for the purposes of collective bargaining or the adjustment of grievances.

WE WILL rescind the fine levied against Robert Witty, and WE WILL expunge from the Union's records all documents relating to the internal union charge, trial, and fine of Robert Witty.

WE WILL notify in writing both PAC, Inc. and Robert Witty that we have taken the foregoing action.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL UNION NO. 46, AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO

Holyoke Water Power Company *and* Local 455, International Brotherhood of Electrical Workers, AFL–CIO. Case 1–CA–20618

11 January 1985

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS HUNTER AND DENNIS

On 31 August 1983 Administrative Law Judge Martin J. Linsky issued the attached decision. The Respondent, the Charging Party,[1] and the General Counsel filed exceptions and supporting briefs, and the Respondent and the Union filed answering briefs.[2]

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[3] and conclusions for the reasons set forth below and to adopt the recommended Order as modified.

The record shows that the Respondent operates a power plant which includes a Forced Draft Fan Room (fan room). The fan room contains two fans which force air into the Respondent's burners as a part of the combustion process. No one disputes that the fan room is very noisy, and Respondent's Station Superintendent Robert Dwyer acknowledged that there is a noise problem there. The Respondent provides earmuffs for those who must enter this room and has posted notices that the fan room is a "High Noise Area. Hearing Protection Must be Worn." Although no employees work full time in the fan room, the Respondent's mechanics and operators enter the room periodically to perform maintenance and repair work.[4]

The Respondent and the Union have had a collective-bargaining relationship since 1971. On 11 January 1983 the Union requested that the Respondent permit the Union's industrial hygienist to have access to the fan room to survey potential health and safety hazards. The Respondent denied the Union's request but gave the Union a summary of an overall noise survey performed in August 1982 by a hygienist engaged by the Respondent. This survey did not specifically cover the noise level of the fan room, but rather showed the weighted average of noise level exposures of certain employees. The Respondent later directed its test coordinator, Richard Ward, to take a noise level reading in the fan room and supplied the Union with a copy of Ward's report. Ward, who is not an industrial hygienist, testified that he was unaware of whether conditions in the fan room at the time of his reading were representative of its usual conditions.

The judge found that the Respondent was obligated to grant access to the fan room to an industrial hygienist of the Union's choice and that the Respondent violated Section 8(a)(1) and (5) of the Act by denying the Union's request for such access. In so doing, the judge noted the obligation of an employer to provide a union with information relevant and necessary to the union's performance of its representation duties. He noted also that an employer is obligated to bargain on request about health and safety conditions since they are terms and conditions of employment. Then, relying on *Winona Industries*, 257 NLRB 695 (1981), the judge noted that requests for access to survey for safety hazards are in the nature of requests for information and that access cannot be denied. He found that granting access would not cause the Respondent any undue hardship, and he noted the testimony of the Union's hygienist that its testing would take, at most, 1 day to complete.

In finding a violation, the judge rejected the Respondent's contentions that (a) access is irrelevant and unnecessary to the Union's representation duties, and (b) the Respondent did supply the information sought, albeit in the form of the test results then in the Respondent's possession. The judge noted that the many hazards inherent in exposure to high noise levels certainly make this matter relevant to the Union's representation duties. He further found the test results given the Union were inadequate for the Union's purposes. He noted that the first test merely gauged the average noise level to determine if it fell within OSHA standards, and he noted the undisputed testimony of the Union's hygienist that hearing can be damaged even where the average noise level falls within OSHA standards. Finally, he noted that there was some dispute as to the method and results of these tests.

In its exceptions the Respondent argues, inter alia, that the Union's request for access must be balanced against the Employer's property rights and that, here, its property rights must prevail because the Respondent has provided the Union with studies and has allowed the Union's business agent

[1] Hereafter the Union.

[2] The Respondent has requested oral argument. The request is denied as the record, the exceptions, and the briefs adequately present the issues and the positions of the parties.

[3] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[4] In sec. III,B of his decision, the judge stated that mechanics are usually there for an 8-hour day when they go into the fan room. However, Respondent's mechanic William O'Rourke testified that the amount of time spent in the fan room varies. He said that routine preventative maintenance entails about 15 minutes while work on the pump is usually an 8-hour job.

access to the fan room. Accordingly, the Respondent contends, it has provided the Union with an alternate means of obtaining the needed information, thus obviating the need for access to its premises.

We agree with the Respondent's contention that an employer's right to control its property is a factor that must be weighed in analyzing whether an outside union representative should be afforded access to an employer's property. *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956). Thus, we disagree with the judge's analysis insofar as it finds that a request for access is tantamount to a request for information; that is, the union is entitled to access if it is shown that the information sought is relevant to the union's proper performance of its representation duties. While the presence of a union representative on the employer's premises may be relevant to the union's performance of its representative duties, we disagree that that alone, ipso facto, obligates an employer to open its doors. Rather, each of two conflicting rights must be accommodated. *Fafnir Bearing Co. v. NLRB*, 362 F.2d 716 (2d Cir. 1966). First, there is the right of employees to be responsibly represented by the labor organization of their choice and, second, there is the right of the employer to control its property and ensure that its operations are not interfered with. As noted by the Supreme Court in *Babcock & Wilcox*, supra, 351 U.S. at 112, the Government protects employee rights as well as property rights, and "[a]ccommodation between the two must be obtained with as little destruction of one as is consistent with the maintenance of the other."

Thus, we are constrained to balance the employer's property rights against the employees' right to proper representation. Where it is found that responsible representation of employees can be achieved only by the union's having access to the employer's premises, the employer's property rights must yield to the extent necessary to achieve this end. However, the access ordered must be limited to reasonable periods so that the union can fulfill its representation duties without unwarranted interruption of the employer's operations. On the other hand, where it is found that a union can effectively represent employees through some alternate means other than by entering on the employer's premises, the employer's property rights will predominate, and the union may properly be denied access.

In sum, the circumstances presented in each case involving a request for access must be carefully weighed, and each of the conflicting rights must be carefully balanced and accommodated in reaching a decision. We shall in the future analyze such cases in this fashion, and we overrule those prior Board cases such as *Winona Industries*, supra, to the extent that they set forth an inconsistent analysis.

Applying this analysis to the instant case, we find that the Respondent's property rights, on balance, are outweighed and that the Respondent must afford the union hygienist reasonable access to its fan room to conduct noise level studies.

First, we agree with the judge that health and safety conditions are a term and condition of employment about which an employer is obligated to bargain on request. Clearly, health and safety data is relevant to the Union's representation obligation. *Minnesota Mining Co.*, 261 NLRB 27 (1982). It is a matter of common knowledge that exposure to excessive noise presents potential health hazards, and in this case no one disputes that the Respondent's fan room is very noisy. The Respondent's safety superintendent acknowledged that there is a noise problem there. In these circumstances, the employees' right to responsible representation entails the Union's obtaining accurate noise level readings for the fan room to ascertain the extent of the hazard and to suggest means of ensuring that employees are properly protected. Balancing this right against the Respondent's asserted property rights, we find that, here, the property rights must yield to the extent necessary to enable the union hygienist to independently conduct his noise level tests.

We note that the Respondent says that access would entail interference with production; however, we also note that the fan room is not a production area and no employees work there full time. Rather, only mechanics and operators enter periodically to maintain and repair the equipment. In these circumstances, it appears that the presence of a union hygienist in the fan room would occasion little if any interference with the production process. Moreover, for the reasons relied on by the judge, we agree that the test results which the Respondent supplied are insufficient to meet the Union's purposes. Nor is the Respondent's willingness to permit the Union's business agent to enter the fan room sufficient absent evidence that the business agent is qualified to perform the tests and evaluate the results.

Accordingly, we agree with the judge that the Respondent must permit a union hygienist to enter its fan room to test for noise hazards. However, since the judge did not in his recommended Order place any restrictions on the access ordered, we shall modify the recommended order to provide that the access be for a reasonable period sufficient to allow the union hygienist to fully observe and survey noise level hazards. This limitation is in line

with our resolve to accommodate the conflicting rights with as little destruction of one as is consistent with the maintenance of the other.[5]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Holyoke Water Power Company, Holyoke, Massachusetts, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(a).

"(a) On request, grant access, by an industrial hygienist designated by the Union, to the FD fan room for a reasonable period sufficient to permit the hygienist to fully observe and survey noise level hazards."

2. Substitute the attached notice for that of the administrative law judge.

[5] For this reason, and because such access has not even been shown necessary in the first place, we reject the contention of the General Counsel and the Union that the recommended Order should be modified to provide for plantwide access.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain in good faith with Local 455, International Brotherhood of Electrical Workers, AFL–CIO, by denying the Union's request for access to the Forced Draft Fan Room at our Mt. Tom facility by an industrial hygienist designated by the Union to observe and survey noise level hazards which are relevant to the Union's discharge of its bargaining obligation.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, on request, grant access by an industrial hygienist designated by the Union to the Forced Draft Fan Room for a reasonable period sufficient to permit the hygienist to fully observe and survey noise level hazards.

HOLYOKE WATER POWER COMPANY

DECISION

STATEMENT OF THE CASE

MARTIN J. LINSKY, Administrative Law Judge. This case arose upon a charge filed by Local 455, International Brotherhood of Electrical Workers, AFL–CIO (the Union) on January 14, 1983. The complaint, which issued on February 25, 1983, alleges that Holyoke Water Power Company (Respondent) violated Section 8(a)(1) and (5) of the National Labor Relations Act (the Act) by refusing to give the Union's industrial hygienist access to the forced draft fan room (FD fan room) at Respondent's Mt. Tom location to observe and survey safety hazards regarding noise levels since the Union's request on January 11, 1983.

Respondent, in its answer, denies the commission of any unfair labor practices. Although Respondent admitted it denied access it claims that access is not necessarily for, or relevant to, the Union's function as the exclusive bargaining representative of unit employees.

A hearing was held on April 11 and 12, 1983, in Boston, Massachusetts. All parties filed briefs. Based on the entire record in the case, including my observation of the witnesses and their demeanor, I make the following[1]

FINDINGS OF FACT

I. JURISDICTION

Respondent, Holyoke Water Power Company, is, and has been at all times material herein, a corporation organized under and existing by virtue of the laws of the Commonwealth of Massachusetts. At all times mentioned, Respondent has maintained its principal office and place of business at One Canal Street in Holyoke, Massachusetts, and is now and continuously has been engaged at said plant and others generating and supplying electric power to residential and commercial customers.

In the course and conduct of its business operations, Respondent annually derives gross revenues in excess of $250,000 and purchases and receives at its Holyoke, Massachusetts location products, goods, and materials valued in excess of $50,000 directly from points outside the Commonwealth of Massachusetts. The Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

It is admitted and I find that the Union, Local 455, International Brotherhood of Electrical Workers, AFL–CIO, is, and has been at all times material, a labor organization within the meaning of Section 2(5) of the Act.

[1] The General Counsel's motion to correct the transcript is granted.

III. THE ALLEGED UNFAIR LABOR PRACTICE

A. *Issue Presented*

The only issue is whether Respondent violated Section 8(a)(1) and (5) of the Act by refusing to give an industrial hygienist designated by the Union access to the FD fan room, at Respondent's Mt. Tom facility to observe and survey safety hazards regarding noise levels.

B. *Background and Facts*

Since 1971 the Union has been the exclusive collective-bargaining representative of all employees of Respondent employed in its production and operations department at its Mt. Tom station, Riverdale station, Hadley Falls station, and Holyoke Hydro station in Holyoke, Massachusetts. The Union has been recognized as such representative by Respondent and they have executed successive collective-bargaining agreements.

Before 1981 Respondent generated power using oil. In 1981, however, the Mt. Tom facility began converting to coal as its power source. This change was subject to a contract reopener under the parties' 1980–1982 collective bargaining agreement.

In the fall of 1981, Respondent and the Union began negotiations on the effect of this conversion on the bargaining unit employees. Health and safety matters were among the issues discussed in the reopener. During the negotiations on the coal reopener, Respondent retained an acoustical engineering firm, Goodfriend Associates, to make a presentation to the Union concerning noise exposure in the plant. The Union retained an industrial hygienist, Richard Youngstrom, to help it interpret the report presented by Respondent and to help the Union identify safety hazards and make recommendations for controlling such hazards.

The coal reopener negotiations concluded in November 1981, with various points of agreements between the parties. The contract containing the coal reopener was due to expire on July 1, 1982, and the parties negotiated toward a new contract from May 1982 until June 1982. The Union raised several health and safety matters in those negotiations. A new collective-bargaining agreement was reached, and is currently in effect.

After the coal conversion was finalized, the Union requested that its industrial hygienist be given access to Respondent's premises to survey safety hazards. This request was denied and led to an unfair labor practice charge, which was settled under the terms of a settlement agreement permitting access by the Union's industrial hygienist to survey hazards associated with the conversation to coal. The FD fan room was not mentioned in the settlement agreement.

Edward Collins, the Union's business manager and financial secretary, and Youngstrom met with representatives of the Respondent on January 11, 1983, to discuss compliance with the settlement agreement. At this meeting, access was granted to those parts of the plant covered in the settlement agreement but access was denied to the FD fan room. Access was denied by Respondent's plant superintendent Robert Dwyer and Regional Personnel Manager Donald Riga. The only reason given for this denial was that the FD fan room was not covered in the settlement agreement.

Youngstrom conducted a survey of potential health and safety hazards on January 11, 1983. The results of this survey and his recommendations were included in a report submitted to the Union and used by the Union in collective bargaining with respect to health and safety matters.

Respondent provided the Union with a summary of a noise survey done by industrial hygienist designated by Respondent, i.e., Oneil Banks. The survey was taken in August 1982, but did not include the FD fan room.

The FD fan room is a room containing two forced-draft fans which force air into the station's burners. The fans, driven by motors, are part of the combustion process of Respondent. The FD fan room is approximately 20 feet by 40 feet and 30 feet high. In addition to the two fans the room contains two limitex sump pumps, various piping, four ash hoppers that collect ash, and louvers which are built into the walls and vary the amount of air pulled into the room.

The construction and operation of the FD fan room has been the same since it was built in 1960, however, the conversion to coal has increased the percentage of time the fans are required to operate at full speed from 60 percent to about 95 percent of the time.

While no employees are assigned to work in the FD fan room full time, employees must enter the room in the course of their jobs for various purposes and at various times. Mechanics must enter the FD fan room to repair pumps, repair leaks, and do preventive maintenance and other duties to ensure proper functioning of the fans and meters. Mechanics are usually in the room for an 8-hour day when they go into the FD fan room. On several occasions mechanics have spent 2 or 3 straight days working in the room, depending on the job. Preventive maintenance done by mechanics requires about 15 or 20 minutes in the FD fan room once every month. Utility operators go into the FD fan room every 2 hours during an 8-hour shift and remain in the room between 5 and 10 minutes each time as part of their "rounds." Those "rounds" include checking bearings, checking oil levels, opening and closing valves, and checking that nothing is out of order with either sump pump. Occasionally utility operators have to spend up to an hour in the room.

There is no dispute about the fact that the FD fan room is extremely noisy. Witnesses testifying for both the General Counsel and Respondent testified that the room was so noisy that a conversation was impossible and you had to read lips to communicate. Respondent has signs posted outside the FD fan room which warn, "High Noise Area Hearing Protection Must Be Worn." Employees testified as to the effects on them of exposure to noise in the FD fan room. These effects included ringing in the ears, temporary decrease in hearing ability and excessive fatigue. A year or so prior to the hearing in this case an employee named James Parnicky, a utility operator, had complained to the Union about the noise in the FD fan room. In addition, during the reopener talks in November 1982, Norman Racine, a mechanic, had likewise complained about the noise in the FD fan room.

Respondent provides earmuffs or earphones for employees and others who must go into the FD fan room. Employees credibly testified that they were less than satisfied with this protection, explaining that the earmuffs or earphones often fell off in the course of their work and were difficult to adjust over other required equipment such as hard hats.

After denying the Union's request for access to the FD fan room, Respondent discovered that it had never measured the noise level in the room. On February 8, 1983, Respondent directed Test Technician Supervisor Richard Ward to conduct readings on the noise level in the FD fan room. Ward testified that since he was not an industrial hygienist, he could not make any recommendations about what to do with his readings. He also testified that he had no experience designing controls and had no way of knowing if he took his readings under representative conditions. Respondent sent a copy of Ward's report to the Union on March 18, 1983.

C. *Analysis*

It is well established that an employer has a duty to provide a union with information which is reasonably necessary and relevant to the Union's duty to represent its members. Equally settled is that safety and health conditions are terms and conditions of employment about which an employer is obligated to bargain on request. *Gulf Power Co.*, 156 NLRB 622 (1966), enfd. 384 F.2d 822 (5th Cir. 1967); *Minnesota Mining & Mfg. Co.*, 261 NLRB 27 (1982). Respondent contends that the access requested here by the Union is not reasonably necessary and relevant to the Union's duty to represent employees because the Union has not "demonstrated a safety concern among employees." The essence of this contention is that no employee on the union-management safety committee raised the issue at those meetings and no grievance has been filed, therefore, the information is not relevant. Respondent argues further that it has demonstrated an awareness of the high noise levels and has taken steps to remedy the situation.

Employee requests for union action is not determinative of a union's obligation to bargain regarding the matter. It is noted, however, that the reopener talks raised the issue of noise levels in parts of the plant and reasonably and legitimately raised the issue of noise generally as an issue the Union should concern itself with. As noted earlier utility operator James Parnicky and mechanic Norman Racine had complained about noise in the FD fan room and Racine had brought this to the attention of Respondent 2 months before access to the FD fan room was requested.

Respondent also contends that because no employees work full time in the FD fan room, the information about noise there is relevant. Testimony from industrial hygienists retained by the Respondent and the Union explained the hazard of exposure to noise at certain levels. The hazards include damage to the ear, loss of hearing, nervousness, hypertension, and psychological problems. The probability of such problems certainly are relevant to the Union's duty to represent its members.

The Board held recently that an employer's refusal to give access to a union industrial hygienist for inspection and survey of safety hazards, violates Section 8(a)(1) and (5) of the Act. *Winona Industries*, 257 NLRB 695 (1981). Such access is treated as in the nature of information and access cannot be denied. The facts here put this case squarely within the principles of *Winona*, supra. In *Winona*, as here, Respondent argued that it was not obligated to give access to the Union's industrial hygienist because even if relevant, the information sought had been given or was available through other means. The results of a noise dosimeter study taken at Respondent's Mt. Tom facility in August 1982, by Respondent's industrial hygienist, Oneil Banks, were given to the Union. The results of a later sound level test performed in the FD fan room by Richard Ward, a test coordinator for Northeast Utilities Service Company, Respondent's parent company, were also provided. These results do not change the Union's need for access by its industrial hygienist. The study from Banks did not focus specifically on several items which the Union needed to test. There was also some dispute as to the method and results of those tests. Respondent's study was not sufficient to give the Union information which it needed to recommend and design controls, but rather checked an average noise level to see if it was within OSHA compliance. It is informative to note that in preparing for trial in this case Respondent's lead counsel, Jason Berger, physically inspected the FD fan room and had one of his witnesses testify as to what happened when the witness and Berger tried to have a conversation inside the FD fan room.

There was unrebutted testimony by the Union's industrial hygienist that hearing damage can take place even when weighted average noise levels are within OSHA compliance. This information was not supplied. Banks admitted that his study could not tell for what period of time an employee had been exposed to peak noise levels, for how long, or how many times. He also admitted that factors such as the presence or absence of windows and doors and whether or not they were opened would affect noise level exposure perhaps significantly, but such things were not in his reports. All of these omissions make the offered studies inadequate for the Union's purposes and no adequate substitute for permitting access to the FD fan room by the Union's industrial hygienist.

Furthermore, granting access to the Union's industrial hygienist would not cause any undue hardship or inconvenience to Respondent or interfere with its business operations. Nothing in the FD fan room was confidential in nature. The Union-designated industrial hygienist Richard Youngstrom testified the test would take probably less than half a day or at most 1 day. After the Union's January 11, 1983 request for access was denied, Respondent had tests run and turned the results over to the Union. It could have just as easily granted the Union that same access to run its own test and should have.

I find that Respondent had an obligation to grant access to the FD fan room to the Union's industrial hygienist. By denying such request, Respondent refused to bargain in good faith and violated Section 8(a)(1) and (5) of the Act.[2]

CONCLUSIONS OF LAW

1. Respondent, Holyoke Water Power Company, is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Local 455, International Brotherhood of Electrical Workers, AFL–CIO is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

3. By denying the Union's request for access by an industrial hygienist chosen by the Union to the FD fan room at Respondent's Mt. Tom facility to observe and survey noise level hazards, which were relevant to the Union's discharge of its bargaining obligation, Respondent refused to bargain in good faith and violated Section 8(a)(1) and (5) of the Act.

REMEDY

Having found that Respondent violated Section 8(a)(1) and (5) of the Act, I recommend that it be ordered to cease and desist therefrom and in any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act. I also recommend that Respondent be ordered to take certain affirmative action necessary to effectuate the policies of the Act. I will not recommend a broader remedial order than the posting of a notice and the granting of access to the FD fan room. However, future requests for access to parts of the plant by the Union should be treated by Respondent consistent with the principles underlying *Winona*, supra.

[2] An analysis of the rationale underlying the "time study cases" cited by the General Counsel also support the General Counsel's position that the denial of access violated the Act. The "time study cases" concluded that to deny the Union's time study expert access to conduct his own tests even though Respondent turned over the results of its time study tests violated the Act. *Fafnir Bearing Co. v. NLRB*, 146 NLRB 1582 (1964), enfd. 362 F.2d 716 (2d Cir. 1966), *Kendall Co.*, 196 NLRB 588 (1972), *Wilson Athletic Goods*, 160 NLRB 621 (1968).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[3]

ORDER

The Respondent, Holyoke Water Power Company, Holyoke, Massachusetts, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain in good faith with Local 455, International Brotherhood of Electrical Workers, AFL–CIO by denying the Union's request for access to the FD fan room at Respondent's Mt. Tom facility by an industrial hygienist chosen by the Union to observe and survey noise level hazards which are relevant to the Union's discharge of its bargaining obligations.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, grant access to the FD fan room by an industrial hygienist designated by the Union to observe and survey noise level hazards.

(b) Post at its Mt. Tom facility in Holyoke, Massachusetts, copies of the attached notice marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Region 1, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[3] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[4] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

EPE, Inc. *and* Amalgamated Clothing and Textile Workers Union, AFL–CIO. Case 5–CA–16111

11 January 1985

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS HUNTER AND DENNIS

On 2 August 1984 Administrative Law Judge Marvin Roth issued the attached decision. The Respondent filed exceptions and the Charging Party and the General Counsel each filed a response to the Respondent's exceptions with a supporting brief.[1]

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, EPE, Inc., Fredericksburg, Virginia, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

[1] The General Counsel and the Charging Party each moved to strike the Respondent's exceptions as not conforming to the requirements of Sec. 102.46(b) of the Board's Rules and Regulations. We find it unnecessary to pass on these motions in view of our determination that the exceptions lack merit.

[2] In adopting the judge's conclusion that the Respondent violated Sec. 8(a)(5) and (1) of the Act, inter alia, by canceling its collective-bargaining agreement with the Union, we find it unnecessary to rely on his finding that the wage reopener provision of the agreement does not provide for the cancellation of the entire collective-bargaining agreement in the event of the failure of the parties to reach agreement in reopener negotiations. We rely instead on the other grounds stated by the judge for finding that the Respondent unlawfully canceled the collective-bargaining agreement.

DECISION

STATEMENT OF THE CASE

MARVIN ROTH, Administrative Law Judge. This case was heard at Washington, D.C., on May 30, 1984. The charge was filed on January 24, 1984, by Amalgamated Clothing and Textile Workers Union, AFL–CIO (the Union). The complaint, which issued on March 6, 1984, and was amended on March 15, 1984, and at the hearing alleges that EPE, Inc., formerly European Parts Exchange, Inc. (Respondent or the Company),[1] violated Section 8(a)(1) and (5) of the National Labor Relations Act. The gravamen of the complaint is that the Company allegedly (1) approached wage reopener negotiations with a fixed position, (2) insisted to impasse on a nonmandatory subject of bargaining, and (3) unilaterally terminated its contract with the Union. The Company's answer denies the commission of the alleged unfair labor practices. All parties were afforded full opportunity to participate, to present relevant evidence, to argue orally, and to file briefs. Briefs were waived.

On the entire record in this case and from my observation of the demeanor of the one witness, and having considered the arguments of the parties, I make the following

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

The Company, a California corporation, with an office and place of business in Fredericksburg, Virginia, is engaged in the manufacture and nonretail sale and distribution of foreign automobile parts and related products. In the operation of its business, the Company annually sells and ships from its Fredericksburg facility, products valued in excess of $50,000 directly to points outside of Virginia. I find, as the Company admits, that it is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE BARGAINING UNIT INVOLVED

It is undisputed, and I so find, that since September 28, 1982, and at all times material, the Union has been and is the certified and exclusive collective-bargaining representative of the employees in the following appropriate unit:

> All production and maintenance employees employed by the Company at its Fredericksburg, Virginia location, including parts department employees, but excluding all other employees, office clerical employees, guards and supervisors as defined in the Act.

IV. BACKGROUND: HISTORY OF PRIOR LITIGATION

The Company's response to unionization has been the subject of two previous unfair labor practice proceedings. The facts of the second case are closely related to those of the present case. In June 1981, the Union commenced an organizational campaign among the employees at the Fredericksburg facility. In *European Parts Exchange*, Case 5–CA–13517, the administrative law judge found, in sum, that the Company responded to this campaign by discriminatorily discharging the leading union adherent after subjecting him to harassment, isolation, altered working conditions, and unwarranted discipline, and otherwise violating the Act by coercive interrogation, creating the impression of surveillance of union activities, and unlawfully restricting employee union activity. The judge found and concluded that the Company thereby violated Section 8(a)(1) and (3) of the Act, and recommended, inter alia, a broad cease-and-desist order by reason of the Company's "flagrant disregard for the

[1] The caption of this case was amended at the hearing to reflect Respondent's new name, effective as of January 1, 1984.

fundamental rights guaranteed employees by the Act." No exceptions were filed and, on June 2, 1983, the judge's recommended Order was adopted by the Board.

On September 28, 1982, following a Board-conducted election, the Board certified the Union as representative of the employees in the appropriate unit. The certification is reported at 264 NLRB 224. In late January 1983,[2] the Company and the Union commenced contract negotiations, and on April 25 reached complete agreement on the terms of a contract. That fact has never been in dispute. Nevertheless, despite its own promises and repeated requests by the Union, the Company did not execute the contract until December 5, following an unfair labor practice hearing before a second administrative law judge. In the meantime, the Union filed unfair labor practice charges which resulted in the issuance of a consolidated complaint and the practice hearing on December 5 in Cases 5-CA-15584 and 5-CA-15777. On January 20, 1984, the judge issued his decision, finding and concluding that the Company violated Section 8(a)(1) and (5) of the Act by (1) failing and refusing to execute and abide by the terms of the agreed-upon contract, (2) unilaterally increasing the unit employees' health care insurance premiums without notifying and bargaining with the Union, (3) unilaterally increasing wages without notifying and bargaining with the Union, and (4) dealing directly with the unit employees and bypassing the Union by polling the employees as to whether they desired health insurance coverage and if so, what type of coverage they desired. The above third violation consisted of a 15-cent hourly wage increase which was granted on September 12 and announced to the employees by letter shortly thereafter. The judge recommended, inter alia, by way of affirmative relief, that the Company be ordered to forthwith sign the contract, reimburse the employees for any losses as a result of its failure to honor the contract, reinstitute the insurance premiums as they existed prior to the July 8 increases, pay the carrier the difference between those premiums and the increased premiums, and reimburse the employees for the increases they paid as a result of the July 8 increase. However, the judge recommended that: "This obligation shall be tolled either on the date Respondent bargains to an agreement with the Union over the premium increases involved herein or on the date a bona fide impasse exists after good-faith bargaining over the matter." Respondent filed exceptions which were pending before the Board at the time of the present hearing. On June 19, 1984, the Board issued its Decision and Order in 270 NLRB 1244. The Board affirmed the judge's findings and conclusions but modified the proposed order. The Board rejected the Company's argument that the contract permitted it to grant wage increases without discussion with the Union. The Board deleted from its order, the proposed qualification regarding bargaining over insurance premiums. The Board held that article XIX of the contract precluded the Company from increasing premiums paid by the employees for insurance coverage during the effective period of the contract without the agreement of the Union. The Board reserved for the compliance stage of the proceeding the Company's argument that 5 cents of the 15-cent wage increase was to compensate the employees for the insurance premium increase.

[2] All dates are in 1983 unless otherwise indicated.

V. THE ALLEGED UNFAIR LABOR PRACTICES IN THE PRESENT CASE

A. *The Facts*

The evidence submitted in the present proceeding consists of stipulated or admitted matters and the uncontroverted testimony of Union Vice President and Regional Director Bruce Dunton, the only witness. The contract between the Company and the Union was effective by its terms from March 15, 1983, through July 1, 1984, and subject to renewal from year to year thereafter. The contract contained in pertinent part the following articles:

> ARTICLE XIX—HEALTH AND WELFARE INSURANCE PLANS
>
> During the life of this Agreement, the Company will maintain their present insurance plans. The cost of such plans, paid by the employees, shall not be increased during the life of this Agreement. . . .
>
> ARTICLE XXI—WAGE RATE AND CLASSIFICATIONS
>
> A. The wage rate and classification Schedule A, attached hereto, and made a part of this Agreement, shall become effective on April 25, 1983. This schedule does not prohibit the Company from paying higher rates for any employee or any classification.
>
> B. Wage Reopener.
>
> 1. Between the dates of November 1 and November 15, 1983, either party, by written notice to the other party, can open this Agreement on wages only.
>
> 2. The parties shall meet within five (5) working days after receipt of said notice and try to reach agreement on new wage rates.
>
> 3. Should the parties fail to reach agreement on the new wage rates by December 15, 1983, then either party can give five (5) working days notice to cancel said agreement and the Agreement will be cancelled after the five (5) day notice unless extended in writing by both parties.
>
> 4. Should the parties reach agreement on new wage rates, then said rates will be effective December 16, 1983.

The language of articles XIX and XXI was drafted by the Company and submitted as part of its final offer, which was accepted by the Union.

By letter dated November 15, the Company informed the Union that it was reopening the contract in accordance with terms of article XXI. By letter dated November 21, the Union indicated that it was available to meet, and again requested the Company to sign the contract. By letter dated November 22, the Company stated as follows:

Our proposal for a wage increase is that which was received by the employees on September 12, 1983. The specifics are as follows:

(1) 10¢ per hour cost of living increase.

(2) An additional 5¢ per hour to pay for increased insurance cost.

(3) We propose an additional 10¢ per hour for the lead personnel due to the increased duties and responsibilities.

We would like your written answer no later than December 2, 1983.

In a subsequent position letter to the Board's Regional Office following the filing of the present charge, the Company's labor relations consultant confirmed that the November 22 proposal consisted of the wage and insurance increases which were the subject of the then pending unfair labor practice proceeding. By letter dated November 29, the Union requested a meeting to discuss the Company's proposal and any proposals which the Union might wish to submit.

On December 5, immediately following the unfair labor practice hearing, company and union representatives met informally for about 15 minutes. The Union asked if there was any new money involved in the proposal beyond that for the lead personnel. The Company answered that there was not and that there was no money available for further increases. At this point Union Representative Dunton responded that: "If you find any money between now and spring, give us a call and we will sit down and conclude." There was no further discussion of the matter of wage increases. The Union confirmed its position by letter dated December 9. Thereafter, by letter dated December 19, the Company asserted that: "It would appear by our meeting on December 9th, that the parties have reached an impasse per the Wage Re-opener provision of the Agreement. Therefore the Company has put our last offer in effect, and hereby gives notice to the Union of our terminating said Agreement per its Provisions." At the present hearing, the Company stipulated that by its letter of December 19, the Company acted to cancel the entire contract.

By letter dated January 6, 1984, the Union again restated its position, asserted that it had not broken off negotiations, and requested a meeting and that "if necessary, a Federal mediator be present at that meeting." The Company did not respond to this letter. Instead, by letter dated March 30, 1984, the Company asserted that:

> After review of the sales of the Company by Headquarters in California, it was decided by the Board of Directors to increase the hourly rates of all employees. Therefore we would propose a ten cents (.10) per hour increase effective April 1, 1984. Said amount covers any additional amounts of insurance premiums that might have been or will be necessary at some future date.

The Company also proposed negotiations for a new contract "as the old agreement was cancelled." By letter dated April 12, the Union refused to agree "to an increase in wages, as outlined in your letter, that is coupled with insurance premiums." The Union agreed to commence negotiations for a new or amended contract in accordance with the terms of the current contract. As of the time of the present hearing the Company had not implemented the proposed 10-cent-per-hour increase.

Concluding Findings

I find that the Company violated Section 8(a)(1) and (5) of the Act by the manner in which it purported to reopen the contract, and by unilaterally repudiating the contract when it did not get its way. First, the Company's action in purporting to reopen the contract for wage negotiations was nothing more than a transparent attempt to coerce the Union into ratifying the Company's unilateral and unlawful actions in raising insurance premiums and granting a general 15-cent-per-hour wage increase. It is established Board policy that where, as here, an employer unlawfully (whether for discriminatory motives or in violation of a collective-bargaining obligation), grants wage increases, the Board will not punish the employees by directing the employer to rescind the increases. Rather, the Board will simply order the employer to refrain from such conduct in the future and to bargain in good faith with the representative. See, e.g., *Dayton Blueprint Co.*, 193 NLRB 1100, 1111 (1971); *Century Papers, Inc.*, 155 NLRB 358, 362–363 (1965). Indeed, in Case 5–CA–15584 the Board left open the possibility that part of the wage increase might be used as an offset against reimbursement for the insurance premium increases. The Company never rescinded the wage increases. Therefore, in purporting to reopen the contract for wage negotiations, the Company did not propose anything which the employees were not already receiving. Moreover, the Company proposed that 5 cents per hour of the proposed increase be used to pay for increased insurance costs, although that increase itself was unlawful insofar as it was passed on to the employees. Therefore, the Company was engaging in another step in an unlawful course of conduct. As for the proposed increases to lead personnel (assuming that they had not already been put in effect), they could have been handled by negotiations under the second sentence of article XXI, paragraph A, without any need to formally reopen the entire article. As found, when the parties met briefly on December 5, the Company told the Union that its so-called "proposal" did not involve any new money and the Company could not afford any increases. The Company thereby precluded any meaningful bargaining concerning wages, and disclosed the true motivation for its actions. The Company placed the Union in a position where it could only (1) propose wage *decreases* which neither party wanted, (2) accept the Company's bogus proposal, and thereby give approval to the Company's prior unlawful actions, or (3) reject that proposal and thereby give the Company a pretext (which it used) to unilaterally terminate the entire contract. I find that the Company violated Section 8(a)(5) by dealing in bad faith with the Union and by submitting a proposal which was nothing more than a demand for approval of its prior unlawful actions, and that the Company did not in fact, or in good faith, reopen article XXI for true wage negotia-

tions. Therefore although the Company's proposal nominally dealt with the subject of wages, the Company did not validly reopen article XXI. For this if no other reason the contract remained in effect. It follows that the Company also acted in bad faith by later proposing a wage increase effective April 1, 1984, notwithstanding that the time for validly reopening article XXI had expired and the contract term ran until July 1, 1984. As the proposed wage increase purported to compensate the employees for the unlawful increased insurance premiums, the Company's proposal, if implemented, would have been unlawful for this additional reason.

Even if the Company, in November, validly reopened article XXI for bona fide wage negotiations, this did not give the Company the right, as it did, to use failure of agreement as an excuse to cancel the entire contract. First, the Union did not break off negotiations. Rather, the Union requested further negotiations "if you find any money between now and spring." Therefore, even assuming good faith on the part of the Company, there was no impasse in negotiations. See generally *Hi-Way Billboards, Inc.*, 206 NLRB 22, 23 (1973), revd. on other grounds 500 F.2d 181 (5th Cir. 1974); *Taft Broadcasting Co.*, 163 NLRB 475, 478 (1967), affd. sub nom. *American Federation of Television & Radio Artists v. NLRB*, 395 F.2d 622 (D.C. Cir. 1968). Second, article XXI does not provide by its terms for cancellation of the entire contract. Rather, when considered in context, it is evident that the phrase "said agreement" as used in pargaraph 3 refers to the wage reopener agreement. Therefore, if the parties fail to reach agreement on new wage rates after bona fide negotiations, the contract, including wage rates, remains in effect and both parties are precluded from taking unilateral action. Although the meaning of paragraph 3 is not crystal clear, the language was drafted by the Company. Moreover, the Company's interpretation, if correct, would mean that failure of agreement on one subject, i.e. wages, could have drastic and disruptive results, namely, cancellation of the entire contract and potential strike or lockout action. Therefore, insofar as paragraph 3 may be ambiguous as to its meaning, the doubt should be resolved against the Company and in favor of contract stability. Third, even if paragraph 3 sanctioned cancellation of the entire contract, the Company could not lawfully do so because there was no compliance by either or both parties with the notice provisions of Section 8(d) of the Act. In his closing argument at the hearing, the Company's representative asserted that: "There is no case that we could find that had to do in regards to contracts that are so-called cancelled in mid-term because the parties couldn't get together." Evidently the Company's representative, who has many years of experience in labor negotiations, did not look hard. In *NLRB v. Lion Oil Co.*, 352 U.S. 282, 291–293 (1957), the Supreme Court held, insofar as pertinent to the present case, that the notice requirements of Section 8(d) operate "wholly independently of whatever notice requirement the parties have fixed for themselves," and that the statutory notice requirements are applicable "in the middle of a contract which authorizes a reopening on wages." See also *NLRB v. Huttig Sash & Door Co.*, 377 F.2d 963, 968 (8th Cir. 1967); *Pacific Grinding Wheel Co.*, 220 NLRB 1389 (1975), enfd. 572 F.2d 1343 (9th Cir. 1978).

Therefore I find, as discussed, that the Company violated Section 8(a)(1) and (5) of the Act. I find that the Company's position in this case is not only lacking in merit, but may fairly be characterized as frivolous. I further find that the Company's actions were also violative of the Board's broad cease-and-desist order in Case 5-CA-13517, and a continuation of the unfair labor practices found in Case 5-CA-15584.

CONCLUSIONS OF LAW

1. The Company is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. All production and maintenance employees employed by the Company at its Fredericksburg, Virginia location, including parts department employees, but excluding all other employees, office clerical employees, guards and supervisors as defined in the Act, constitute a unit appropriate for collective bargaining within the meaning of Section 9(b) of the Act.
4. At all times material the Union has been and is the exclusive collective-bargaining representative of the employees in the unit described above.
5. By improperly invoking the wage reopener provision of its contract with the Union, dealing in bad faith with the Union, continuing its prior course of unlawful conduct, and unilaterally terminating its contract with the Union, the Company has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(1) and (5) of the Act.
6. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that the Company has committed violations of Section 8(a)(1) and (5) of the Act, I shall recommended that it be required to cease and desist therefrom, and to take certain affirmative action designed to effectuate the policies of the Act. I shall recommend that the Company be ordered to maintain and give full effect to its collective-bargaining contract with the Union and any successor contracts, to bargain in good faith with the Union, to reimburse the unit employees for their loss of wages and of other employment benefits, if any, as a result of the Company's termination of the contract, with interest, in the manner set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), and *Florida Steel Corp.*, 231 NLRB 651 (1977), and to post appropriate notices.

The Company's conduct in this case demonstrates both a proclivity to violate the Act and a tendency to engage in frivolous litigation before the Board.[9] Thus the Com-

[9] Although no exceptions were filed in Case 5-CA-13517, the judge's decision may properly be considered in determining whether the Company has demonstrated a proclivity to violate the Act. *Operating Engineers Local 12 (Associated Engineers)*, 270 NLRB 1172 (1984).

pany persisted in litigating Case 5–CA–15584 etc., notwithstanding that it never disputed that it had negotiated the contract with the Union. Therefore, like the administrative law judge in Case 5–CA–13517, I am recommending that the Company be ordered to cease and desist from infringing in any manner on the rights guaranteed in Section 7 of the Act. I am also recommending to the General Counsel that it seek judicial enforcement of the outstanding orders against the Company. I am further recommending that the Company be ordered to reimburse the Union for its costs and expenses incurred in the preparation and conduct of contract negotiations during the period from November 15, 1983, through April 12, 1984, and in the investigation, preparation, presentation, and conduct of this proceeding. See *Wellman Industries*, 248 NLRB 325, 329 (1980); *Koval Press*, 241 NLRB 1261, 1263–64 (1979), enfd. 622 F.2d 579 (3d Cir. 1980). But for the Company's action in reopening the contract for unlawful reasons, there would have been no need for such negotiations. Therefore, the Union's expenses are attributable to the Company's unfair labor practices.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[4]

ORDER

The Respondent, EPE, Inc., Fredericksburg, Virginia, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain collectively and in good faith with Amalgamated Clothing and Textile Workers Union, AFL–CIO as the exclusive bargaining representative of the employees in the appropriate unit, by invoking the wage reopener provision of their contract for improper or unlawful reasons, dealing in bad faith with the Union, continuing to engage in prior unlawful conduct, or unilaterally terminating its contract with the Union.

(b) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action which is found necessary to effectuate the policies of the Act.

(a) Maintain and give full effect to its collective-bargaining contract or contracts with the Union.

(b) Bargain collectively and in good faith with the Union as the exclusive representative of its employees in the appropriate unit.

(c) Reimburse the unit employees for their loss of wages or other employment benefits, if any, as a result of its termination of the contract with the Union, with interest, as set forth in the section of this decision entitled "The Remedy."

(d) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Pay to the Union the costs and expenses incurred by it in the preparation and conduct of contract negotiations during the period from November 15, 1983, through April 12, 1984, and in the investigation, preparation, presentation, and conduct of this proceeding, including salaries and travel expenses, such costs and expenses to be determined at the compliance stage of this proceeding.

(f) Post at its Fredericksburg, Virginia place of business copies of the attached notice marked "Appendix."[5] Copies of the notice, on forms provided by the Regional Director for Region 5, after being signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(g) Notify the Regional Director in writing within 20 days from the date of this Order what steps Respondent has taken to comply.

[4] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[5] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT fail or refuse to bargain collectively and in good faith with Amalgamated Clothing and Textile Workers Union, AFL–CIO as the exclusive bargaining representative of our employees in the appropriate unit, by invoking the wage reopener provision of our contract for improper or unlawful reasons, dealing in bad faith with the Union, continuing to engage in prior unlawful conduct, or unilaterally terminating our contract with the Union. The appropriate unit is:

> All production and maintenance employees employed by the Company at its Fredericksburg, Virginia location, including parts department employees, but excluding all other employees, office clerical employees, guards and supervisors as defined in the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of your right

to engage in union or concerted activities, or to refrain therefrom.

WE WILL maintain and give full effect to our contract or contracts with the Union.

WE WILL bargain collectively and in good faith with the Union as the exclusive representative of our employees in the appropriate unit.

WE WILL reimburse you for your loss of wages or other employment benefits, if any, as a result of our unlawful termination of the contract with the Union, with interest.

WE WILL compensatc the Union for its costs and expenses incurred in preparing for and participating in contract negotiations during the period from November 15, 1983, through April 12, 1984, and in preparing for and conducting this case.

EPE, INC.

Building Material & Dump Truck Drivers, Local Union No. 420, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America *and* Mike Sullivan and Associates. Case 21–CA–21452.

11 January 1985

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS HUNTER AND DENNIS

On 24 August 1984 Administrative Law Judge Gerald A. Wacknov issued the attached decision. The Charging Party filed exceptions and a supporting brief, and the Respondent filed an answering brief.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

[1] The Charging Party has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

DECISION

STATEMENT OF THE CASE

GERALD A. WACKNOV, Administrative Law Judge. Pursuant to notice, a hearing with respect to this matter was held before me in Los Angeles, California, on April 23, 24, 25, 26, and 27, 1984. The initial charge was filed on August 2, 1982, by Mike Sullivan and Associates.

On April 29, 1983, the Regional Director for Region 21 of the National Labor Relations Board (the Board) issued a consolidated complaint and notice of hearing alleging, inter alia,[1] a violation by Building Material & Dump Truck Drivers, Local Union No. 420, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Respondent or the Union) of Section 8(a)(1), (3), and (4) of the National Labor Relations Act (the Act).

The parties were afforded a full opportunity to be heard, to call, examine and cross-examine witnesses, and to introduce relevant evidence. Since the close of the hearing, briefs have been received from the General Counsel, counsel for Respondent, and the Charging Party.

On the entire record, and based on my observation of the witnesses and consideration of the briefs submitted, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent is a labor organization engaged in representing its employee-members in matters of collective bargaining with various employers located in Southern California. In the course and conduct of its business operations, Respondent annually remits per capita dues of its members in an amount in excess of $50,000 directly to the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, which is headquartered in Washington, D.C.

It is admitted, and I find, that Respondent is, and has been at all times material herein, an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

It is admitted that Respondent is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Issues*

The principal issue raised by the pleadings is whether employee Leonard Worthington, a business agent, was laid off and/or discharged by Respondent in violation of Section 8(a)(1), (3), and (4) of the Act.

B. *The Facts*

1. Worthington's reinstatement

In a prior Board proceeding[2] it was determined that Leonard Worthington, who had been employed by Respondent as a business agent from August 2, 1976, had been unlawfully terminated on June 8, 1978, by Oliver Traweek, then Respondent's secretary-treasurer and chief executive officer.

In 1979, during the pendency of the Board proceeding, Worthington, who expressed an interest in running against Traweek for the position of secretary-treasurer, together with a group of Respondent's members, including Richard Martino, a personal friend of Worthington, agreed to support Martino for the position. Worthington became a political supporter of Martino and contributed $1000 to his campaign. The election procedure was protracted, and extended over a period of several years. Prior to the time of the scheduled second rerun election, Traweek was removed from office by Respondent's executive board because of alleged improprieties with respect to Respondent's funds, and on June 1, 1981, Martino was appointed to the position. Martino had never

[1] The instant case was originally consolidated with an unrelated matter (Case 21–CB–8353) which was settled prior to the hearing and was severed from the instant case at the commencement of the hearing.

[2] *Teamsters Local 420*, 257 NLRB 1306 (1981).

held any union position, and his experience for the Union's highest office was limited to driving a truck for 24 years in the rock and sand industry.

Martino was sympathetic with Worthington's unfair labor practice claim which, at the time Martino became secretary-treasurer, had been found meritorious by an administrative law judge and was on appeal before the Board. Martino had previously advised Worthington that, as secretary-treasurer, he intended to reinstate Worthington to his position as business agent and settle the Board case. On assuming office, Martino proceeed to terminate all but one of the business agents who were then employed, and immediately hired seven additional business agents, many of whom had previously been business agents under Traweek's administration but had been dismissed by Traweek for reasons unrelated to the instant matter.

After conferring with the Union's executive board, which is composed of officers and trustees of Respondent, many of whom are also business agents for Respondent, Martino engaged in negotiations with Worthington. On July 13, 1981, he initially offered Worthington reinstatement and $10,000. Later that same day he offered Worthington $30,000 on the condition that he waive reinstatement. Worthington declined both offers. Thereupon, Martino became upset, and accused Worthington of being disloyal and of trying to financially break the Union which, as Worthington was advised, was in a precarious financial position. Martino also advised Worthington that, if he persisted in attempting to extract as much money as possible from the Union, he would be jeopardizing his future with the organization and cited as of an example an individual who sued and recovered a large sum of money from the Union and who thereby irreparably damaged his political aspirations. Worthington persisted, however, and Martino told him that he was not a good teamster and that he did not want him to work for the Union. According to Worthington, Martino told him that if he persisted in insisting upon the full amount of backpay[3] and the job, and got them both, then he would be fired when he made the first mistake.

Several days later, anticipating that the Board would affirm the administrative law judge's decision, Martino offered Worthington reinstatement, with the apparent understanding that Worthington would receive the amount of backpay which the Board would later determine. Worthington, sensing that various executive board members and business agents of the Union did not want him to return, asked Martino whether his tenure was secure. Martino assured him that if he kept his nose clean, didn't "screw up," and did his job, he would be in no danger of being fired. Martino further told him that he need not worry about his relationship with the other members of the executive board, as Martino, not the executive board or other business agents, possessed the authority to hire and fire.

[3] The amount of backpay, at that time, had not been determined. Martino was apparently led to believe that it could be $45,000 or more, as Worthington was apparently insisting upon reimbursement for car allowances and expenses and union-related trips he would have taken had he not been terminated. Reimbursement for these items, however, was disallowed.

On July 15, 1981, Martino employed Mary Jo Smith, a personal friend, as Respondent's hiring hall dispatcher, telling her that the previous dispatcher had been terminated, that he needed someone he could trust in that position, and that he wanted her to keep her eyes and ears open and to report anything that appeared to be illegal or wrong, particularly regarding the operation of the hiring hall. The day before Worthington was to report to work, about August 3, 1981, Martino told Smith that he had been instructed by the Teamsters International to reinstate Worthington, that Worthington had previously been a business agent but had had problems in the past, that he and Worthington had been personal friends but Worthington had run against him or had planned to run against him for office, that Worthington had rejected an offer of $30,000 if he would waive reinstatement and was being shoved down Martino's throat, that Worthington was a "shady character" as he had been involved with the dispatching procedure involving "illegal dealings," and that Smith was to keep an eye on him. Martino also instructed Smith to report anything Worthington did wrong, as Martino would then have grounds for "getting rid of him."

Thereafter, according to Smith, Martino would check with her several times a week regarding Worthington's whereabouts. Smith had no problems with Worthington, and testified that Worthington would call in regularly and that he seemed to be doing his job properly.

The Board order affirming Worthington's unlawful discharge issued on September 15, 1981, and in December 1981 Worthington was paid $16,046.01 in backpay and interest and his severance benefit plan account was required to be credited with $10,000, apparently the amount that should have accumulated in his account since his initial employment in 1976.

2. Respondent's financial condition; layoffs

The Respondent's financial condition worsened and the month following the backpay settlement to Worthington, partly as a result thereof, Martino found it necessary to lay off the hiring hall dispatcher, Smith, for financial reasons. He also implemented additional cost-reducing measures, included the denial of a wage increase to the business agents, and the laying off of the Respondent's grounds maintenance man. Between March 1981 and August 1982, Respondent's treasury was depleted from approximately $330,000 to approximately $21,000. During this time there were occasions when payroll checks were late in being issued or employees were asked not to deposit them immediately. The monetary drain was attributed to former Secretary-Treasurer Traweek's mishandling of union funds; the adverse general economic conditions, particularly in the construction industry, resulting in massive layoffs of Respondent's members and a corresponding reduction in members' dues, the Union's primary source of income; expenses involved in financing several strikes; and the settlement of Worthington's unfair labor practice case.

It is uncontradicted that Martino was advised by the Respondent's accountant that the Union was bordering on bankruptcy, and that it was imperative that he reduce

expenses by $15,000 per month. The salary and expenses for retaining each business agent amounted to approximately $5000 per month, and thus Martino determined that he needed to lay off three business agents in order to keep the Respondent solvent.

Martino selected Clyde Craig, who had been assigned to service the rock and sand employees,[4] and was the least senior business agent. Because the construction industry had been most affected by the adverse economic conditions, Martino decided to lay off two of the three construction industry business agents, Keith Penrod and Worthington, and retain Charles Tanberg, the most qualified construction business agent. Martino had earlier appointed Tanberg as coordinator to assist and oversee the work of the other business agents, although Penrod apparently had more seniority as a business agent or experience working in the construction industry than either Tanberg or Worthington. Each of these three individuals had formerly worked under Traweek's administration, had been terminated by Traweek, and were then hired by Martino. Martino testified that the executive board recommended that Martino take whatever action was necessary to cut expenses, and did not become involved in selecting the particular employees to be laid off.

About June 18, 1982, Martino told the assembled business agents, all of whom had previously been advised about the layoff, that he felt the Respondent's financial situation would improve and that the layoff would be for a short period of time. At the meeting, Business Agent Craig proposed an alternative plan whereby three business agents, on a rotating basis, would be laid off for a period of 1 week each month until Respondent's financial situation improved. Martino initially indicated his concurrence with Craig's agents, however, Leo Pittman, then president of Respondent, and Art Webb, both of whom were on the executive board, opposed the plan,[5] and Pittman suggested that the matter be brought up to the executive board. Martino testified that the matter was discussed at an "out-of-session" executive board meeting, and recalls that "probably three members of the board" objected to it, and "everyone was not too happy with the time-sharing program . . . business," so the board just moved on to other business. Apparently objections to the plan revolved around the fact that certain business-agent related expenses are paid on a monthly basis and thus a 1-week layoff per month would not have permitted the Respondent to avoid these expenses. Further, it was apparently believed that such a procedure would not be conducive to the efficient handling of complaints or problems.[6]

The layoff began on June 25, 1982. Because Respondent's financial condition did not improve, Penrod was not rehired. Craig was not rehired until about October 1982 when he returned on a part-time basis for 4 or 5 months. He was then put back on full-time status, apparently to replace another business agent who left Respondent's employ.

Mary Jo Smith, who had been laid off in January 1982, testified that on August 21 or 22, 1982, Martino came to her home regarding an unrelated matter. Martino mentioned that he believed the economic climate would improve in September, and that this would put the Union back on its feet. Smith asked if that meant she could possibly have her job back, and Martino said he would think about it. During the course of the conversation Martino mentioned that he had laid off Penrod, Craig, and Worthington. Martino said that he was going to recall Penrod due to the fact that he would soon be retiring and, on being reinstated, would be able to retire with a higher rate of pay. He also said that eventually Craig would be returning, but Worthington would not. Martino stated that the Union had information that Worthington had been involved in outside activities while employed by the Union, and that this was the "bombshell" they were going to drop on him in court, as he was suing the local.[7] Martino further said, according to Smith, "that the three of them had been laid off because it wouldn't have looked right to have only gotten rid of [Worthington]."

Smith testified that it was a very lengthy conversation. Shortly after the conversation she apparently typed up the points that she could recall and on September 7, 1982, gave a statement to a Board agent regarding the conversation. There is no mention in this statement that Martino told her he laid off the other business agents in order to make Worthington's layoff look proper.

Lon Smith, Mary Jo Smith's husband, was present during the aforementioned conversation. Lon Smith essentially corroborated his wife's testimony, and testified several times that Martino said that the three businesss agents were laid off for monetary reasons as there was no money left in the Respondent's treasury. He was repeatedly asked, on direct examination, if Martino gave any other reason for the layoff but said that he could recall no other reason. Finally, he was directly asked if he recalled Martino "saying something to the effect that he had to lay off Craig and Penrod to cover up Worthington's layoff." Smith testified that, "It seems to me, something was said that it wouldn't look good unless all three were laid off." Martino denied that he made such a statement during the conversation.

3. Worthington's conduct

Aurora Samiano, who has been Respondent's office manager and bookkeeper for about 15 years, testified that a short time after the June 25, 1982 layoff, apparently within a few days to a week or so, Martino dictated the following memorandum to her and directed that it be placed in Worthington's file. The memo is as follows:

[4] Respondent's business agents, when hired, were assigned to primarily service employees within their field of expertise. Thus, Martino designated business agents for the "construction" industry, the "rock and sand" industry, and "the lumber and industrial" industries.

[5] Worthington testified there may have been others who objected to Craig's time-sharing proposal.

[6] Arthur Webb, then a member of the executive board, testified that to his knowledge Craig's alternate time-sharing plan was not discussed by the executive board.

[7] Martino was apparently referring to the instant charge which had been filed on August 2, 1982.

> On June 25, 1982, Leonard Worthington was laid off for economic reasons. We no longer needed his services as a Business Agent.
>
> We do not wish to hire this employee back due to the following reasons:
>
> 1. Letter sent to the Western Conference re Landscape agreement stating his policy on Landscape disclaimer without the authority of the Secretary Treasurer and because his policy was not that of Teamsters Local 420.
> 2. Also reports from other Local unions that he was in their jurisdiction on Local 420's time talking to Landscape Companies. This report Local 692. Curt Williams B.A. for Local 692.
> 3. Report from other Local Union that he was in their jurisdiction without proper authority on Local 420's time, Report was from Local 166, Pete Esputo Sec. Treas.
> 4. Was informed many times to call in three to four times daily and report to office, would not respond to that request . . .

Worthington played a significant role as a business agent under Secretary-Treasurer Traweek's administration in organizing the employees of four or five landscaping companies, employing a total of approximately 100 individuals. Respondent entered into contracts with these companies, representing their employees on a wall-to-wall basis. When the contracts expired in 1980, Respondent did not seek to negotiate successor contractors. Rather, it disclaimed further representation of these employees on the basis of a jurisdictional settlement agreement entered into with the Southern California District Council of Laborers, whereby the landscaping employees were to be represented along the customary jurisdictional lines of the two unions. Certain landscape employees contacted Worthington expressing their displeasure at this course of events.

Later, in January 1981, allegedly after various locals of the Laborers Union indicated an intention to violate the jurisdictional agreement by attempting to organize employees of the landscape employers on a wall-to-wall basis, Respondent repudiated the jurisdictional settlement agreement and once again signed contracts with these employers on a wall-to-wall basis. The contracts extended until 1983.

However, in June 1981, before Worthington was reinstated, Martino elected to cancel the contracts and disclaim interest in the employees in an effort to adhere to the terms of the jurisdictional agreement. Martino was aware that Worthington was very upset about this, and talked to him on numerous occasions about the matter. Worthington persisted in requesting that the Respondent renew its wall-to-wall contracts, and requested Martino's permission to talk to the employers about this. Martino emphatically and repeatedly told Worthington not to do this, and specifically stated that he would allow Worthington to approach the employers only on the basis that the Respondent would be willing to represent their truckdrivers but no other employees.

Further, Martino instructed Worthington to discontinue his relationship with Mike Sullivan because it could hurt the Union. Sullivan, an employer representative, had represented Worthington in his prior unfair labor practice proceeding. Also Sullivan represented the landscape employers throughout the course of their relationship with Respondent, and had filed unfair labor practice charges and a suit in Federal district court protesting Martino's rescission of the contracts. On July 15, 1981, during his conversation with Worthington regarding reinstatement as a business agent, Martino stated that he did not know that Worthington's relationship was with Sullivan, but that Sullivan was causing the Union considerable trouble and expense, and that he was going to fight Sullivan and, in this regard, had a number of ideas. Worthington told Martino that he thought it was a shame that Martino had been "conned" into disclaiming the landscape contracts and knew what Sullivan could do with such a case in court. Martino according to Worthington, said he did not want to talk about it further with Worthington "because he didn't want to tell Mike Sullivan his plans.

Following Worthington's reinstatement, on several occasions Worthington told Martino that he was talking to Larry Mayo, director of construction for the Western Conference of Teamsters, with whom it was necessary for Worthington to deal generally regarding construction-related matters, about getting the Teamsters to organize some of these landscape employees. Martino indicated to Worthington that, during his discussions with Mayo or anyone else, it was not his place to formulate an opinion counter to Martino's disclaimer. About April 1982, contrary to Martino's explicit instructions and admonitions, Worthington contacted the owner of one of the landscape employers and suggested that an affiliation of the Respondent and an independent union, which certain landscape employees had formed, could possibly be arranged if the employer, represented by Sullivan, would drop its lawsuit against Respondent then pending in Federal district court. Worthington testified that the owner appeared receptive to this proposal.

Thereafter, on April 20, 1982, Worthington sent a lengthy letter to M. E. Anderson, International vice president and director of the Western Conference of Teamsters, outlining the history of the Respondent's relationship with the landscape employers. The letter, sent without Martino's permission or knowledge, concluded as follows:

> I feel that a prudent approach to limiting our liability in the lawsuits filed by these employers, and potential lawsuits by these employees, would be to offer the independent union and [sic] affiliation with the Teamsters Union.
>
> I would be willing to discuss this matter with you further and, if and when necessary, to arrange for a meeting with all interested parties. Please feel free to contact me at any time.
>
> Fraternally yours,
> /s/ Leonard Worthington
> cc: Larry Mayo
> Richard Martino

Business Agent Tanberg is coordinator of the construction business agents. His duties include recommending to Martino which agents should be assigned to particular areas or jobs. He has trained business agents, including Worthington, and also is apparently responsible for training and assisting Respondent's business agents other than those involved in construction. He is alleged in the complaint to be a supervisor and/or agent of Respondent; however, his supervisory status was not raised as an issue during the course of this proceeding, and the parties appear to have agreed that Tanberg is not a supervisor within the meaning of the Act. Tanberg was called as a witness on behalf of the General Counsel. On becoming appointed as a business agent by Martino's instructions in trying to organize the landscape drivers only, under a multijurisdiction agreement with the Laborers and apparently other unions.

Prior to sending the aforementioned April 20, 1982 letter to Anderson, Worthington showed it to Tanberg. Worthington and Tanberg had had prior conversations about the matter of seeking affiliation of the independent union, which represented the employees of certain landscape employers, and Respondent. Tanberg asked if he had advised Martino that he was sending the letter, and Worthington said he was sending Martino a copy. Tanberg cautioned him about this approach and reminded him that the explicit policy of Respondent vis-a-vis the landscape industry had been established, and any deviation from the policy should be cleared with the secretary-treasurer. Tanberg, testifying that he possessed a certain degree of authority in instructing the business agents, considered it insubordination that Worthington refused to follow this instruction. However, Tanberg further testified that he had no authority to require that Worthington first clear the letter with Martino. On numerous occasions Tangerg reminded Worthington that his involvement with Sullivan and the landscape industry created a conflict with his position as a business agent for Respondent. Worthington's response was that he would be willing to "take the heat." Tanberg testified, without objection, that he knew that Worthington had not severed his relationship with Sullivan, and that he had warned Worthington about this.

Tanberg testified that shortly after Worthington was reinstated in August 1981, Worthington told him that he was planning to establish an independent union for the landscaping employees.[8] Worthington said he was the one who was setting it up and that his brother-in-law was one of the trustees. He asked whether Tanberg wished to participate and Tanberg said no. Tanberg warned him that if he persisted in such activities there would be a day of reckoning somewhere down the road because Worthington's conduct in this regard conflicted with his responsibility as a representative of Respondent. Worthington disregarded this admonition and told him the independent union was going to be holding elections, and asked Tanberg if he wanted to run for office. Tanberg said no. Worthington said he was running for an "executive position." On several occasions Tanberg warned him that his involvement with the independent union would jeopardize his position with Respondent. Worthington said that he was doing his own thing and there would be a position available with the independent union if he or Tanberg got fired.

Regarding the June 25 layoff, Tanberg further testified that Martino had consistently stated that Worthington and the other business agents were laid off for economic and financial reasons, and recalls that shortly after the layoff Martino stated that Worthington was ineligible for recall.

Tanberg was equivocal regarding his discussions with Martino regarding Worthington's activities with the landscape industry. Tanberg testified that he was attempting to protect Worthington and would be evasive when Martino asked about Worthington's relationship with Sullivan, and that he covered for Worthington regarding this and other matters. However, Tanberg also testified that he feared that Worthington was jeopardizing Tanberg's position because of his close relationship with Worthington, and particularly because of Tanberg's past involvement with the independent union prior to his being hired by Martino. The extent of Martino's knowledge of Worthington's activities, as related by Tanberg, is unclear.

Tanberg testified that after Martino found out about the letter to Anderson he became very upset. Tanberg, without objection, testified that in his opinion Worthington "was on a collision course with the local and I was just hoping that he would get some better sense and there were things that happened that just—it seems like Leonard would start to settle down a little bit and then something would happen and he would go off on another tangent." Tanberg also said that Worthington's involvement with the landscapers after the contracts had been rescinded and the employees disclaimed was a direct affront to the secretary-treasurer and the local union.

There is some discrepancy in the record regarding whether Martino had been given a copy of Worthington's letter to Anderson before he received a call from a representative of the Western Conference of Teamsters. In any event, during this conversation, Martino was told that the letter was contrary to the policy of Respondent, the Western Conference, and various construction industry agreements. Martino was further told that Anderson was upset and wanted to discuss the letter. After this call, according to Martino, Worthington presented him with a copy of the letter, and Martino proceeded to reprimand Worthington for his insubordinate conduct and involvement with the landscape matter, and for sending correspondence without his permission or even knowledge. Martino advised Worthington that his conduct affected the Teamsters' reputation, and was a personal em-

[8] An independent union was formed in 1979, composed of landscape employees whom the Respondent, through Traweek, had disclaimed. Worthington testified at the hearing herein that he was not involved in the 1979 formation of the independent union which at that time had filed a petition with the Board to become the collective-bargaining representative of the employees of one of the landscape employers in a wall-to-wall unit. However, prior to the election, the Respondent, under Traweek, entered into the second aforementioned collective-bargaining contract, and the independent union apparently became inactive or defunct.

barassment to Martino. Worthington testified that Martino essentially told him that he would be unemployed if he had "any further involvement in this landscape thing." Worthington did not indicate that he intended to thereafter follow Martino's instruction, but merely responded that he had not received a reply from Anderson.

Martino testified that he had received reports from representatives of various building trades unions that Worthington had been involved with the landscapers and had been seen with Sullivan, and that these union representatives would question Martino about Worthington's activities. On one occasion an agent from another Teamsters local, Kirk Williamson, asked Martino to keep Worthington out of the local's geographic jurisdiction, as he was "messing around" with landscaping companies. Martino testified that he did not recollect whether he confronted Worthington regarding this complaint, but his affidavit affirmatively states that he did not. Worthington, however, testified that Martino told him that representatives of the Los Angeles Building Trades Council were questioning Worthington's loyalty to the Teamsters and to the construction union trades.

Apparently in January 1982, Martino received a call from Pete Espudo, the secretary-treasurer of another Teamsters local, who requested that Martino keep Worthington out of his local's jurisdiction, and advised him that Worthington was harassing one of his companies. When Worthington came in that day Martino asked him where he had been. Worthington replied, "Out in the field." Martino asked him, "What field?" and Worthington did not reply. When confronted with the fact that he was known to be in the other local's jurisdiction, Worthington explained that during regular working hours he had gone to his brother-in-law's home, located in the other local's geographic jurisdiction, and admitted checking a nearby company's compliance with the contract, as he had nothing better to do while waiting for his brother-in-law. Worthington's conduct, according to Martino, is clearly against policy, as business agents are to remain within their assigned jurisdiction unless otherwise instructed.

Worthington said that Martino confronted him about this matter on January 11, 1982. He admitted being in another local's jurisdiction where his brother-in-law, who is an officer of the independent union, resides. While waiting, he noticed a small construction company and decided to investigate compliance with the contract as the company had six or eight trucks in the yard but the reporting book which Worthington carried showed that the company employed only one driver. Thereupon, Worthington talked to the employer and, in Worthington's words, saw fit to "rattle his cage."

Mary Jo Smith testified that the business agents were instructed to report in three times a day, and Smith would enter this on a daily log sheet. Smith said that she saw Worthington almost every morning prior to his leaving the hall, and that he would come in around noontime. He would again come in at 4 p.m. or would phone if he was out in the field. She said she had no problem in this regard with Worthington. However, Smith testified that she did complain to Martino about three other business agents who were lax in adhering to the reporting procedure.

All the business agents with the exception of Worthington, and perhaps one other agent, had radios in their vehicles[9] and could contact Respondent's office or be contacted at any time. Worthington had no radio in his car and objected when Martino told him that he wanted a radio installed in his vehicle, stating that he intended to sell one or more of his vehicles. The expense of installing a radio in $350.

Martino testified that he did not believe Smith's testimony was accurate regarding Worthington's adherence to the establish reporting procedures, and stated that the call-in logs, which would reflect the frequency with which the business agents reported in, have since disappeared from the dispatch drawer. Contrary to Smith's testimony, Martino said that Worthington would report to the office in the morning, and thereafter on many occasions would not check in, and, because he had no radio, Respondent would have no way of locating him.

Bookkeeper Aurora Samiano testified that she spoke to Worthington about installing a car radio and Worthington said he did not want one because "he didn't want to be pinpointed or didn't want anybody to know what he was doing at all times." Samiano testified that various office clericals in addition to Smith would receive calls from business agents and note them in the log, and that Worthington would not call as frequently as he was instructed to, and was hard to locate. Samiano testified, without objection, that "Leonard is kind of a free spirit. He wants to be out there and doing his own thing, and he doesn't like to be pinned down."

Tanberg testified that he had spoken to Worthington as well as other business agents about calling in, but that this was an ongoing problem particularly with Worthington, and that "We were having a tremendous problem with Leonard just not calling in. At the same time he didn't want a radio in his car because he didn't want any holes drilled in his car."

C. *Analysis and Conclusions*

Despite Martino's expressed belief that Worthington, a political supporter, had been unlawfully discharged by Traweek, and Martino's assurance that as secretary-treasurer he intended to reinstate Worthington and settle the Board case, it is clear that Martino mistrusted Worthington and was apprehensive about reinstating him even prior to any disagreement regarding backpay. Thus, upon becoming secretary-treasurer in June, Martino immediately hired about seven business agents, and did not commence his negotiations with Worthington until about mid-July. I credit Martino's testimony and find that he was sincerely concerned with Worthington's integrity. Thus, I find that when Worthington initially offered to contribute $1000 to Martino's campaign fund, it was upon the condition that, as Martino credibly testified, he agreed to hire Worthington's mother-in-law as Respondent's bookkeeper. The administrative law judge in the

[9] The record is very indefinite regarding this. It appears that Worthington was the sole business agent without a radio.

prior proceeding found that Worthington should not be disqualified from reinstatement as a result of various alleged improprieties during his tenure. Martino nevertheless believed as a result of his past association with Worthington, that Worthington's trustworthiness was certainly suspect and that Worthington did in fact engage in certain improprieties which were considered in the prior Board proceeding. The record supports the conclusion that Martino's mistrust of Worthington preceeded his settlement and reinstatement discussions with Worthington. Although Worthington's insistence upon full backpay admittedly upset Martino, I find that Martino's instruction to Mary Jo Smith, upon Worthington's reinstatement, that she carefully monitor his activities, is consistent with and a result of this inherent mistrust rather than Worthington's activity in connection with the pending Board proceeding. Thus, Martino believed that Worthington was a "shady character" and for this reason emphasized that Smith carefully monitor his activities.

The financial condition of Respondent became increasingly precarious and, on occasion at various membership meetings, Martino would express his displeasure that Worthington had received what Martino believed to be an inordinate amount of backpay, and that Worthington's insistence upon this amount which contributed somewhat although certainly not extensively to Respondent's financial condition, was not compatible with being a "good Teamster." The record shows that general membership meetings were frequently utilized by contending or potential political opponents as forums for castigating the opposition and gaining membership support, and that Martino perceived Worthington as a political opponent. I do not place significant credence in any of the statements made at these meetings. While Martino may have stated at the October 1982 meeting that, among other reasons, Worthington was not recalled from layoff and was discharged, in part, because of the amount of backpay he insisted on receiving and while this remark demonstrates Martino's antipathy toward Worthington, I find that, in view of the entire record, such a statement, under the circumstances, is insufficient to demonstrate that this was a motivating reason for Worthington's discharge.

It is clear and I find that Worthington directly, intentionally, and knowingly, flaunted Martino's orders regarding the landscaping matter, and that he was instrumental in assisting the independent union in an effort to promote Worthington's, rather than Respondent's, interests,[10] despite the repeated admonitions of Tanberg, who warned Worthington of the readily foreseeable consequences. I further find that, as credibly testified to by Martino, Tanberg, and Samiano, Worthington was often remiss in not sufficiently and regularly reporting his whereabouts, and that Martino had good reason to be particularly concerned with Worthington's whereabouts given the rumors and information Martino had received regarding Worthington's continued preoccupation with the landscape matter. The credible record evidence shows, and I find, that Worthington was indeed, as characterized by various witnesses, a "free spirit" who would elect to do as he pleased, and would not hesitate to disregard policy with which he disagreed.

I do not credit the testimony of Mary Jo Smith and her husband, who testified that in August 1982 Martino made the statement, shortly after the layoff, that the layoff, in effect, was orchestrated merely to dismiss Worthington. It is clear that throughout this conversation Martino consistently stated that the layoffs were necessitated by Respondent's financial condition. Further, had Martino directly stated that the layoffs merely constituted an effort to get rid of Worthington, it is inconceivable that Mary Jo Smith would not have memorialized this in the typewritten notes of the conversation she made immediately thereafter, or in her subsequent statement to the Board. It also defies credulity, absent any plausible explanation, that her husband would have such a faulty recollection of this obviously incriminating statement, and that he would not readily recall it except after being directly asked whether this is what Martino said. Under the circumstances, I credit Martino and find either that he did not make the statement attributed to him by the Smiths, or that the Smiths misconstrued Martino's meaning. I further find that the layoffs were economically motivated, and that Worthington was not discriminatorily selected for layoff because of his refusal to accept a reduced amount of backpay in settlement of his prior Board proceeding.

The record shows that Martino was aware of a good deal, although not the entire extent, of Worthington's insubordinate and improper conduct. While it is clear that Martino would have had good cause to terminate Worthington prior to or at least as of April 20, 1982, when Worthington elected to send the letter to Anderson, the fact that he did not do so until shortly after the layoff[11] does not mean that Martino condoned such behavior. Rather, it apparently occurred to Martino following the layoff that this was a propitious time to permanently sever Worthington's employment.

The General Counsel points out various inconsistent lapses in Martino's testimony, and argues that this demonstrates Martino's lack of credibility on material issues. On a careful reading of the record, and noting particularly Martino's testimony and his demeanor at the hearing, I find Martino to have testified credibly regarding the material issues in this case. The fact that his recollection of dates or time periods or the details of particular conversations is sometimes faulty or incomplete, as Martino readily admitted, does not appear to be contrived or selective in an effort to distort Martino's inability to recollect with precision the details or time sequences of certain events. While the General Counsel emphasized that Worthington's discharge resulted in a large monetary outlay to Respondent as a result of Worthington's entitlement to the funds in his severance benefit account, the record shows that such funds are required to be placed in a separate account and are not supposed to be utilized by the Respondent for the general business purposes. In any event, given Worthington's extensive, blatant, and

[10] Worthington admitted at the hearing that he received reimbursement from the independent union for automobile and telephone expenses.

[11] I find, as Martino and Samiano testified, that Martino determined not to recall Worthington from the layoff within a week thereafter, and prior to the time the instant charge was filed.

persistent insubordinate behavior, it is apparent that the expense involved in discharging him outweighed his perceived value to the Respondent.

In summary, I find that even if Worthington was discharged, in part, because of his refusal to accept a reduced amount of backpay in the underlying Board proceeding, nevertheless, the Respondent has demonstrated that Worthington would have been discharged, in any event, because of his failure to properly carry out his assigned duties and responsibilities as a business agent. Therefore, I shall dismiss the complaint, *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and is also a labor organization within the meaning of Section 2(5) of the Act.

2. The Respondent has not violated the Act as alleged.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[12]

ORDER

The complaint is dismissed in its entirety.

[12] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

Ducane Heating Corporation *and* International Union of Electrical, Radio and Machine Workers, AFL–CIO. Cases 11–CA–8747, 11–CA–8748, 11–CA–9044, and 11–CA–9248

11 January 1985

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS HUNTER AND DENNIS

On 4 August 1981 Administrative Law Judge Howard I. Grossman issued the attached decision. The Respondent filed exceptions and a supporting brief.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order as modified.

1. We agree with the judge that the Respondent violated Section 8(a)(1), (3), and (4) of the Act when it permanently laid off employee Betty G. Robinson on 7 November 1979. At the hearing, the Respondent filed a motion to dismiss the Robinson allegation on the ground that the underlying charge was untimely reconsidered by the General Counsel under the Board's Rules and Regulations and reinstated outside the time limitations of Section 10(b). At the hearing, the judge denied the Respondent's motion, applying Section 102.19(a) of the Board's Rules and Regulations. We agree with the judge's ruling, but only for the reasons set forth below.

The Robinson charge (Case 11–CA–8747), filed by the Union on 9 November 1979, was dismissed by the Regional Director for Region 11 on 19 December 1979. Thereafter, the Union timely appealed the dismissal of this charge. The Union's appeal was denied by the General Counsel on 14 March 1980 but, at the Union's request, it was granted an extension until 11 April 1980 to file a motion for reconsideration. The Union submitted a motion for reconsideration dated 11 April 1980. The exact date this motion was submitted is in doubt. It is unclear from the record whether the Union's motion was actually received on Friday, 11 April, or Monday, 14 April 1980.[2] In any event, the General Counsel accepted the Union's motion, apparently in view of another charge against the Respondent (Case 11–CA–9044) filed on 3 April 1980. On 24 April 1980 the General Counsel notified the parties that further processing of the motion for reconsideration had been suspended pending a determination on the merits of Case 11–CA–9044. On 17 July 1980 a complaint on the Robinson charge issued.

Section 102.19(a)[3] of the Board's Rules applies to initial appeals of a Regional Director's dismissal of a charge. Section 102.19(c)[4] of the Board's Rules, not considered by the judge, applies to a motion for reconsideration of the General Counsel's determination regarding the charging party's appeal from the Regional Director's dismissal of its charge. Both these Board Rules allow an initial 10-day period in which to submit either the appeal or the motion for reconsideration. In addition, Section 102.19(a) provides: "Consideration of an appeal untimely filed is within the discretion of the general counsel upon good cause shown." Unlike Section 102.19(a), Section 102.19(c) does not have a similar "good cause" requirement to be met before an un-

[1] The Respondent asserts, in essence, that the judge's resolutions of credibility, findings of fact, and conclusions of law are the result of bias. After a careful examination of the entire record, we are satisfied that this claim is without merit. There is no basis for finding that bias and partiality existed merely because the judge resolved important factual conflicts in favor of the General Counsel's witnesses. As the Supreme Court stated in *NLRB v. Pittsburgh Steamship Co.*, 337 U.S. 656, 659 (1949), "[T]otal rejection of an opposed view cannot of itself impugn the integrity or competence of a trier of fact." Furthermore, the Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] For purposes of this decision, we shall assume the motion was received on 14 April 1980.

[3] Sec. 102.19(a) provides:

> If, after the charge has been filed, the regional director declines to issue a complaint or, having withdrawn a complaint pursuant to section 102.18, refuses to reissue it, he shall so advise the parties in writing, accompanied by a simple statement of the procedural or other grounds for his action. The person making the charge may obtain a review of such action by filing an appeal with the general counsel in Washington, D.C., and filing a copy of the appeal with the regional director, within 10 days from the service of the notice of such refusal to issue or reissue by the regional director, except as a shorter period is provided by section 102.81. If an appeal is taken the person doing so should notify all other parties of his action, but any failure to give such notice shall not affect the validity of the appeal. The appeal shall contain a complete statement setting forth the facts and reasons upon which it is based. A request for extension of time to file an appeal shall be in writing and be received by the general counsel, and a copy of such request filed with the regional director, prior to the expiration of the filing period. Copies of the acknowledgment of the filing of an appeal and of any ruling on a request for an extension of time for the filing of an appeal shall be served on all parties. Consideration of an appeal untimely filed is within the discretion of the general counsel upon good cause shown.

[4] Sec. 102.19(c) states:

> The general counsel may sustain the regional director's refusal to issue or reissue a complaint, stating the grounds of his affirmance, or may direct the regional director to take further action; the general counsel's decision shall be served on all the parties. A motion for reconsideration of the decision must be filed within 10 days of service of the decision, except as hereinafter provided, and shall state with particularity the error requiring reconsideration. A motion for reconsideration based upon newly discovered evidence which has become available only since the decision on appeal shall be filed promptly on discovery of such evidence. Motions for reconsideration of a decision previously reconsidered will not be entertained, except in unusual situations where the moving party can establish that new evidence has been discovered which could not have been discovered by diligent inquiry prior to the first reconsideration.

timely motion for reconsideration can be considered by the General Counsel. Thus, we find that it is within the discretion of the General Counsel to accept reconsideration motions submitted within the 10(b) time limit, but beyond the 10-day period provided by Section 102.19(c) itself or any extension given by the General Counsel. The General Counsel need only act within the 10(b) period, and that action can take the form of mere acceptance of the untimely motion.

We find that there has been no showing that the General Counsel acted arbitrarily or capriciously or abused his discretion when he accepted the Union's motion for reconsideration, even if 1 business day late. We note that reconsideration was granted by the General Counsel within the 10(b) time limit, even though the investigation on the Robinson charge was not completed and a complaint thereon did not issue until 8 months after her layoff. Thus, we conclude that the Robinson charge was not extinguished by the operation of Section 102.19(c) of the Board's Rules and is not time-barred by Section 10(b) of the Act.

2. We also agree with the judge that the Respondent violated Section 8(a)(1), (3), and (4) of the Act when it discharged employee Randolph McCrea on 29 February 1980. In accordance with the judge, we find that the evidence concerning McCrea's work record and production fails to rebut the prima facie showing that his discharge was motivated by his union activity and participation in prior Board proceedings, as more fully detailed in the judge's decision. For the following reasons, however, we reverse the judge's findings and conclusions that McCrea's September 1979 suspensions were unlawful.

The record reveals that the Union filed the charge in Case 11–CA–8748 on 9 November 1979 alleging, in part, that the Respondent had violated Section 8(a)(1) and (3) by suspending employee McCrea on 7 September 1979 and again on 28 September 1979. Thereafter, on 19 December 1979, the Regional Director refused to issue a complaint involving McCrea's suspensions and dismissed the portion of the charge pertaining to McCrea's suspensions. No appeal from this dismissal was taken by the Union.

On 3 April 1980 the Union filed a second charge concerning McCrea, Case 11–CA–9044, alleging that he had been discriminatorily discharged on 29 February 1980. After a complaint on McCrea's discharge issued on 30 June 1980, the Acting Regional Director for Region 11 sua sponte revoked the earlier dismissal of Case 11–CA–8748 pertaining to McCrea's two September 1979 suspensions. In his letter to the parties dated 11 July 1980, the Acting Regional Director indicated the basis for revoking the prior dismissal was the uncovering of new evidence. On 17 July 1980 the Regional Director issued a complaint on McCrea's suspensions and consolidated Case 11–CA–8748 with the other pending charges against the Respondent.

At the hearing commencing 17 February 1981, the Respondent moved to dismiss the portions of the outstanding consolidated complaint relating to McCrea's September 1979 suspensions. The Respondent argued that further proceedings on these allegations were time-barred by Section 10(b) of the Act.

The judge denied the Respondent's motion and permitted the General Counsel to adduce evidence relating to McCrea's suspensions. In so ruling, the judge relied on *California Pacific Signs*, 233 NLRB 450 (1977); the General Counsel's authority under Section 3(d) of the Act; and the General Counsel's assertion that the issuance of the complaint, alleging a violation in McCrea's suspensions, after the allegations earlier had been dismissed in December 1979, was based on "newly discovered evidence." However, the General Counsel never disclosed what constituted the "newly discovered evidence."

In disagreeing with the judge's disposition of allegations involving McCrea's suspensions, we find that the Regional Director contravened the purposes of the limitations proviso to Section 10(b) of the Act[5] by reinstating a charge some 10 months after McCrea's suspensions occurred. We note that, while the charge was timely filed on 9 November 1979, it was thereafter dismissed by the Regional Director, and no appeal from this dismissal was ever filed. We hold today that a dismissed charge may not be reinstated outside the 6-month limitations period of Section 10(b) absent special circumstances in which a respondent fraudulently conceals the operative facts underlying the alleged violation. Where there is a fraudulent concealment, the limitations period begins to run when the charging party knows or should have known of the concealed facts. Accordingly, we reverse *California Pacific Signs*, supra, and *Winer Motors*, 265 NLRB 1457 (1982), to the extent that they are inconsistent with our decision.

In *California Pacific Signs*, supra, the Board permitted the reinstatement of an earlier dismissed charge some 10 months after the alleged violation.

[5] Sec. 10(b) of the Act contains the proviso:
That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge.

The Board found that the limitations proviso to Section 10(b) is applicable only to the filing of the charge and that Section 3(d) of the Act[6] grants the General Counsel "virtually unlimited" discretion to proceed on timely filed charges as he sees fit. The Board said that, absent a showing that the General Counsel had abused this authority, it would not interfere with the exercise of his discretion.

Later, in *Winer Motors*, supra, a Board majority did recognize certain limits on the General Counsel's discretion, at least with respect to charges withdrawn by a charging party. There, a Board majority of former Chairman Van de Water and former Member Zimmerman and Member Hunter found that the General Counsel could not, for equitable reasons, reinstate a *withdrawn* charge outside the limitations period absent fraudulent concealment by a respondent. However, a majority of former Members Fanning, Jenkins, and Zimmerman did not find the same proscription applicable to dismissed charges. Former Member Zimmerman drew a distinction between withdrawn and dismissed charges. The former, he asserted "ceases to exist," while the latter "continues to exist" because the charging party has not conceded that the charge lacks merit and, accordingly, the General Counsel retains his discretionary authority to reinstate a dismissed charge. We do not agree with the distinction that former Member Zimmerman drew in *Winer Motors*. Rather, we shall treat withdrawn and dismissed charges alike and shall not allow the reinstatement of either beyond the 6-month limitations proviso absent the special circumstances mentioned above.

We disagree first with the notion that Section 3(d) bestows "virtually unlimited" discretion on the General Counsel to reinstate charges outside the 10(b) limitations period. We find, instead, that the General Counsel must exercise his discretion in conformity with the limitations proviso created by Congress. We note that the General Counsel's authority is to be exercised "on behalf of the Board," and we find that we would exceed our own authority were we to permit the General Counsel to ignore the statutory limitations proviso.

Further, we find this standard must apply regardless of whether the charge was withdrawn *or* dismissed. We see no substantive distinction between a withdrawn and a dismissed charge. In either event, the charge has been disposed of and, in effect, ceases to exist.[7] Moreover, it seems to us that the dismissal of a charge by a government official well versed in the intricacies of labor law creates the impression on members of the public that the charge has been disposed of even more conclusively than is the case when it is merely withdrawn.[8]

We note also that in *Koppers Co.*, 163 NLRB 517 (1967), a case considered by the judge, the Board held that a respondent has the right under the statute to be assured that, absent the existence of a properly served charge on file, it will not be liable for conduct occurring more than 6 months earlier. To permit the General Counsel to resurrect either withdrawn or dismissed charges is inconsistent with this principle and should be permitted only where a respondent, in effect, forfeits its right to such assurances by engaging in fraudulent concealment. We must, as the majority noted in *Winer*, "restrike the balance established by Congress when it added the proviso to Section 10(b)." 265 NLRB at 1458.

Applying the above principles to the instant case, we have concluded that the reinstatement of Case 11–CA–8748 relating to McCrea's September 1979 suspensions outside the limitations period cannot be permitted. We find no fraudulent concealment in this case which would warrant our extending the limitations proviso. In this regard, we note that the General Counsel has never asserted or shown any fraudulent concealment of operative facts relating to McCrea's suspensions. At best, it appears that the General Counsel reviewed the evidence on hand pertaining to the suspensions in light of the subsequent discharge of McCrea and reconsidered the earlier dismissal on that basis.

Considering the above,[9] we find that the 10(b) period expired in March 1980, 6 months after McCrea's suspensions, and that the consolidated complaint allegations concerning them must be dismissed.[10]

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[6] Sec. 3(d) of the Act provides in pertinent part:

[The General Counsel] shall have final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under section 10, and in respect of the prosecution of such complaints before the Board, and shall have such other duties as the Board may prescribe or as may be provided by law.

[7] Member Dennis notes that the Casehandling Manual, Sec. 10120.3, provides that a charging party should be given the opportunity to withdraw a charge before it is dismissed. Whether the charging party avails himself of such an opportunity should not determine whether the charge can be resurrected thereafter.

[8] This is particularly true because "the Board's General Counsel has unreviewable discretion to refuse to institute an unfair labor practice complaint." *Vaca v. Sipes*, 386 U.S. 171, 182 (1967).

[9] In view of the manner in which this case was litigated and briefed, Member Dennis finds it unnecessary to pass on the question whether the charge the Union filed 9 November 1979 in Case 11–CA–8747 (alleging that employee Robinson was unlawfully laid off) might have supported the McCrea suspension allegations under a "closely related" theory. See *NLRB v. Dinion Coil Co.*, 201 F.2d 484, 491 (2d Cir. 1952).

[10] In light of this conclusion, we find it unnecessary to pass on the judge's conclusion that McCrea's suspensions were unlawful. Our disposition of McCrea's suspensions, however, does not detract from our general agreement with the judge's finding that the evidence concerning

Continued

3. Contrary to the judge, and for the reasons set forth below, we find that the Respondent did not violate the Act by discharging employee Larry Hampton on 18 March 1980.

The pertinent credited facts are as follows: Hampton commenced working for the Respondent in 1977, and his job required lifting and pulling units weighing up to 40 pounds. His activities in support of the Union began in August or September 1978, and the Respondent admitted that it had observed Hampton engaging in these activities. Additionally, Hampton testified at an earlier Board hearing held between October and November 1979.

On 25 January 1980 Hampton sustained a back injury while working. He continued to perform his assigned duties for approximately 30 minutes and then requested medical attention because he began to experience pain. Later that day, an examination by Dr. John C. Whitley Jr. revealed tenderness and a muscle spasm in Hampton's lower back. As a result, Whitley prescribed muscle relaxants and pain medication and recommended that Hampton perform only light work duty for 5 days. Hampton returned to work and was instructed by Supervisor Creech to return to his usual job. When Hampton protested on the ground that Dr. Whitley had recommended that he be restricted to light duty, Assistant Plant Manager Stewart demanded that he return to the doctor's office for a written work restriction. Hampton apparently did so, and then returned to the plant where he commenced performing light duties.

On 30 January 1980 Hampton again complained to Dr. Whitley of pain and was given another analgesic. On 4 February 1980 Dr. Whitley's diagnosis of Hampton continued to be back strain, minor contusion, and minor spasm. He therefore referred Hampton to an orthopedic surgeon, Dr. Harry L. Pearce, who, on 8 February 1980, diagnosed Hampton's condition as acute dorsal lumbar back strain or a pulled back muscle. He prescribed pain medication, rest, a back brace (which Hampton thereafter wore), and light duty. Dr. Whitley examined Hampton for the last time on 11 February 1980 and, although he was of the opinion that Hampton could return to full work duty, he deferred to Dr. Pearce's recommendation for light duty as being within the latter's area of expertise.

On 15 February 1980 Dr. Pearce again examined Hampton for pain and prescribed anti-inflammatory medicine. Hampton complained to Dr. Pearce of intermittent discomfort on 17 March 1980, but Dr. Pearce concluded that the healing process had been completed, although he acknowledged that lifting and bending might aggravate the existing injury. Additionally, on that day, Dr. Pearce gave Hampton a "certificate" that he was able to return to work with no limitations. Dr. Pearce testified that he frequently counsels patients against prolonged light duty since there is an abundance of healthy applicants for employment.

When Hampton returned to work on 17 March 1980, he complained to two supervisors of back pain. Nevertheless, based on the certificate issued by Dr. Pearce, Supervisor Creech ordered Hampton to return to his regular job, which he apparently did for the balance of that workday.

Hampton returned to work on the following day and requested more medical attention because of back pain. Later that day, Plant Manager Frank Ducate was advised that Hampton was complaining that he could not or would not perform his regular job because of back pain and that he had requested more medical attention for the problem. Ducate then prepared a permanent layoff notice for Hampton because of "inability or refusal to do the work." When Hampton received the layoff notice, he protested that he was not refusing to do his normal job, but that he was unable to perform his regular job at that time because his back hurt. In a letter dated 19 March 1980,[11] Dr. Pearce, in response to a request from the Respondent, outlined his diagnosis of Hampton's condition and concluded that Hampton was ready to return to work with the help of aspirin, if needed. Approximately 3 weeks later, the Respondent received a letter from Dr. Whitley which noted that his last examination of Hampton had failed to reveal any objective pathology and that he had encouraged Hampton to return to work.

The judge found that the facts established that the Respondent viewed Hampton's injury as an opportunity to get rid of a union protagonist. In so doing, the judge rejected the Respondent's reason for Hampton's discharge—that he "could not or would not work." Thus, the judge noted that, although Hampton *could not* engage in a full duty job at the time of his discharge, he was capable of engaging in other lighter work which was then available. The judge found that the Respondent's failure to permit Hampton to continue performing such light duties constituted evidence of unlawful motivation. The judge also found no credited evidence to support the Respondent's contention that

McCrea's work record for the period in question was inadequate to rebut the General Counsel's prima facie showing of discrimination toward McCrea.

[11] The judge inadvertently referred to "March 19, 1979," rather than "March 19, 1980," as the date of Dr. Pearce's letter to the Respondent. The judge further inadvertently referred to "April 17" rather than "March 17" as the date that Dr. Pearce told the Respondent that Hampton had complained to him of back pain.

Hampton *would not* work since that would essentially involve a charge that Hampton was malingering. In this regard, the judge found that the Respondent did not have a good-faith belief that Hampton was malingering and that, moreover, the evidence established that Hampton had, in fact, sustained an injury and that he had, in fact, encountered a muscular spasm as a result. Based on the foregoing, the judge concluded that the Respondent discharged Hampton because of his union activities and because of his testimony in the prior Board proceeding.

Contrary to the judge, we conclude that Hampton's physical condition was relied on by the Respondent in deciding to discharge him. It is undisputed that an integral part of Hampton's job required lifting and pulling units weighing up to 40 pounds. It is further undisputed that, immediately after Hampton had sustained the injury to his back on 25 January 1980, the Respondent created a light duty job for him based on his doctor's recommendation that he perform such work for 5 days. Thereafter, the Respondent, again on the advice of Hampton's doctor, extended his light duty work until 17 March 1980, when it received medical certification that Hampton was able to return to his regular job duties without limitations. Hampton admitted, and the judge found, that, even after his doctor had authorized him to perform his regular job duties, he remained in pain and felt unable to fulfill those duties. It was only at this point that the Respondent discharged him. Thus, as it is beyond dispute that Hampton "could not" do the work he was assigned, and as we are satisfied that this was the Respondent's reason for discharging Hampton, we find no violation in the discharge.

Unlike the judge, we find no basis for concluding that the Respondent's failure to permit Hampton to *remain* on light duty constituted evidence of unlawful motivation since, under these circumstances, the Respondent was neither under a duty to create a permanent light duty position to accommodate Hampton's physical limitation nor under a duty to employ Hampton, who admitted that he could not fulfill the requirements of his position. Further, the General Counsel's contention and the judge's finding that the Respondent was motivated by antipathy toward Hampton's protected activities is undercut by the fact that the Respondent, although under no obligation to do so, created approximately 7 weeks of special light duty work for Hampton during his medically documented incapacitation. Moreover, the Respondent's decision to discharge Hampton appears to be consistent with its past practice since the record contains evidence that the Respondent had discharged another employee for refusal or inability to work after a doctor had released him to perform such work. In light of the above, we shall dismiss that portion of the complaint which alleges that Hampton's discharge was violative of the Act.[12]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Ducane Heating Corporation, Blackville, South Carolina, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1(a).

"(a) Discouraging membership in International Union of Electrical, Radio and Machine Workers, AFL–CIO, or any other labor organization, by unlawfully discharging any of its employees, or by discriminating against them in any other manner with respect to their hire or tenure of employment, in violation of Section 8(a)(3) of the Act."

2. Substitute the following for paragraph 2(a).

"(a) Offer Randolph McCrea and Betty G. Robinson immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision. Remove from its files any references to the unlawful discharges and notify the employees in writing that this has been done and that the discharges will not be used against them, in any way."

3. Substitute the attached notice for that of the administrative law judge.

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[12] As indicated above, the judge rejected the Respondent's alternative contention that Hampton was malingering and thus "would not" work. He further rejected the Respondent's claims that it had a good-faith belief that Hampton was malingering. We find it unnecessary to pass on these findings or the case law cited in support of them since we have found that, in fact, Hampton could not do his work and that the Respondent relied on this fact in letting him go. Thus, no violation of the Act has been made out in this proceeding.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT discourage membership in International Union of Electrical, Radio and Machine Workers, AFL–CIO, or any other labor organization, by unlawfully discharging any employees, or by discriminating against them in any other manner with respect to their hire or tenure of employment.

WE WILL NOT discharge or otherwise discriminate against employees because they have given testimony under the National Labor Relations Act.

WE WILL NOT in any other manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer Randolph McCrea and Betty G. Robinson immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed and WE WILL make them whole for any loss of earnings and other benefits resulting from their discharges, less any net interim earnings, plus interest.

WE WILL notify Randolph McCrea and Betty G. Robinson that we have removed from our files any references to their discharges and that the discharges will not be used against them in any way.

DUCANE HEATING CORPORATION

DECISION

STATEMENT OF THE CASE

HOWARD I. GROSSMAN, Administrative Law Judge. The charges in Cases 11–CA–8747 and 11–CA–8748 were filed on November 9, 1979, by the International Union of Electrical, Radio and Machine Workers, AFL–CIO (the Union). The charges in Cases 11–CA–9044 and 11–CA–9248 were filed by the Union on April 3 and June 30, 1980, respectively. Complaints or consolidated complaints issued on June 30, July 17, and August 6, 1980, alleging that Ducane Heating Corporation (Respondent or the Company) suspended employee Randolph McCrea twice in September 1979; discharged employee Betty G. Robinson in November 1979, McCrea in February 1980, and employee Larry Hampton in March 1980; and refused to recall Robinson in the first quarter of 1980, because said employees joined and assisted the Union and testified at a hearing before the National Labor Relations Board (the Board), in violation of Section 8(a)(1), (3), and (4) of the National Labor Relations Act (the Act). A hearing was held before me on these matters in Aiken, South Carolina, on February 17, 18, and 19 and March 17, 18, and 19, 1981.

On the entire record, including my observation of the demeanor of the witnesses, and after due consideration of a brief by the General Counsel, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent is a South Carolina corporation with a plant located at Blackville, South Carolina, where it is engaged in the manufacture and sale of heating equipment. During the 12-month period preceding issuance of the complaint on June 30, 1980, Respondent received goods and materials at its Blackville, South Carolina plant valued in excess of $50,000, directly from points outside the State of South Carolina. Respondent is an employer engaged in commerce within the meaning of Section 2(5) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Respondent's Prior Unfair Labor Practices*

On January 13, 1981, the Board issued its Decision and Order in *Ducane Heating Corp.*, 254 NLRB 112 (1981), wherein it affirmed the findings of an administrative law judge that Respondent had violated Section 8(a)(1) of the Act since October 1978 by various acts of interference with its employees' Section 7 rights, and had also violated Section 8(a)(3) and (1) in December 1978 by discriminatorily discharging one employee, suspending another, and issuing a written warning and a threat of discharge to employee Randolph McCrea, one of the alleged discriminatees in this proceeding.

As more fully explained in the prior decision, the Union began an organizational campaign in October 1978, and unfair labor practice charges were filed in early 1979, leading to a hearing before the administrative law judge from October 30 through November 3, 1979. Pursuant to a Stipulation for Certification Upon Consent Election, an election was held on March 22, 1979, which the Union lost with six challenged ballots.[1]

As described in the former opinion, McCrea was one of the leaders of the union movement, and testified at the previous hearing. His testimony was credited over that of Respondent's supervisors. Robinson also participated in union activities and testified at the previous hearing. She was called by the General Counsel as a rebuttal witness, and her testimony was also credited by the judge in preference to that of Respondent's supervisors. Employee Larry Hampton testified without contradiction that he began distributing union cards in August or September

[1] The representation case was not consolidated with the unfair labor practice case.

1978, and further averred that he also testified at the former hearing. Noting the dates of the new alleged unfair labor practices in this proceeding, it may be observed that they allegedly took place at times in close proximity to the dates of the former hearing (October 30 through November 3, 1979).

B. *Randolph McCrea*

1. Construction of residential gas furnaces

Respondent contends that McCrea was discharged because of substandard production, rather than for the reasons alleged in the complaint. Accordingly, an inquiry into what McCrea was "producing" for the Company becomes relevant. This consists of components of residential gas furnaces, in particular "heat exchanger units."

In essence, according to Supervisor William Creech,[2] a gas furnace consists of a blower pushing air through tubes in a heat exchanger unit, where the air is heated, and from there flows into the air ducts. A flue box carries away fumes, and a burner box holds the gas burners. The burners are placed within a component called a "burner ring," which is actually rectangular in shape. The burner ring is composed of metal pieces called "fillers top and bottom," and "fillers left and right," which are assembled by welding. According to Creech, the completed burner ring is affixed to the bottom of the heat exchanger unit by a combination of hammering and "tacking," or arc welding. Thereafter, the seams formed by the juncture of the burner ring and the heat exchanger unit are sealed by "seam welding" (R. Exhs. 14–20).

There is little uniformity among the employees' description of these operations. Thus, Creech testified that employees who "worked on burner rings" would variously report work on "fillers," or on "left and right," or "tops and bottoms," or burner rings, all referring to the function of placing the burner ring onto the heat exchanger unit. In addition, the next step of seam welding is also referred to by employees in a variety of terms, according to both Creech, McCrea, and Respondent's Exhibit 61. McCrea called seam welding "Left & Right-Top & Bottom," or "L&R-T&B," referring to components of the burner ring welded to the heat exchanger unit.

Whatever the nomenclature, Creech and McCrea agree that the function of placing a burner ring onto a heat exchanger unit is a different operation from the next function of welding it to the unit, and that both functions are normally performed by different individuals. Employee David L. Davis said that these were different operations, but that he, on occasion, had to perform both of them. McCrea testified that the burner ring job was more difficult than the welding position, testimony which was corroborated by leadman Willie Ferguson, a witness for Respondent. According to Ferguson, the "hammering" part of the burner ring job makes it more difficult. I credit this consistent testimony, and find that the placing of burner rings on the heat exchanger unit was more difficult than the seam welding job. Other jobs, according to the evidence, included welding and placing flue boxes, repairing leaks, straightening units, "tying ends," and grinding corners.

Employees did not normally have equal proficiency on all jobs, and McCrea credibly testified that the Company's practice was to assign employees to the jobs which they could do best.

2. McCrea's early work history

McCrea was hired in December 1975, and worked in the oil welding department under Assistant Plant Manager Billie Joe Stewart.[3] He received regular advances and pay raises, and Respondent had no complaints about him at that time, according to Stewart.

McCrea later transferred to the gas welding department, and began as a seam welder, a job at which he was proficient. He attempted to learn other jobs in order to increase his pay. In late 1977 McCrea asked other employees to teach him how to put on burner rings. Creech saw this, and told McCrea that he did "beautiful work," was not fast enough, but would pick up speed.

McCrea testified that he did a variety of jobs in the gas welding department, but was not assigned to do burner rings until the last week of August 1979. Creech, however, testified that McCrea was assigned "to weld burner rings" for an "accumulated" period of 3–4 months prior to August 1979.

The issue in this dispute is whether McCrea had prior experience in the job or, rather, was suspended on September 7 after only about 10 days in a difficult job which was new to him. Creech was a contradictory and unreliable witness, and his testimony on this subject literally describes seam welding rather than burner rings. Those of Respondent's business records which are in evidence do not support its position that McCrea was assigned to burner rings prior to August 1979 and I credit McCrea on this issue. Although he had some experience in burner rings prior to August 1979 and, indeed, was once seen doing this in 1978 by employee David L. Davis, this represented McCrea's attempts to learn from other employees and did not constitute work assignments.

Respondent had a practice of making "special units," i.e., components that were as nearly perfect as possible, for promotional purposes. It used its best employees for this purpose, according to Creech. McCrea testified that, beginning in late 1977 or early 1978, Supervisor Creech and leadman Ferguson asked him to do welding on special units. Supervisor Creech, leadman Willie Ferguson, and employee Bronson Bell denied this. However, Odell Millhouse, an employee of Respondent at the time he testified, stated that he saw McCrea doing special units in 1979, and employee David L. Davis testified that he saw this in 1980. Creech and Ferguson were not disinterested witnesses, and Bell could not have known everything McCrea was doing. I credit the testimony of McCrea, Millhouse, and Davis, and find that McCrea was asked to do welding on "special units."

[2] The pleadings establish and I find that Creech was an agent of Respondent and a supervisor within the meaning of Sec. 2(11) of the Act.

[3] The pleadings establish and I find that Stewart was an agent of Respondent and a supervisor within the meaning of Sec. 2(11) of the Act.

3. The union campaign and Respondent's discipline of McCrea

(a) *The First Two Warnings.* It was at about the time of his transfer or shortly thereafter that McCrea began his organizational work on behalf of the Union, as described in the prior decision. On December 1, 1978, Respondent issued a written warning to McCrea for allegedly having told another employee to stop work and attend a meeting without permission. The warning threatened McCrea with discharge upon repetition of such conduct, was characterized by the judge in the last proceeding as "excessively harsh," and was found to be discriminatory discipline in violation of Section 8(a)(3) and (1). *Ducane Heating Corp.*, 254 NLRB at 122–123, 130.

About 5 months later, on April 24, 1979, Respondent issued McCrea another warning reading as follows:

> This is to inform you that an official warning or discharge notice has been given to you for substandard production.
>
> This warning is being given to you concerning your substandard quantity work.
>
> We are confident that your returning late from breaks and lunch could be one of the reasons for your production being lower than that of your coworkers.
>
> If your production does not pick up and remain up, you will be forcing us to take further disciplinary action.

The warning is signed by Supervisor William Creech (G.C. Exh. 5). Employee David L. Davis credibly testified that McCrea was the only employee to receive a written warning for low production.

McCrea was given this warning by Assistant Plant Manager Billie Joe Stewart in the presence of Creech. According to McCrea, he told Stewart that Creech had told him to do "as many units as [he] could," and asked Stewart to give him, in writing, a daily quota of production he was expected to meet. Stewart responded with a query, asking whether it was "too much to ask" McCrea to do as many as he could, if no more than "one unit" per day. Creech admitted that he did not tell McCrea how to improve his production.

McCrea, dissatisfied, asked Creech for permission to speak with Vice President John Ducate Jr.[4] but was told that Ducate was too busy, and that McCrea should take it to his "Union organizer." Creech asserted that another employee was given a warning for low production on the same day. However, Creech also testified that McCrea was working on burner rings in April 1979, testimony which is contradicted by Respondent's records. I credit McCrea, and do not credit Creech.

(b) *McCrea's Transfer to Burner Rings, Two Suspensions and Discharge*: McCrea testified that he was assigned "to do burner rings" in the last week of August 1979. Supervisor Creech acknowledged that he assigned McCrea to the new job, but could not remember the date. I credit McCrea's testimony.

On September 7, 1979, McCrea was given a written 3-day disciplinary suspension, which, after a beginning sentence identical to the warning in April, continues as follows:

> After receiving a warning on 4/25/79, your production did show a slight increase for a few weeks thereafter. However, after reviewing your daily production reports, we found your productivity far below department standards. In an effort to avoid any further disciplinary action, I moved you to a job requiring less skill. Even though you had previous experience on this job, we allowed you approximately two weeks for retraining.
>
> Not only is your production far below your coworkers, two of these co-workers are complaining that while each one of them is producing over 200 units, you are producing only 80 to 90 units per day.
>
> Therefore, you leave us no alternative but to issue this 3-day disciplinary layoff which is effective from 9/10/79 through 9/12/79. To avoid any further disciplinary action, when returning on 9/13/79, you will be expected to bring your production up to department standards and remain there.

This document is also signed by Creech (G.C. Exh. 6).

McCrea had a conversation with Assistant Plant Manager Billie Joe Stewart that day in the latter's office. McCrea testified that he requested but was denied the presence first of a coworker, and then of a union organizer. Stewart denied that McCrea made this request; I credit McCrea. Stewart told him that the Company did not recognize "Union men." McCrea asked for permission to see General Manager Frank Ducate, but this was denied.

Shortly after this suspension, Creech asked McCrea whether he was willing to have leadman Willie Ferguson show McCrea how to increase his speed, and McCrea agreed. Ferguson then came to McCrea's booth, and a dispute arose as to which employee was more productive. According to McCrea, Ferguson challenged him to a test to see which could put on 10 burner rings more rapidly. According to Creech and Ferguson, McCrea asked for a timestudy.

However initiated, McCrea, Ferguson, and another employee, David L. James, had a "10-burner-ring race." James finished first. McCrea testified that Ferguson was doing his fourth burner ring when McCrea had reached his fifth ring, and that Ferguson had stopped to talk to someone. McCrea did not observe Ferguson again until he had almost finished his 8th burner ring, at which time Ferguson said he had finished all 10. "No way," McCrea told Ferguson, and said that he must have done something with his burner rings. Ferguson insisted that he finished all 10 himself, before McCrea finished.[5]

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[4] The pleadings establish and I find that Ducate was an agent of Respondent and a supervisor within the meaning of Sec. 2(11) of the Act.

[5] James was not called as a witness. The General Counsel asserts that he tried without success to reach James, and asks for an adverse inference from the fact that Respondent did not call James. The General Counsel contended that, if called, James would have testified that he did some of Ferguson's burner rings and attempted to elicit testimony from McCrea as to what James told the former. I sustained Respondent's objection that this would have constituted hearsay.

Respondent introduced various "documentations" of alleged action which it took between September 7 and 28, the dates of McCrea's two suspensions. Thus, in assigning Ferguson to help McCrea, Creech noted "a slight improvement" in McCrea's production on September 19 (R. Exh. 36). The next day, in analysis of the timestudy, Creech concluded that McCrea did have the ability to meet production standards, and "tried [his] best to explain to Randy that the disappointing part of my job is when you know an employee has the ability and skill to do his job, but will not apply himself" (R. Exh. 37). The next day, Creech wrote, employee David James complained to him that McCrea was not doing his "fair share" (R. Exh. 38). Respondent thus took the position that the timestudy showed that McCrea *could* produce adequate quantities of work, but that he was not utilizing his ability.

On September 28, 1979, Creech signed another warning which, after the same introduction as the prior warnings, continues as follows:

> Since your last warning on 9/7/79 in a sincere effort to avoid further disciplinary action, we placed a program into effect to help you pick up your production to departmental standards.
>
> 1. We gave you additional training by the Leadman to make sure you knew every aspect of the job and to see where you were having problems, if any.
>
> 2. You and Ferguson collectively decided to time study the job. The time study included you, Ferguson, and David James. The results of the study indicate that you could easily do production of 200+ units in eight hours with ample time for rest and delay.
>
> 3. You received personal assistance from me to help you develop your technique and numerous conversations in an effort to try to motivate you.
>
> It is evident that through the time study that you have the ability, when applied correctly, to perform to standards.
>
> Because of the seriousness of this problem and your failure to respond to our help, you leave us no alternative but to enforce a 5-day suspension [G.C. Exh. 7; R. Exh. 39].

McCrea had a conversation with Billie Joe Stewart that day in which he requested but was denied the presence of a coworker. Stewart told him that a study showed that he could do 200 units daily, and that Stewart had no alternative to issuance of a 5-day suspension. McCrea requested permission to see General Manager Frank Ducate, but this request was denied.

McCrea credibly testified that he had no further conversation with any supervisor about his production until February 29, 1980, when Creech discharged him at the end of the day, stating merely that he had already been suspended twice. Creech gave him another written notice (G.C. Exh. 8) and his final check. McCrea walked out, noticing Billie Joe Stewart "peeping around the corner." Stewart testified that he did not meet with McCrea on the day of the discharge. Creech testified initially that he and Stewart had a conversation with McCrea in Stewart's office, but reversed himself on cross-examination. I credit McCrea and Stewart that there was no such meeting.

Creech testified that McCrea was discharged because of low *overall* production, then vacillated between this position and the contention that the reason was low *burner ring* production, and finally admitted that he did not know the reason without his records.

4. Statistical analysis of McCrea's alleged low production

(a) *Description of the Evidence and Contentions of the Parties*: The parties engaged in extensive argument during the hearing as to the means of proving or disproving that McCrea was guilty of low production. At the outset, it must be acknowledged that the relevance of all this evidence is questionable, since Supervisor Creech admitted at the hearing that Respondent had no production requirements, and that "it is more or less what a man is capable of doing."

Nonetheless, the General Counsel moved to admit two statistical studies, one concerning McCrea's production, and the other concerning production of other employees. Although these summaries purported to be derived from Company documents in Respondent's possession which the General Counsel had subpoenaed, or from copies of such documents made by employees who had submitted the originals to the company, Respondent opposed their introduction. The parties agreed to the following procedure: Each would be afforded an opportunity to submit statistical summaries with supporting data and copies to the other parties, after the close of the hearing but prior to the due date for briefs, whereupon the summaries and data would be received in evidence.

The General Counsel, having withdrawn the summaries originally submitted at the hearing prior to this arrangement, filed a posthearing motion submitting General Counsel's Exhibits 13 and 14 with supporting data, while Respondent filed a "Submission of Post-Hearing Evidence" with supporting data. In accordance with the aforesaid agreement at the hearing, these documents are hereby received as General Counsel's Exhibits 13 and 14, and Respondent's Exhibit 61, respectively.[6] Comparison of the data on these exhibits shows that they are substantially consistent, although Respondent's exhibit has more production reports of employees other than McCrea.

The General Counsel argues that his exhibits show that "while McCrea's production was somewhat less than that of other welders on the burner ring operation, his production on seams was representative with the output of other welders in the department." Moreover, in the month before his discharge, McCrea's performance was equivalent overall to that of other employees, according to the General Counsel.

Respondent offers no opinion as to what its statistics show. Both the General Counsel's and Respondent's exhibits consist of summaries of daily production reports

[6] In the absence of any exhibit number proposed by Respondent, its posthearing exhibit is given the number next in order. Respondent also submitted, at the hearing, an actual heat exchanger unit, which was received.

prepared by employees. There is no evidence that the quantities shown on the reports were verified by management. Creech testified that various products were not subject to production requirements, but some of the products he named appear on the production reports.

The Company's exhibit, "Compilation of Ducane Employee Production Reports," states in part as follows: "The jobs, welding seams, seams, left right top and bottom, burner rings, doing burner rings, putting on burner rings, tacking burner rings, ends and tying ends are approximately equal in terms of numbers of units produced by an employee in an eight hour day. Many of the terms used by the employees on the production reports are aberration(s) of the current description of the job as defined by the company and are different names for the same job" (R. Exh. 61).

The first sentence quoted above appears to say that each employee produces the same number of units no matter which job he is performing. If so, this is equating apples with oranges and is demonstrably false.[7]

(b) *Statistical Evidence Pertaining to the April 24 Warning, and the September 7 Warning and Suspension*: Respondent issued a warning to McCrea on April 24, 1979, for "substandard production," as described above. No such conclusion can be derived from Respondent's production statistics for that month. The only conclusions which may be derived, assuming that two other employees were doing the same work as McCrea but were giving it a different name, are that (1) Respondent was keeping more production figures on McCrea than it was on other employees, and (2) such comparative figures as are available show that McCrea was in about the mid-range of production.[8]

McCrea's production increased slightly in May, which is acknowledged in Respondent's September 7 warning and disciplinary suspension (G.C. Exh. 6). However, it is difficult to find justification for Respondent's statement, in its September 7 warning, that McCrea's transfer to burner rings in late August was caused by "review" of his production reports showing him "far below department standards." The reason is the fact that the Company's exhibit shows no figures whatever for June and July 1979 for McCrea or any other employee. The General Counsel's exhibits show that McCrea continued about the same pace, and, as before, that there were other employees who produced less units, doing work which may possibly have been the same as McCrea's.[9]

The General Counsel's statistics, like Respondent's, are derived from employee production reports. However, if Respondent did not keep the production records submitted to it by its employees for these 2 months, then it obviously had nothing to "review" for this period.

Respondent's statistics start again in August 1979 and, as previously described, McCrea was assigned to burner rings in the last week of August. As noted, Respondent's September 7 warning and suspension allege that two of McCrea's coworkers had complained to the Company that McCrea was only producing 80 to 90 units daily while they were producing over 200.

Respondent called former employee Lee Brown, who testified that McCrea frequently left his work station, and that Brown told Creech that McCrea had said that he did not have to work as hard as Brown. The latter further averred that he told Creech that McCrea, then working on burner rings, "wasn't doing shit." Brown could not recall when he said this to Creech, but appeared to testify that he said it "not one time but many times . . . ."[10] Brown further testified that he averaged 250–255 burner rings daily for a size "60" heat exchanger (a small size), about 230–235 daily for a size "80," and 215–220 daily for the larger size "100." Respondent's statistics show that Brown exaggerated his own production, and that he never averaged over 200 units daily for any period of time.[11] I do not credit his testimony.

For the same period of August 1 through September 7, four other employees had burner ring averages lower

[7] Taking the first employee other than McCrea whose name appears on R. Exh. 61, "E. Moorer," the Company's data shows that Moorer produced, during 8 hours, 205 "fillers" on April 2, 1979, 176 "fillers" on April 3, 142 "fillers" on April 11, 120 "flue boxes" on April 15, 142 "fillers" on April 16, 202 "fillers" on April 20, 199 "fillers" on April 27, a combined total of 157 "fillers" and "burner rings" on August 16, etc. The figures of other employees show similar variation in production depending upon the type of product being made, and, indeed, some variation on different days with the same employee making the same product. As noted above, the "heat exchanger units" come in different sizes, and there is evidence in the record that it takes more time to make a component for the sizes. In addition, the not infrequent combination of different jobs the same day for the same employee makes comparisons unreliable.

[8] McCrea listed his work as "L&R-T&B" (left and right—top and bottom), the only such listing in the records, by which, I conclude, he meant the seam welding of burner rings after their placement on the heat exchanger unit. The burner ring, which is seam welded to the heat exchanger unit, consists of fillers "left and right," and "top and bottom." R. Exh. 61 shows only two other job descriptions in April 1979 which might mean the same thing ("fillers" (E. Moorer), and "filler strips" (G. Garrick)). The exhibit shows the following April 1979 daily entries for "L&R-T&B" work by McCrea through April 24, the day of the warning: 142, 125, 139, 128, 113, 112, 115, 105, 130, 143, 143, 140, and 155. For the same period, the exhibit shows the following "filler" entries for Moorer: 205, 176, 142, 142, and 202. For Garrick's "filler strip" work, Respondent had only two entries for the same period, 97 and 144. The variant of larger and smaller units is shown on the exhibit, but is not reflected in this discussion, as it would involve extended statistical analysis not warranted for the purposes of this decision.

[9] For July 1979, G.C. Exh. 14 shows one entry of 94 for G. Garrick, for "welding," and entries of 96 and 92 for "S.W. (?)," for "seam welding," figures below the average for McCrea.

[10] This is not entirely clear, as the witness' testimony was cut off.

[11] From August 1, 1979, through September 7 (the date of McCrea's first suspension) Brown had daily burner ring production figures of 178, 152, 169, 189, 150, 126, 125, 211, 191, 164, 154, 187, 178, 140, 212, 206, 212, 179, and 142 (R. Exh. 61), a total of 3593 and an average of about 180 daily. This data includes only days when Brown's daily work was entirely or almost entirely devoted to burner ring production. Consideration of other work during this period would bring down his averages, e.g., 106 "filler welding" (seam welding?) on September 6, and 63 "philliers" and 63 burner rings on September 7 (R. Exh. 61). Brown's lower production, when doing work easier than burner rings, which was the only work McCrea was doing during the same period, remains unexplained.

For the period from September 8 through 28 (the date of McCrea's second suspension), Brown had only 3 days of exclusively burner ring production—174, 147, and 112, a drop in average production to about 144. The other days, combinations of burner ring and easier work, show the same pattern of substantially less than 200 units daily.

than Brown's, about 169,[12] 166,[13] 148,[14] and 137.[15] McCrea's first burner ring production was on August 27, but it was combined with other work on that and the following day.

Beginning on August 29 and continuing through September 7, McCrea had only 6 days of exclusively burner ring work—85, 87, 80, 85, 91, and 106, an average of about 89 with a pattern of increasing productivity.[16] He was then suspended for "low production."

As I have already found, McCrea's new burner ring job was more difficult than that of his former seam welding job. The statement in Respondent's September 7 warning, to the effect that burner rings was "a job requiring less skill," is clearly false. Employee Odell Millhouse testified that it took about 2 months for an employee to reach the standards of his fellow employees in burner ring production, and Respondent's September disciplinary action against McCrea therefore occurred when he was learning a new and more difficult job. According to Millhouse, McCrea was the only employee so disciplined during this beginning 2-month period. I credit this testimony.

(c) *Statistical Evidence Between September 7 and McCrea's Second Suspension on September 28*: Respondent's figures show that McCrea increased his daily burner ring average from 89 to about 116 during the period between his two suspensions.[17] The only other employees with substantial numbers of burner ring days were David James, with an average of about 158,[18] and L. Brown, previously noted. James had long experience at burner rings. Two other employees with isolated burner ring days had averages of about 130.[19]

As set forth above, Respondent's "time study" took place during this period. According to Respondent, it showed that McCrea had the ability to produce "268 units per day," 68 over the "200 required" for a day (a "requirement" stated for the first time in the record). Respondent asserts that this proved that McCrea *could* do the job, but *would not* do so. As previously noted, David James was the "winner" of the timestudy which, according to Respondent, showed that he could do "450 units" per day, 250 over the "200 required." Creech told James that he was "very pleased that he outdid anything we ever expected on the job . . . ." (R. Exh. 37.)

McCrea's average production of 116 during this period was about 43 percent of his capacity indicated by the timestudy,[20] and less than the "200 required" per day. James' average of 158 was also less than the "200 required" daily, and was about 35 percent of *James'* capacity as revealed by the timestudy.[21] Although James was far more experienced than McCrea in burner rings, and was the winner over leadman Ferguson as well as McCrea in the timestudy, he was still deficient in actual production according to Respondent's asserted 200-unit daily quota, and was working at a less percentage of *his* daily capacity than was McCrea. Nonetheless, James received only lavish praise, while McCrea, who increased his average, received a suspension.

(d) *Statistical and Other Evidence Pertaining to McCrea's Discharge on February 29, 1980*: McCrea injured his thumb with a hammer on October 17, 1979. Respondent's figures from the time of his second suspension on September 28 until his injury show that he increased his burner ring production average to over 126 daily.[22]

The doctor put McCrea's hand in a splint and placed him on light duty. Stewart told McCrea to go back to seam welding, but McCrea could not put on a glove, and was sent home. His name next appears on the production records on November 16, doing work other than burner rings, and he continued doing different kinds of work through the rest of 1979.[23]

McCrea and employee David L. Davis testified that Supervisor Creech held a meeting in January 1980, in which he showed employees photographs of completed units which were deficient. Creech said that he was not going to lose his job for anybody, and that the quality of the work would have to improve. He was not too much concerned about production, and did not care if a man put out only one unit per day, as long as it was of good quality. Creech admitted that he probably told employees on more than one occasion that he did not care how many units employees produced, as long as they worked 8 hours a day and produced work of good quality. Millhouse testified that Stewart said substantially the same thing at another time.

McCrea returned to burner ring production on January 7, 1980, and in about the first week increased his daily average to over 137.[24] He was then switched to welding seams, on which he did well. On his last 5 days of employment, McCrea produced 200 "seams" on February 25, 164 "seams" and 27 burner rings on February 26, 153 burner rings and 27 "seams" on February 27, 90 burner rings and 27 "seams" on February 28, and 130 burner rings on February 29.[25] Employee David L. Davis testified that he saw McCrea doing special units in January, and McCrea stated that he did so during his last week of employment. I credit this testimony.

(e) *Other Evidence of McCrea's Work Habits and Attitude*: Employee Bronson Bell said that McCrea once told him that he did not have to work so hard. "That's why

[12] W. Davis, daily production figures of 174, 150, 173, 198, 124, and 159 (both dated the same day but deemed to be different days), 129, 222, and 191.

[13] S. Banks, daily production figures of 125, 156, 153, 202, 129, 132, 138, and 145.

[14] E. Moorer, daily production figures of 131, 155, 147, and 159. Moorer listed "burner rims" (burner rings), and had several days of combined work, not included herein.

[15] G. Garrick, daily production figures of 152, 126, 164, 57, 134, 83 plus 6 seams, 88, 173, 167, and 112.

[16] R. Exh. 61.

[17] For 8-hour days, McCrea had burner ring production of 113, 120, 105, 118, 120, 108, 115 plus 15 "L&R–T&B," and 129 plus 5 "L&R–T&B."

[18] James' daily production figures were 82, 170, 185, 170, 178, 166, and 160.

[19] O. Millhouse, with two entries of 102 and 157, respectively, and E. Moorer with one entry of 130.

[20] 116 divided by 268, McCrea's daily "capacity" (R. Exh. 37).

[21] 158 divided by James' daily "capacity" of 450 (R. Exh. 37).

[22] Daily production figures of 101, 105, 125, 147, 151, and 130 (R. Exh. 61).

[23] G.C. Exh. 13; R. Exh. 61.

[24] Daily production figures of 140, 144, 125, 145, 132, 138, and 140 (R. Exh. 61).

[25] R. Exh. 61.

we need a union," McCrea told him. As previously described, Lee Brown alleged slack work habits on the part of McCrea. The latter, on the other hand, testified that his fellow employees never complained to him about low production. On the contrary, they asked him why he stayed in his booth so much. Employee Odell Millhouse testified that McCrea was "the type who would stay in his booth."

McCrea and Millhouse impressed me as more reliable witnesses than Brown and Bell. In general, however, on the issue of McCrea's work habits and productivity, I attach less weight to this conflicting evidence, and greater weight to the production records.

5. Summary and analysis

Respondent's discipline of McCrea is a textbook study in discrimination under Section 8(a)(3) and (4) of the Act. The Board has already determined that Respondent committed prior unfair labor practices manifesting animus against the union campaign and its supporters, of which the principal one was McCrea. The Board concluded that Respondent's prior warning to McCrea and threat of discharge were discriminatorily motivated. This previously determined animus is a factor which must be considered in assessing Respondent's subsequent discipline of McCrea, and tends to establish that the latter, like Respondent's former conduct, was unlawfully motivated. *J. P. Stevens & Co. v. NLRB*, 638 F.2d 676 (4th Cir. 1980), enfg. as modified 245 NLRB 198 (1979); *NLRB v. Clinton Packing Co.*, 468 F.2d 953 (8th Cir. 1972), enfg. as modified 191 NLRB 879 (1971).

Subsequent to his organizational activities which had already incurred Respondent's ire, McCrea testified against Respondent in the last Board hearing. His testimony was one of the factors which resulted in a decision adverse to Respondent—a fact which could only have added to Respondent's animus.

In April 1979, about 5 months after Respondent's unlawful warning and threat of discharge which were litigated in the last hearing, Respondent issued another "warning," this time for "substandard production." This charge cannot be supported by any production figures then available, because Respondent did not require uniform job descriptions in its employees' production reports, did not verify the accuracy of those reports, and had no established production quotas. McCrea was then doing seam welding, although he, like other employees, called it by another name. Such comparisons as can be made suggest only the tentative conclusion that McCrea was in about the midrange in production.

There can be no doubt of the quality of McCrea's work—it was outstanding. There had been no complaints about his work in the oil welding department. After his transfer to the gas welding department, McCrea became an exceptional seam welder, and was assigned to welding on "special units," products required to be free of defects, for promotional purposes. McCrea's excellent work record constitutes evidence that his discipline was discriminatorily motivated. *Clark Manor Nursing Home Corp.*, 254 NLRB 455 (1981); *Boyer Ford Trucks*, 254 NLRB 1389 (1981). His work record was considered to be excellent until he appeared at a Board hearing on behalf of the Union. *Dillon Stores*, 241 NLRB 579 (1979).

Despite this record, Respondent issued a written warning to McCrea about his production—the only such warning it had ever issued up to that date. The uniqueness of this treatment of McCrea, as distinguished from other employees, additionally suggests its pretextual nature.

Respondent conceded in its September 7 warning and suspension that McCrea's production improved in May 1979, but contended that "review" of his production thereafter showed that it was "far below department standards." Respondent submitted no figures for June or July, warranting an inference either that it had none to review, or that it believed that the figures would be adverse to its cause. Respondent in fact did receive employee production reports for these months, since they are covered by the General Counsel's statistics based on copies of employee reports submitted by the Company. These figures suggest that McCrea continued at about the same pace in his seam welding job, and that there were other employees producing less units of the same work.

Respondent has a practice of assigning employees to the work they do best. McCrea was an expert seam welder, but was not good on the more demanding job of burner rings. However, he was transferred to burner rings in late August 1979, contrary to company practice. In its September 7 warning, Respondent falsely stated that the burner ring job was less demanding. Considered in connection with later events, this transfer to more onerous work is evidence of discriminatory motivation on the part of Respondent. *Ward Products Corp.*, 243 NLRB 354 (1979).

After only 6 full days of burner ring production, during which McCrea increased his daily output, Respondent gave him a 3-day suspension for production "below department standards," contrary to its established policy of allowing 2 months for development of proficiency in this work. When McCrea asked Assistant Plant Manager Stewart for a written quota he was expected to produce, Stewart refused, evasively asking McCrea whether it was too much to produce only one unit per day. Respondent's refusal to tell McCrea what he was expected to produce, and suspending him again for failing to meet production, constitutes further evidence of its arbitrary and discriminatory frame of mind.

Respondent conducted a so-called timestudy of the production of McCrea and two other employees. Although the "study" was conducted under circumstances which cast doubt on its objectivity, Respondent professed to discover from it that McCrea *could* meet an asserted "200-unit" daily quota, but lacked motivation to do so. During the 3-week period after the first suspension, McCrea increased his production to the point where he was producing a higher percentage of his own capacity than was the winner of the timestudy. Both were below the "200" daily quota—a fictional standard newly invented by Respondent, which no employee other than McCrea was required to meet. Although neither McCrea nor the winner of the timestudy met this

standard, the latter received praise, while McCrea received a 5-day suspension. This gross disparity in treatment simply adds to the already abundant evidence of Respondent's unlawful motivation. *AMF, Inc. v. NLRB*, 593 F.2d 972 (10th Cir. 1979), enfg. 228 NLRB 1406 (1977).

During the 2–3 weeks after his September 28 suspension, McCrea continued to add to his burner ring productivity, so that he reached the lower range of more experienced producers of this product. He was then injured, was off work, and was thereafter transferred to other work for the balance of 1979.

McCrea returned to burner ring work in January 1980, and quickly raised his production so that he reached the low to middle range. He was then transferred to other work, including seam welding of special units. He had an outstanding last 5 days of work before his discharge, including one "200-unit" day of seam welding. He was discharged on February 29 for "substandard production," the only employee so disciplined. *Magnesium Casting Co.*, 250 NLRB 692 (1980).

The transparent falsity of Respondent's asserted reason for twice suspending and then firing McCrea is further demonstrated by the fact that two supervisors told employees in early 1980 that Respondent did not care about production as long as quality was good, and by Supervisor Creech's admission at the hearing that he did not know whether McCrea was discharged for low burner ring production or low overall production. As Creech candidly testified, Respondent has no production requirements—"it is more or less what a man is capable of doing." Respondent's vacillating, equivocal, and ultimately false reason for McCrea's discipline shows that it was engaged in "elaborate and contrived bureaucratic exercises" to get rid of the leader of the union movement and the principal witness against it in a previous Board proceeding. *Midwest Stock Exchange*, 244 NLRB 1108, 1119 (1979); *Town & Country Supermarkets*, 244 NLRB 303 (1979).

The overwhelming weight of the evidence establishes that Respondent twice suspended McCrea in September 1979, and discharged him on February 29, 1980, because of his union activities and sympathies and because he gave testimony at a previous Board hearing. The General Counsel has therefore established a strong prima facie case that McCrea's discipline was unlawful, and Respondent has not rebutted that case. Accordingly, I find that Respondent's aforesaid conduct was violative of Section 8(a)(1), (3), and (4) of the Act. *Wright Line*, 251 NLRB 1083 (1980).

C. *Betty G. Robinson*

1. Employment history

Robinson was employed in June 1979 and worked at a variety of jobs, as a welder and press braking machine operator in the welding department, and as a shipping clerk in the shipping department. She was working in the latter job at the time of her layoff on November 7, 1979. Like McCrea, she had been active in the union campaign and had testified on behalf of the Union at the prior Board hearing.

2. Supervisory interrogation of Robinson

Robinson testified that in March 1979 Shipping and Receiving Supervisor Dennis Ducate[26] asked her, "What is this that I hear about you being for the Union?" In response, Robinson asked whether she could "afford" to be for the Union, and Ducate answered that she could not afford to do so. Robinson asked the identity of the person who told Ducate that she favored the union cause, and Ducate gave the name of another employee. Ducate denied this conversation and asserted that Robinson said that people would be "crazy" to vote for the Union, although Ducate also said that he did not know whether Robinson was really against the Union. Robinson was the more believable witness, and I credit her testimony.[27]

Robinson described a second conversation with Ducate in late March 1979, in which the supervisor, referring to the absence of another employee, said, "Yeah, that is how we are going to get rid of the bunch of them, all 166 of them, right, Betty?" (The tally of ballots in the election on March 22 showed that 166 employees voted for the Union. *Ducane Heating Corp.*, supra, 254 NLRB at 113.) According to Robinson, this statement was made in the presence of another supervisor, Arnold Croft or Ronnie Hutto.[28] According to her testimony, Robinson asked Ducate who it was that said she was "one of the 166." Ducate, Croft, and Hutto denied any such conversation. Robinson impressed me as the more truthful witness. In addition, the figure "166," being the exact number that voted for the Union during the election, is a corroborative detail adding verisimilitude to Robinson's testimony, which I do not consider a likely invention on her part. I credit Robinson's testimony.

3. The September 7 layoff and Robinson's conversations with management

According to Plant Manager Frank Ducate,[29] Respondent laid off about 90 employees on September 7, 1979, because of an alleged decline in customer orders. Robinson was not included in this layoff but, being pregnant, was concerned about future layoffs. Accordingly, she had a conversation about September 14 with Supervisor Arnold Croft in which she asked about company policy on layoffs, and whether there would be any more. Croft replied that layoffs were by seniority, that he did not know whether there would be any more, but that Robinson and another employee would be the next layoffs if there were any.

Robinson testified that she asked Croft whether she could meet with Plant Manager Frank Ducate. The

[26] The pleadings establish and I find that Dennis Ducate was an agent of Respondent and a supervisor within the meaning of Sec. 2(11) of the Act.

[27] Respondent objected that this incident took place outside any "relevant period" herein, and the General Counsel responded that it was intended to prove background animus, not an independent violation.

[28] The pleadings establish and I find that Croft and Hutto were agents of Respondent and supervisors within the meaning of Sec. 2(11) of the Act.

[29] As in the cases of John Ducate Jr. and Dennis Ducate, the pleadings establish and I find that Frank Ducate was an agent of Respondent and a supervisor within the meaning of Sec. 2(11) of the Act.

latter agrees that he did have a conversation with Robinson and, although he places it about 1 week earlier than Robinson, he stated that it took place after the September 7 layoff. Croft, on the other hand, denied that Robinson asked for a meeting with Ducate. In light of the obvious fact that such a meeting did take place, I credit Robinson's testimony that she asked for it, and do not credit Croft on this difference. However, Croft did corroborate Robinson's testimony about his description of Respondent's layoff policy as governed by seniority, and Robinson's concern with the possibility of her own layoff.

Robinson's version of her conversation with Frank Ducate is that it took place on the afternoon of the same day that she spoke with Croft. Robinson asked about her rights to maternity benefits, and whether she was going to be laid off. Ducate replied that she would receive $60 weekly in insurance payments, and would not be laid off. He advised that this would be a better policy than "taking a layoff," since Robinson could automatically return to work after 2 months on maternity leave. Robinson then went home and wrote Ducate a letter, thanking him. He called her into the office after receiving it, and asked whether she had written this "sweet letter." An amiable conversation ensued, in which Ducate told Robinson that he needed her in the shipping department, that he had no one else to put back there, and that everything was going to be "all right."

Ducate admitted one conversation with Robinson, and averred that she merely asked whether there were going to be any more layoffs, and whether she would be eligible for unemployment benefits and food stamps. He replied that he did not know about future layoffs, and supposed that she would be entitled to benefits. Ducate denied that Robinson wrote him a letter, or that he had another conversation with her about layoffs.

Robinson's version of what she described as her first conversation is more likely than Ducate's. She had just seen Supervisor Croft, to whom she had expressed concern about the possibility of her own layoff, and her right to maternity benefits. The supervisor had told her that she and another employee would be the next to be laid off. It is highly probable that Robinson expressed the same concerns in her conversation the same day with Plant Manager Ducate. According to the latter, however, Robinson talked only about layoffs in general and her right to unemployment benefits, but did not specifically ask about her own status in any forthcoming layoff nor mention maternity benefits. This is highly unlikely, and I credit Robinson's testimony as to the nature of her concerns expressed to Ducate.

Ducate denied the statements attributed to him by Robinson, assuring her of continued employment and maternity benefits. As in his testimony about the beginning of the conversation, Ducate's version is contrived and unnatural. Robinson was a more believable witness, and I credit her testimony. I also credit her account of the letter she wrote Ducate, thanking him, and her second conversation with him thereafter.

4. Robinson's testimony at the prior hearing

On November 3, 1979, Robinson appeared as a rebuttal witness for the General Counsel in the earlier proceeding, and her testimony was relied on by the administrative law judge in the latter's finding that an alleged discriminatee had not been suspended for cause, contrary to Respondent's witnesses. *Ducane Heating Corp.*, supra, 254 NLRB at 126.

5. Robinson's "Permanent Layoff"

On the day that she returned to work after her testimony at the hearing, according to Robinson, she was called to the telephone by Supervisor Dennis Ducate. She took the call, and an individual at the plant called her "a very dirty person [for] testifying for the Union." Robinson averred that she protested this call to Dennis Ducate, who replied that it was a "personal problem." Robinson testified that she asked Ducate to get this "harassment stopped," and told him that she would contact the Labor Board if it were not stopped. According to Robinson, Dennis Ducate replied, "I know you will." Dennis Ducate admitted knowing the individual identified by Robinson who, he testified, was employed by a vending company at the plant canteen. However, Ducate denied that Robinson ever protested any call she had received from this individual. Ducate was not a reliable witness, and I credit Robinson's testimony.

On November 7, 4 days after her testimony before the Board, Robinson was laid off by Plant Manager Frank Ducate. The latter told her and three other employees in his office that they were being put on "permanent layoff due to the economic situation in the country," and that they should seek employment elsewhere. Frank Ducate initially testified that 10 employees were laid off on November 7. Ducate also testified, however, that Robinson and five other employees were all present in his office on that date at the same time, when he read to them from a layoff notice which had been posted on the bulletin board.

Ducate further stated that six employees were laid off on November 26, because of a reduction in customer orders. All three layoffs—September 7 and November 7 and 26—were "permanent," according to Ducate.

6. Respondent's asserted reasons for Robinson's layoff

a. *The seniority issue*

(1) *Summary of the Evidence*: Respondent contends that Robinson was laid off in accordance with plantwide seniority. Plant Manager Frank Ducate said that Robinson had "less seniority than the next person" on a "seniority list." He could not recall the name of the next person on the list, but contended that he had submitted a copy of same to the Board. However, the General Counsel represented that he had no such list, and Supervisor Arnold Croft testified that he was not even aware of a seniority list. Supervisor Dennis Ducate contended that the November 7 layoff was made on the basis of plantwide seniority, but testified that Robinson was not the least

senior employee in the plant, thus contradicting Frank Ducate.

Frank Ducate conceded that some employees were recalled after layoff. Although they had been laid off according to plantwide seniority, they were recalled pursuant to a system of departmental seniority, according to the plant manager. Robinson credibly testified that two other employees, who had "started working" after she did, were called back to work. One of these worked in the shipping department, where Robinson was assigned at the time of her layoff, and the other in the welding department, where Robinson formerly worked.

(2) *Analysis*: Because of the undocumented and contradictory nature of Respondent's evidence concerning the existence of a seniority list and Robinson's placement on it, Respondent has not established that Robinson was laid off in accordance with any seniority system.

Assuming arguendo the truth of Frank Ducate's testimony about layoff of employees according to plantwide seniority, and recall according to departmental seniority, such a system is fraught with potential for manipulation by an employer to get rid of an undesirable employee. Thus, an employer could transfer the latter to another department, where he would be last in departmental seniority, implement a mass layoff, and then recall in accordance with departmental seniority. This may have been the case with the shipping employee who was recalled although he started working at the plant after Robinson began. With respect to the welding department employee who was also less senior than Robinson, the employer's argument would be that Robinson was not employed in that department at the time of layoff, and therefore not entitled to recall.

This system in effect would grant the employer discretion to select which employees shall continue to be employed. The Board has already approved of the conclusion that "an employer's discretion as to who shall have continuous service and who shall not is to enable an employer to pick and choose between employees, a result totally inconsistent with the generally accepted purpose of a seniority system." *Ram Construction Co.*, 228 NLRB 769, 776 (1977).

The dubious nature of Respondent's double system of seniority is further emphasized by the fact that, although all layoffs were "permanent" according to Ducate, some of the employees were recalled. To paraphrase Orwell's *Animal Farm*, some of the permanent layoffs were apparently more permanent than others.

Considering all these conclusions together—the fact that Respondent has not established that Robinson was initially laid off pursuant to a seniority system, the double system of seniority with its potential for discriminatory manipulation, and the recall of some "permanently" laid-off employees with less plantwide seniority than Robinson—I find that Robinson was initially laid off, and her layoff status was thereafter maintained, contrary to any system of seniority. In fact, she was discharged. *Don Pizzolato, Inc.*, 249 NLRB 953, 957 (1980).

b. *The declining business issue*

(1) *Respondent's Position*: Plant Manager Frank Ducate testified that the layoffs were caused by decline in customers' orders. The Company went bankrupt in 1974, and had permanent layoffs at that time, according to Ducate. He feared that the Company might be facing similar problems in late 1979, and planned permanent layoffs to avoid them.

During the 1974 layoff, according to Ducate, the position of shipping clerk was abolished as a separate job, and was later reinstated. Betty Robinson held this position in the fall of 1979. According to Dennis Ducate, it consisted of typing packing slips and bills of lading, and operating a teletype information service for customers.

Three employees in the shipping department were laid off during the September 7, 1979 layoff, according to Frank Ducate. The plant manager and Dennis Ducate testified that they discussed the shipping clerk position about 2 weeks before the November 7 layoff, and at that time decided to have the personnel clerk perform the shipping clerk's duties. The personnel clerk at that time was, and still is, Donna Winstead. Respondent thus contends that it made a decision to eliminate Robinson's job about 2 weeks before the November 7 layoff. This is described by Respondent's witnesses as "consolidation" of the shipping clerk and personnel clerk positions. Since the prior hearing began on October 30, and Robinson testified on November 3, Respondent appears to be suggesting that its decison to lay off Robinson was actually made just before Robinson's testimony at the last hearing. Robinson was not given any advance notice of this decision, according to Dennis Ducate.

Respondent's witnesses testified that Donna Winstead performed the shipping clerk functions about 2 hours daily. There is no plan to reinstate the shipping clerk job as a separate position, although Dennis Ducate said that it now takes more than 2 hours to perform shipping clerk functions.

(2) *Analysis*: The General Counsel argues that Respondent's failure to call Donna Winstead casts doubt on the testimony of Respondent's witnesses, and that I have no choice but to find that her testimony would have been adverse to Respondent's cause, if she had been called. There is merit in this argument.[30]

Respondent did not submit any documentary evidence to support its contention that there was a decline in customers' orders. The General Counsel asked Dennis Ducate whether he could state the number of orders either at the time of the layoff or the time of hearing, and Ducate replied that he could not.

The search for documentary evidence pertaining to Respondent's economic defense is not, however, entirely in vain. As described above, Respondent submitted voluminous production records and a summary thereof in an attempt to prove that Randolph McCrea had "substandard production." Production records, of course, are not customers' orders. However, there must be some relationship between the two if a company is to stay in business. Absent special circumstances, no rational entrepreneur would increase his production while his daily sales were declining. As a corollary, the fact that production

[30] *Alabaster Lime Co.*, 194 NLRB 1116, 1118 (1972); see authorities cited in *Hadbar*, 211 NLRB 333, 337 fns. 3, 4 (1974).

is increasing is some evidence that sales, or orders, are also increasing. These principles apply to Respondent's economic defense of its layoff of Betty Robinson, and to the production records which it submitted in this proceeding.

Respondent's records cover the months of April 1979 through February 1980, with unexplained omissions of June and July 1979. They are thus coextensive with the one layoff in September and the two in November. They do not purport to be records of all units or components produced by the Company. Nonetheless, they do constitute records of a very substantial number of components produced during a relevant period. The monthly totals of all these components thus constitute some evidence of the Company's orders from customers at times when employees were being laid off because, the Company asserts, orders were going down.

The records are quite the reverse of what one would expect in a business with declining sales. Thus, they show totals of 6162 components produced in April,[31] 13,579 in May (no figures for June or July), 12,137 in August, 28,361 in September, 33,587 in October,[32] 27,463 in November,[33] 18,373 in December,[34] 20,688 in January 1980,[35] and 31,789 in February.[36])

Thus, in the month of the first layoff (September), production was about four and one-half times greater than it was 5 months before (April), and continued at the same substantially higher level. Assuming some lag time between receipt of orders and production, the fact that production continued at a high level for all 5 months after September strongly suggests that there was no decline in orders during that and succeeding months.

These figures are not conclusive, since they are derived from the Company's gas welding department. Frank Ducate testified that the rising cost of home heating fuel had almost eliminated business in oil furnaces since November 1979. However, he admitted that business in gas furnaces had "picked up" in the winter of 1980. The record thus contains only testimonial assertions of a decline in total orders and a decline in oil furnace sales, while the only documents available, plus Frank Ducate's corroboration, show a substantial increase in gas furnace sales. There are no documents to establish that this increase in one part of Respondent's business was more than offset by a decline in another part. Respondent presumably had business records showing total orders during relevant periods of time. No such records were supplied.

[31] R. Exh. 61, totals of all products for all employees in the column entitled, "Quantity Production."

[32] McCrea was injured in October and did not return to work until November. R. Exh. 61 omits figures for all employees for the period of McCrea's absence. Thus, for October 1979, with 23 working days, the exhibit provides production figures for only 9 days, the total of which is 13,143 units. Assuming similar production during the 14 working days omitted on the exhibit, the extrapolated total is 33,587 for October.

[33] Out of 22 working days in November 1979, R. Exh. 61 provides production figures of 18,724 for 15 days. Assuming similar production rates for the 7 omitted days, the extrapolated total for the month is 27,463. See fn. 32.

[34] Eight weekdays are omitted, presumably for holiday reasons.

[35] Actual figures, see fn. 31.

[36] Ibid.

Respondent's animus against the Union and its supporters has already been established, as well as an elaborate structure of pretextual defenses in the case of McCrea. Respondent's witnesses on the issue of its alleged decline in orders were not reliable, and I conclude that the Company has not established that it suffered a decline in customers' orders during the period of the layoffs.

c. *The "Prior Decision" issue*

With respect to the specific layoff of Robinson, I do not credit the testimony of Respondent's witnesses that this decision was made about 2 weeks prior to November 7. Robinson had had an amiable conversation with Frank Ducate only a few weeks before, in which she was assured of continued employment and maternity benefits. It is unlikely that Ducate would thereafter make a secret decision to terminate her, but delay notifying her for 2 weeks. There is no evidence of delay in implementation of layoff decisions pertaining to other employees, and no reason to believe that Respondent varied its customary practice in the case of Robinson.

It is probable that Respondent would have consulted with Donna Winstead before adding the shipping clerk duties to her existing duties as a personnel clerk, and that Winstead would then have had some knowledge of the date of the alleged decision to "consolidate" the two positions. However, Winstead, currently employed by Respondent, was not called as a witness. I infer that, if called, her testimony would have been adverse to Respondent on this issue.[37]

For these reasons I find that Respondent's decision to give Robinson a "permanent layoff" was made about the date of the actual layoff, to wit, November 7, 1979.

d. *Respondent's other evidence against Robinson*

Respondent introduced voluminous shipping documents with various errors on them, allegedly by Robinson. Dennis Ducate asserted that he spoke to Robinson in May 1979 about these errors, but acknowledged that he never gave her a written warning. Ducate also admitted that these errors had nothing to do with Robinson's layoff. There is therefore no need to consider them, since Respondent concedes that they were not a factor in its action against her.

Respondent also sought to attack Robinson's credibility on the ground that she filed an application for unemployment compensation benefits on November 13, stating thereon that she was not pregnant, whereas in fact she gave birth 2 days later. Robinson testified that she was obviously pregnant 2 days before childbirth, at the time when she appeared in the unemployment compensation office, and that she inadvertently checked the wrong box on the application. I have carefully considered this evidence and conclude that it does not indicate that Robinson was an untruthful witness.

[37] Supra, fn. 30.

7. Legal analysis and conclusions

As in the case of McCrea, Robinson was a union supporter who testified at the prior hearing, and Respondent's animus against such employees has been established. For reasons already given and authorities cited, this animus must be considered in evaluating Respondent's action against Robinson.

In March 1979, Supervisor Dennis Ducate asked Robinson, "What is this that I hear about you being for the Union?" and told her that she could not "afford" to be for the Union. In a later conversation referring to the absence of another employee, Ducate said that this was how Respondent was going to "get rid of the bunch of them, all 166 of them." Since 166 employees voted for the Union during the election held the same month, Ducate was obviously threatening to get rid of all the union supporters. Although these statements by Ducate were not alleged as independent violations of the Act, they were obviously coercive.

Robinson did not openly admit her prounion sympathies in March 1979. Thus, she asked Dennis Ducate who it was that had told him that she was "one of the 166." Ducate contends that Robinson said that employees would be "crazy" to vote for the Union. Respondent's doubts about Robinson's true sympathies were augmented during her two conversations with Frank Ducate in September 1979, after the first layoff, when she requested assurances of maternity benefits and job continuity. The fact that Ducate gave her these assurances in a friendly conversation, and told her that he needed her in the shipping department, suggests that Respondent was not yet aware of Robinson's stand on the union issue.

Robinson's views became apparent on November 3, when she testified for the General Counsel in the prior hearing. Respondent's attitude underwent an abrupt about-face. Thus, when Robinson returned to work and protested being called a "dirty person" for testifying, and said that she was going to the Labor Board if the harassment did not stop, Dennis Ducate said that he knew she would—a comment evidencing Respondent's animus.

On November 7, 4 days after her testimony, Robinson received a "permanent layoff" under circumstances which warrant a finding that she was discharged, as already set forth. Her discharge was motivated by Respondent's discovery of her union sympathies, and by the fact that she testified on behalf of the General Counsel at the Board hearing. This conclusion is warranted because of Dennis Ducate's prior coercive interrogation and threats in March 1979,[38] the abruptness of Robinson's discharge[39] a few days after her testimony at a Board hearing,[40] the fact that the asserted reason for her discharge, a decrease in orders, did not in fact take place,[41] the fact that other employees were recalled at a time when business was allegedly going down, without explanation in accordance with any rational seniority system,[42] and by Respondent's previously established animus against the Union and its supporters. *Wright Line*, supra.

For these reasons, I find that Respondent discriminatorily discharged Robinson on November 7, because of her union sympathies and her testimony before a Board hearing, in violation of Section 8(a)(1), (3), and (4) of the Act.

D. *Larry Hampton*

1. Employment history

Hampton started working for the Company as a welder in the oil welding department in August 1977. He later transferred to the gas welding department where his principal job was tying ends. This work required him to lift and pull units weighing up to 40 pounds.

2. Hampton's union activities

Hampton credibly testified that he started working on behalf of the Union in August or September 1978, and that this continued until about October 1979. He passed out union leaflets and asked fellow workers to sign union cards. John Harrison, a supervisor in the oil welding department,[43] testified that he saw Hampton distributing leaflets, and company knowledge of this activity is therefore established.[44] Hampton also testified at the previous Board hearing which began October 30, 1979, and Respondent obviously had knowledge of this fact.

3. Hampton's injury and treatment

On January 25, 1980, Hampton slipped in a hole caused by a missing roller within the roller belt, and fell on his back.[45] He worked for about 30 minutes, then began to feel pain, and asked to see a doctor. He was examined that day by Dr. John C. Whitley Jr., a witness for Respondent. Frank Ducate described Dr. Whitley as "our Company doctor," although the latter said that he was "simply available" to the Company. Whitley took X-rays and conducted a physical examination of Hampton. The X-rays showed no abnormality, but the physical examination revealed tenderness and a muscle spasm in the lower back. Hampton was given muscle relaxants

[38] *Robin American Corp.*, 245 NLRB 822, 835 (1979); *Pearson Bros. Co.*, 199 NLRB 1179 fn. 3 (1972).

[39] *McGraw-Edison Co.*, 172 NLRB 1604 (1968).

[40] *Grove Mfg. Co.*, 196 NLRB 280 (1972).

[41] *NLRB v. West Coast Casket Co.*, 469 F.2d 871 (9th Cir. 1972), enfg. in part 192 NLRB 624 (1971); *Wisconsin Bearing Co.*, 193 NLRB 249, 259 (1971).

[42] *Eugene Luhr & Co.*, 187 NLRB 769, 772 (1971).

[43] The complaint dated July 17 alleges and the answer thereto admits that "John Hairston" is an agent of Respondent and a supervisor within the meaning of the Act. At the hearing, "John Harrison" testified that he had been a supervisor in the oil welding department since March 1979. I find that the correct last name is "Harrison," as stated in the official transcript, and that he was an agent of Respondent and a supervisor within the meaning of Sec. 2(11) of the Act.

[44] As indicated, ibid., Harrison said that he had been a supervisor since March 1979. The allegation in the complaint, admitted by the answer, avers that he was a supervisor "at all times material herein." Since Hampton's union activities continued through October 1979, I conclude that Harrison and, by attribution, Respondent acquired knowledge of Hampton's activities at times subsequent to Harrison's acquisition of supervisory status.

[45] Hampton stated that the date was January 5. However, the medical records show that it was January 25.

and pain medication, and was recommended for light duty for 5 days.

Hampton returned to Dr. Whitley on January 30. There was some improvement, but he still complained of pain, and was given another analgesic. After Hampton's return to Dr. Whitley on February 4, the latter continued his diagnosis of back strain, minor contusion, and minor spasm. However, because of the continued pain, Hampton was referred to an orthopedic surgeon, Dr. Harry L. Pearce, who examined him on February 8. X-ray examination was unremarkable, and Dr. Pearce's diagnosis was acute dorsal lumbar back strain or a pulled back muscle. He prescribed pain medication, rest, a back brace, and light duty. Hampton credibly testified that he wore the back brace throughout his period of treatment, and thereafter.

Dr. Whitley saw Hampton, for the last time, on February 11. It was his opinion that Hampton could return to full duty. However, he deferred to Dr. Pearce's recommendation for light duty as being within the latter's area of expertise. Although Dr. Whitley testified that he had detected a muscle spasm in Hampton's back on initial examination, he was later unable to say whether there were any involuntary muscular contractions. He was asked what diagnostic inference might be derived from the absence of such contractions. Dr. Whitley answered that, although "faking" had to be considered in the absence of involuntary signs and symptoms, "the patient can't help but experience some discomfort and sometimes [it] is almost impossible to really tell whether it is subjective or objective."

Dr. Pearce saw Hampton again on February 15, at which time he was still experiencing pain. Dr. Pearce prescribed anti-inflammatory medication and, 4 days later when Hampton was seen again, Dr. Pearce felt that there had not been sufficient time for healing.

Hampton missed one appointment with Dr. Pearce on March 11 because of transportation problems, but was seen on March 17. He was still complaining of "intermittent discomfort," but Dr. Pearce considered that the healing process had been completed. He testified that no examination of Hampton was necessary after the initial examination, because the latter reported diminishing pain over the period that he was seen. Dr. Pearce did acknowledge, however, that lifting and bending might aggravate the existing injury.

Hampton testified that Dr. Pearce told him that his back might hurt for a while because of the injury. However, the doctor told him that he might lose his job if he continued on light duty. Although Dr. Pearce said that he did not know specifically whether Hampton was working, or the name of his employer, he agreed that he frequently counsels patients against prolonged light duty, because of the abundance of healthy applicants for employment. Accordingly, he gave Hampton a "certificate" that he was able to return to work with no limitations.

4. Hampton's work during the period of treatment and his discharge

Hampton credibly testified that, after he returned from seeing Dr. Whitley the first time, Supervisor Creech told him to go back to his usual job. Hampton protested, saying that Dr. Whitley had assigned him to light duty. Assistant Plant Manager Billy Joe Stewart demanded that Hampton return to the doctor's office and get the work restriction in writing. Creech maintained that tying ends *was* light duty. Hampton differed with this, because of the bending and lifting requirement, and Creech attempted to show him how to do the job without bending and lifting. Hampton was then assigned to sweeping. He testified, and Creech denied, that the latter tried to get him to sweep under the roller belts in a manner which required bending. I credit Hampton.

In February, Hampton was transferred to the oil welding department under Supervisor John Harrison. His job was making cleats, a spot welding function classified as light duty. Hampton testified that there was sufficient work of this nature. Harrison, although he said that this was a "created" job, also testified that he had enough of this work for Hampton to do.

When Hampton returned from his March 17 visit with Dr. Pearce, he gave Harrison the doctor's certificate stating that he could return to work without limitations. Harrison read the certificate and, noting that "they're putting you back on your regular duty," asked Hampton how he felt. According to Hampton, he replied that his back still hurt, and Harrison responded by saying he did not know why Hampton should go back to regular duty with pain in his back. Harrison alternately denied and then said that he did not know whether he had this conversation. I credit Hampton.

Harrison further testified that Hampton walked around the plant "slumped over," but that he also saw him walking normally one night in a grocery store. When Hampton saw the supervisor, according to Harrison, he "sort of went back into his slump." I attach little importance to this testimony, because the fact that Hampton was actually experiencing pain is medically documented. Further, as noted, Hampton wore a back brace at times, and may have had unusual posture because of it.

After Hampton's return to the plant with Dr. Pearce's certificate on March 17, he went back to making cleats. Creech came over and asked him what Dr. Pearce had said, and how his back felt. Hampton said that his back hurt, and referred Creech to Harrison for the doctor's report. Hampton was then ordered to return to the gas welding department and begin welding, which he did for the balance of March 17.

Hampton returned to work the next day, and during the morning told Creech that his back still hurt and that he would like to see a doctor. Creech asked whether the last doctor had released him, and Hampton responded affirmatively. According to Creech, Hampton said that he was unable to do his job and would not do it. I credit Hampton's version of this conversation.

Plant Manager Frank Ducate testified that he received a report on March 18 that Hampton had been released for work without limitation, but that he was complaining that he could not or would not do the job, and wanted to see a doctor. Ducate asserts that he then called Dr. Pearce, who told him that he could not find anything wrong with Hampton, and that the latter was "malingering." Ducate then spoke with his attorney, and also

stated that he called Dr. Whitley, who told him that Hampton was "faking." Ducate then prepared a permanent layoff notice for Hampton, because of "inability or refusal to do the work," and gave it to Assistant Plant Manager Billie Joe Stewart.

Hampton was then called into Stewart's office, with Creech present, and was given the discharge notice. According to Hampton, he read it, and protested that he was not refusing to do his normal job, but that his back hurt and he was unable to do his job at that time. Stewart replied that there was nothing he could do. Hampton stated that he unsuccessfully asked for a union representative or coworker. Stewart testified that the entire proceeding went smoothly. It was "cut and dried." Hampton did not ask for a union representative, and did not even object to being permanently laid off. This testimony is incredible, and I accept Hampton's version.

Respondent introduced into evidence a letter from Dr. Pearce dated March 19, 1979, stating that it was in response to a request from Ducate. The letter outlines Dr. Pearce's diagnosis and treatment given above, and concludes that Hampton was still complaining of mild pain in the middorsal back on April 17 but that the doctor felt he could return to work with the help of aspirin if needed. Respondent also introduced a letter from Dr. Whitley dated April 11. This letter notes that Hampton was last seen on February 11, that examination then "failed to reveal any objective pathology," and that Hampton was "encouraged to return to work as suggested by Dr. Pearce."

I do not credit Ducate's testimony concerning the "malingering" and "faking" statements attributed to the doctors. Dr. Whitley testified during the hearing, and his letter is outlined above—there is no reference to "faking" anywhere in this evidence. Indeed, when Dr. Whitley was explicitly asked whether "faking" could be inferred from an absence of involuntary muscular contractures, he replied that it was difficult to tell.

Nor is there anything about "malingering" in Dr. Pearce's testimony or letter. Given his diagnosis of acute back strain, and his treatment consisting of pain medication, rest, a back brace, and light duty, it is incredible that he would have considered Hampton a malingerer. Even on March 17, when he released Hampton for general duty, Dr. Pearce acknowledged that Hampton was still asserting intermittent pain, but felt that he could work with the help of aspirin if necessary.

There is no testimony from either doctor about a telephone conversation with Frank Ducate on March 18. Respondent introduced a "documentation" wherein Ducate sought to record his alleged conversation with Dr. Pearce on March 18, and, as noted, the latter did send a letter dated March 19. There is no "documentation" concerning a conversation on March 18 with Dr. Whitley, however, and the latter's letter to Respondent about Hampton is dated April 11, about 3 weeks after the layoff. I do not credit Ducate's testimony that he had any conversation at all with Dr. Whitley on March 18.

Up until the time of his return from Dr. Pearce's office on March 17, Hampton had been engaged for several weeks in light duty, making cleats. He was then transferred for the balance of the day to welding, despite his claim that his back hurt. The next day he said that his back still hurt, and asked to see a doctor. He was a believable witness, and his testimony as to pain is supported by the medical evidence. I credit that testimony.

5. Respondent's other evidence against Hampton

Respondent introduced evidence of Hampton's alleged absenteeism. However, Frank Ducate testified that Hampton was not laid off because of absenteeism, and there is therefore no need to consider this evidence.

Hampton was given a written warning for "low productivity" on June 9, 1979, but was also given "recognition" a week later for improvement. Other similar evidence introduced into the record by Respondent has nothing to do with the issues in this case.

Frank Ducate testified that Respondent had permanently laid off another employee (Timothy Jeffries) under "exactly the same" circumstances as Hampton's—refusal or inability to work after a doctor's release to full duty from light duty (R. Exh. 43).

6. Legal analysis and conclusions

The record clearly establishes that Hampton suffered a work-related back injury on January 25, and was thereafter in pain. The General Counsel seeks to cast doubt on the value of Dr. Whitley's testimony, because of its variance from that of Dr. Pearce, and on the latter's opinions because he did not conduct a physical examination of Hampton on March 17 before releasing him for general duty.

Dr. Whitley candidly deferred to Dr. Pearce's expertise in the field of back injuries. And there is no record evidence to contradict Dr. Pearce's description of medical practice, i.e., that barring evidence of a new injury, a patient's assertions of diminishing pain warrant a release without another examination. However, if the patient's statements alone provide the basis for a medical opinion, according to Dr. Pearce, then there would appear to be no medical contradiction to Hampton's statement the next day that his back hurt too much to engage in welding. On the other hand, if Hampton's statement is insufficient for a medical judgment, then he should have been given a physical examination before increasing the level of his physical activity, particularly in light of his protestations of continuing pain.

These doubts as to the procedure followed are augmented by Dr. Pearce's counseling of Hampton—that he might lose his job if he continued on light duty. It is unclear how Dr. Pearce knew that Hampton was on any kind of duty, since he testified that he did not know whether Hampton was working. Further, this view would seem to be an unwarranted introduction of a nonmedical opinion into what should have been an exclusively medical subject.

Although these factors must be weighed in assessing the medical evidence, they do not establish bias on the part of the doctors in favor of Respondent. As set forth, both doctors agree that Hampton did suffer an injury, and that he was in pain. The appropriate area for consideration is Respondent's use of the information it received from Hampton and the doctors.

As in the cases of McCrea and Robinson, Respondent's animus against the Union and its supporters has already been established, and must be considered in analysis of its treatment of Hampton. Like the other two employees, Hampton was a union activist and a witness at the prior hearing.

The record shows that Respondent viewed Hampton's injury as an opportunity to rid itself of a union protagonist. Thus, it was only with grudging reluctance that Respondent complied with Dr. Whitley's prescription of light duty for Hampton. First, Stewart demanded that Hampton go back and get the order in writing from the doctor. Then, Creech tried to convince Hampton that his regular job of tying ends *was* light duty. Finally, with Hampton transferred to sweeping duties, Creech tried to force him to sweep under the roller belts, a process requiring bending.

When Hampton returned from Dr. Pearce with a general duty "certificate," Creech promptly transferred him to welding, despite Hampton's statement that he was still in pain. The next morning, March 18, Hampton told Creech that his back still hurt and that he would like to see a doctor. This simple request was transformed into a statement that Hampton "would not or could not" do his job—at least, this is the report which Plant Manager Ducate received. Ducate did not consult with Hampton about the latter's version before making a decision—he talked merely with his lawyer, perhaps with Dr. Pearce, and thereupon decided to give Hampton a "permanent layoff." Respondent's failure to investigate the matter fully prior to making a decision constitutes evidence of its animus. *T.I.M.E.-DC, Inc. v. NLRB*, 504 F.2d 294 (5th Cir. 1974), enfg. 203 NLRB 1141 (1973).

When Stewart met with Hampton, it was to inform him of a decision already made, because Hampton "would not or could not" do his job. When Hampton said that he was suffering pain which prevented him from doing the welding job at that time, Stewart dismissed the matter without any consideration of the fact that Hampton had manifestly been able to make cleats in the oil welding department, a light duty job where there was a sufficiency of work. It is therefore clear that one of the alternatives in Respondent's dual rationale for its discipline of Hampton—that he "could not" do his job—was inaccurate. Although he could not engage in a full duty job at the time, he was capable of engaging in other, lighter work, which was then available. Respondent's failure to transfer him back to this work constitutes additional evidence of its unlawful motivation. *PPG Industries*, 251 NLRB 1147, 1173 (1980).

The other alternative in Respondent's dual rationale—that Hampton "would not" work—involves in essence a charge that Hampton was malingering. It is clear that this was not true in fact, based on the medical evidence of an actual injury, the observed muscular spasms, the doctors' opinions, and Hampton's credible testimony of pain.

Nor does the evidence warrant a finding that Respondent had a good-faith belief that Hampton was malingering. Respondent's only support for this argument is Dr. Pearce's general duty certificate. Factors militating against a finding of a good-faith belief, however, are (1) Respondent's initial reluctance to give Hampton light duty; (2) Hampton's protestations of pain to Supervisors Creech and Harrison, without any expressions of doubt from the latter; (3) Hampton's abrupt transfer back to the gas welding department upon Respondent's receipt of Dr. Pearce's certificate, without any consultation with Hampton; (4) Ducate's precipitate decision to give Hampton a permanent layoff without full investigation, and without an opinion from the doctors that Hampton was malingering; (5) Stewart's denial of Hampton's request for a union representative or coworker during the exit interview; (6) Respondent's failure to transfer Hampton back to the light duty which he could do; and (7) Respondent's pr viously established union animus. Respondent's argument that it was merely following its own past practice, citing the Jeffries case, is not persuasive—there is no evidence that any, much less all, of the foregoing factors were present in the Jeffries case.

The Board has had occasion to pass on a similar factual situation. In *Fasco Industries*, 214 NLRB 93 (1974), the company sought to establish the validity of its belief that the alleged discriminatee, a union activist, had abused company policy against "summer leaves" for female employees by a false claim of a back impairment. Chairman Miller, in a dissenting opinion, concluded that the company had established its position, and stated that "all of the medical evidence and the factual evidence confirms the report of the orthopedic specialist that from and after July 7 even the subjective symptoms of back pain had disappeared. There never having been any evidence of other than purely subjective symptoms, there is no reason to doubt, and every reason to accept, Respondent's reasons for having had a deep-seated suspicion that (the alleged discriminatee) was indeed attempting to circumvent Respondent's policy against 'summer leaves" (id. at 95). A panel majority, however, sustained the administrative law judge's conclusion that the company's asserted reason was a pretext (id.). In the case at bar, warrant for a finding of pretext is measurably stronger than in *Fasco*, because of the many factors cited above, and because Hampton, unlike the discriminatee in *Fasco*, gave testimony in a Board hearing in addition to his union activities.

For these reasons, I find that Respondent discriminatorily discharged Hampton on March 18, 1980, because of his union activities and his prior testimony in a Board hearing, in violation of Section 8(a)(1), (3), and (4) of the Act.

In accordance with my findings above, and upon consideration of the entire record, I make the following

CONCLUSIONS OF LAW

1. Ducane Heating Corporation is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. International Union of Electrical, Radio and Machine Workers, AFL-CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. By discriminatorily suspending Randolph McCrea for 3 days beginning September 7, 1979, and for 5 days beginning September 28, 1979; and by discriminatorily

discharging Betty G. Robinson on November 7, 1979, Randolph McCrea on February 29, 1980, and Larry Hampton on March 18, 1980, and by thereafter failing and refusing to reinstate them, Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1), (3), and (4) of the Act.

4. The foregoing unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

It having been found that Respondent has engaged in certain unfair labor practices, it is recommended that it be ordered to cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act. It having been found that Respondent unlawfully suspended Randolph McCrea for 3 days beginning September 7, 1979, and for 5 days beginning September 28, 1979; and unlawfully discharged Betty G. Robinson on November 7, 1979, Randolph McCrea on February 29, 1980, and Larry Hampton on March 18, 1980, in violation of Section 8(a)(1), (3), and (4) of the Act, it is recommended that Respondent be ordered to offer the foregoing employees immediate and full reinstatement to their former positions or, if such positions no longer exist, to substantially equivalent positions without prejudice to their seniority or other rights and privileges, dismissing if necessary any employee hired on or since November 7, 1979, to fill any said position, and to make said foregoing employees whole for any loss of earnings any of them may have suffered by reason of Respondent's acts herein described, by payment to each of them a sum of money equal to the amount he or she would have earned from the date of his or her unlawful discharge to the date of an offer of reinstatement, including in the case of McCrea the period of his aforesaid unlawful suspensions, less net earnings during such period, with interest thereon to be computed on a quarterly basis in the manner established by the Board in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and *Florida Steel Corp.*, 231 NLRB 651 (1977).[46]

I further conclude that Respondent's unfair labor practices found herein, engaged in concurrently with and following its unfair labor practices established in the last proceeding, demonstrate a proclivity to violate the Act. Thus, the record shows that Respondent has additionally violated the Act by two discriminatory suspensions and three discriminatory discharges, with practices including questionable bookkeeping, layoffs for dubious reasons, a propensity to seize upon the work-related injury of employees for discriminatory purposes, and a panoply of pretexts. Accordingly, I shall recommend a broad order.

Respondent will also be required to post an appropriate notice.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[47]

ORDER

The Respondent, Ducane Heating Corporation, Blackville, South Carolina, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discouraging membership in International Union of Electrical, Radio and Machine Workers, AFL–CIO, or any other labor organization, by unlawfully discharging or suspending any of its employees, or discriminating against them in any other manner with respect to their hire or tenure of employment, in violation of Section 8(a)(3) of the Act.

(b) Discharging or otherwise discriminating against employees because they have given testimony under the National Labor Relations Act.

(c) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action designed to effectuate the policies of the Act.

(a) Offer Randolph McCrea, Betty G. Robinson, and Larry Hampton immediate and full reinstatement to their former positions or, if such positions no longer exist, to a substantially equivalent position, without prejudice to his or her seniority or other rights and privileges, discharging if necessary any employee hired to replace any of them, and make them whole for any loss of pay any of them may have suffered by reason of Respondent's unlawful discharge or suspension of him or her, in accordance with the recommendations set forth in the section of this decision entitled "The Remedy."

(b) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Post at its plant in Blackville, South Carolina, copies of the attached notice marked "Appendix."[48] Copies of the notice, on forms provided by the Regional Director for Region 11, after being signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps Respondent has taken to comply.

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[46] See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962).

[47] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[48] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Ausable Communications, Inc. *and* **International Brotherhood of Electrical Workers, Local Union #781.** Cases 3–CA–10407 and 3–CA–10677

14 January 1985

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS HUNTER AND DENNIS

On 11 February 1983 Administrative Law Judge Harold Bernard Jr. issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed cross-exceptions.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order as modified.[2]

The judge found that the Respondent's subcontracting of installation work orders received in September 1981, without affording the Union an opportunity to bargain, violated Section 8(a)(5) of the Act. We disagree.

The record shows that in September 1981 the Respondent completed installing a satellite disc that added eight new channels to the services offered to customers. As a result the Respondent experienced an unusually large influx of installation work orders. Rather than hire more unit employees, the Respondent decided to subcontract the additional installation work. Based on our decision in *Otis Elevator Co.*, 269 NLRB 891 (1984), we find that the Respondent's decision to handle the increased workload affected the scope of the business and was not a bargainable item. We therefore dismiss the 8(a)(5) portion of the complaint.[3]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set out in full below and orders that the Respondent, Ausable Communications, Inc., Plattsburgh, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees that their work will be subcontracted out and that there would be layoffs because of employees' support for the Union.

(b) Promising employees better employment benefits in order to discourage them from supporting the Union.

(c) Threatening employees with a loss of seniority, company stock benefits, and other employment benefits as well as job reclassification because employees supported the Union.

(d) Informing employees that employees were laid off for engaging in union activities.

(e) Coercively interrogating employees concerning their union activities.

(f) Creating the impression that employees' union activities were being kept under surveillance.

(g) Informing employees that the Respondent would never settle on a contract with the Union.

(h) Subcontracting out construction work in order to discriminate against employees because of their activities in support of the Union.

(i) Discriminating against employees by laying them off for their activities in support of the Union.

(j) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make Michael Minnie, David Gladue, and Thomas Nephew whole for any loss of earnings they may have suffered by reason of the discrimination against them in the manner set forth in the section of the judge's decision entitled "The Remedy."

(b) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports,

[1] In adopting the judge's finding that the Respondent knew of employee union activity, we do not rely on his inference (based on the fact that most employees attended a union meeting) inasmuch as the record contains sufficient direct evidence of employer knowledge.

In the section of his decision entitled "Promise of Benefits," the judge's spot-cite to *Jamaica Towing* is incorrect. The correct citation is 236 NLRB 1700, 1700–1701 (1978).

Finally, in adopting the judge's finding that the Respondent, through Supervisor Art Caron, violated Sec. 8(a)(1), we find it unnecessary to rely on *Coach & Equipment Sales Corp.*, 228 NLRB 440 (1977).

[2] The General Counsel excepts to the judge's inadvertent failure to provide appropriate cease-and-desist language for his finding that the Respondent discriminatorily laid off employees. We find merit in the exception and modify the recommended Order accordingly.

We also modify the recommended Order so as to require the Respondent to expunge from its files any reference to the unlawful layoffs of employees Minnie, Gladue, and Nephew, and to notify them in writing that this has been done and evidence of the unlawful layoffs will not be used as a basis for future personnel actions against them. See *Sterling Sugars*, 261 NLRB 472 (1982).

Finally, we modify the recommended Order to make clear that the restoration order applies to work discriminatorily subcontracted and does not require undoing construction work already completed.

[3] Member Dennis relies on her concurring opinion in *Otis* in agreeing with her colleagues that the Respondent did not violate Sec. 8(a)(5) by unilaterally subcontracting installation work. She would find that the subcontracting decision had only "an indirect and attenuated impact on the employment relationship" and therefore fell within the definition of nonmandatory Category I decisions. 269 NLRB 891.

and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Return to the construction work subcontracting policy and practices existing prior to the subcontracting action herein found unlawful and restore to bargaining unit employees the work discriminatorily subcontracted which is uncompleted.

(d) Expunge from company files any reference to the unlawful layoffs of employees Minnie, Gladue, and Nephew, and notify them in writing that this has been done and the evidence of the unlawful layoffs will not be used as a basis for future personnel actions against them.

(e) Post at its Plattsburgh, New York location copies of the attached notice marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Region 3, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[4] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT create the impression of engaging in surveillance of the union activities of our employees.

WE WILL NOT threaten employees with layoffs for engaging in union activities.

WE WILL NOT inform employees that employees were laid off for engaging in union activities.

WE WILL NOT interrogate employees concerning their union activities or sympathies.

WE WILL NOT promise employees improved medical or dental programs, extra holidays based on an employee's birthday, or other improvements in employment benefits in order to discourage support for International Brotherhood of Electrical Workers, Local Union #781, or any other labor organization.

WE WILL NOT inform employees that we will never settle on a contract with the Union.

WE WILL NOT threaten to subcontract work, or that employees will lose their seniority, stock benefits, or other benefits and that jobs will be reclassified to discourage employee support for the Union.

WE WILL NOT subcontract our construction work to discriminate against employees because of their union activities.

WE WILL NOT discriminate against employees by laying them off for their activities in support of the Union.

WE WILL NOT in any other manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE have already offered reinstatement to Michael Minnie, David Gladue, and Thomas Nephew and WE WILL pay them for any loss of pay they may have suffered by reason of our discrimination against them, with interest.

WE WILL return to the construction work subcontracting policy and practices existing prior to our unlawful subcontracting of construction work and restore to bargaining unit employees any such work discriminatorily subcontracted which is uncompleted.

WE WILL expunge from our files any reference to the unlawful layoffs of employees Minnie, Gladue, and Nephew, and notify them in writing that this has been done and that evidence of the unlawful layoffs will not be used as a basis for future personnel actions against them.

AUSABLE COMMUNICATIONS, INC.

DECISION

STATEMENT OF THE CASE

HAROLD BERNARD, JR., Administrative Law Judge. These consolidated cases were tried before me in Platts-

burgh, New York, on March 24 and 25, 1983, pursuant to complaint allegations that Respondent, inter alia, promised employees improved benefits, interrogated employees concerning union activities, created the impression of surveillance of employee union activities, threatened employees with reprisals, subcontracted construction work, and laid off employees David Gladue, Michael Minnie, and Thomas Nephew because of employees' union activities, thereby discriminating against employees in violation of Section 8(a)(1) and (3) of the Act. The complaint further alleges that Respondent unilaterally subcontracted installation work on September 8, 1981, without notice to the Union, thereby violating Section 8(a)(1) and (5) of the Act. Respondent's duly filed answer denies all allegations of conduct violating the Act.

All parties were accorded the opportunity to participate fully at the hearing, to examine witnesses, to introduce evidence, to present oral argument, and to file briefs.

On the entire record[1] in this proceeding, including my observation of the witnesses and briefs filed by counsel, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent is a New York corporation located in Plattsburgh, New York, where it is engaged in operating a cable television system. Respondent annually derives gross revenues in excess of $1 million in the course of its business and annually purchases products valued in excess of $50,000, directly from points outside New York. As admitted, I find Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act. Admittedly, the Union is a labor organization within the meaning of Section 2(5) of the Act, and I so find.

The Appropriate Bargaining Unit

The parties agree that the following bargaining unit, for which the Union is the certified bargaining representative pursuant to certification on October 8, 1981, in Case 3–RC–8090 is appropriate:

> All employees employed by the Employer at its 68 Bridge Street, Plattsburgh, New York facility; excluding managerial employees, guards and supervisors as defined in the Act.

Respondent further admits the supervisory-agency status under Section 2(11) and (13) of the Act of Manager Charles Malone and Chief "tech" Arthur Carn as alleged in the complaint, supported by the record and, accordingly, so found.

[1] The General Counsel's unopposed motion to correct minor errors in the transcript is granted.

II. THE UNFAIR LABOR PRACTICES

A. *Background*

The time frame for events is the period beginning in late summer 1980 and lasting through November 1981.

Respondent installs cable television service in several New York communities where it has secured the franchise to do so, and maintains that service, which comprises some 235 miles of cable and 23 channels with a work force numbering about 14 employees divided into 6 office clericals, 3 outside installers, 2 service technicians, 1 line technician, and 1 installer with a clerk in warehouse inventory. Manager Charles Malone, Chief Tech Art Caron, and an officer manager comprised the supervisory echelon at relevant times herein. By the time of the hearing, in addition, Respondent had moved employee Ron Depo into an admittedly supervisory position as line supervisor.

In the fall of 1980, the above employees were not yet represented, there having been a Board election the previous June in which a majority cast votes against representation.

The record demonstrates that in the summer and fall of 1980 Respondent was engaged in a large amount of work, renewing franchises, making bids, purchasing new equipment, including a construction trailer, supplies, and hiring employees for anticipated stepped-up needs arising from rebuilding a system in Plattsburgh, and building up a system in the Cumberland Head project. Both employees Michael Minnie and David Gladue were informed by Respondent when hired that there was a "lot of work" to be done. Respondent's Exhibit 11 clearly indicates that the workload, in fact, reached new highs in this period, August through January 1981, as the number of backlogged customer orders for installations, disconnects, and service calls mounted.

In addition, the record shows that Respondent (which had, in the past 4 years, performed construction work—involving digging with its own equipment and the like—such as setting up and framing poles and laying cable with its own employees as well as outside contractors) "formed" a construction crew in January 1981. This crew, up until the events noted below, engaged in construction work according to undisputed employee testimony, as well as Respondent's own business records.[2]

B. *Employee Union Activity*

Following an earlier discussion between service tech Russell Caron and installer David Gladue 2 weeks before about getting together to discuss employment matters, all the shop employees met at Russell Caron's home in early March, where they discussed the need for help in securing better pay and benefits and clarification concerning their job classifications. The employees decided to contact a union representative for such purpose. On March 17 a meeting was held pursuant to such decision, at 7 p.m., at the Union's hall on North Beacon Street, attend-

[2] In fact, it is instructive to note that Respondent's employees performed in-house construction work in the years 1981, 1979, 1978, and 1977.

ed by all shop employees except one, four office clerical employees, and two union representatives. During the course of the 2-hour-long meeting, there was discussion concerning the benefits available to employees from union representation. All the shop employees there signed cards authorizing the Union to be their representative for purposes of collective bargaining with the Respondent.

C. *Respondent's Knowledge Concerning Employee Activities*

As shall further appear, there is no question that the employees' union activity became quickly known to Respondent. The fact that the entire work force—except one employee—attended the March 17 meeting above warrants such a conclusion. In addition, the Union sent Respondent, by letter dated March 24, notice that:

> The employees of Ausable Communications, Inc., have selected the I.B.E.W. as their bargaining representative. A petition for recognition will be filed at the appropriate time.

The letter was received by Respondent on March 25. Events on the following day, March 26, further sharply illustrate Respondent's knowledge in this regard.

D. *Respondent's Animus*

On that day, March 26, employees Michael Minnie, David Gladue, Russell Caron, and Ron Depo—who later became an admitted supervisor by the time of this hearing—were working at the North County Shopping Center when Respondent's chief tech and admitted supervisor Art Caron approached the group while employees were clearing out rocks and cleaning up the area. Minnie testified that Art Caron asked, "Who is going to be your shop steward?" David Gladue testified that, when no one replied, Caron pressed further with his questioning and stated, "Come on, we know all about it." When Minnie professed ignorance, Caron replied that he and the Company were both aware of all the union meetings that had been taking place and that he knew who the ringleader was because an employee who attended the meeting had handed in a four-page report to Caron and Malone listing the names of those who attended the meeting, and describing what had been said and what had taken place. As an acknowledged supervisor, and second in command, Caron's knowledge was, in addition to the other factors showing Respondent had knowledge of employee union activities, further proof in such regard. *Bartenders Local 19*, 240 NLRB 240, 246 (1979), enfd. 636 F.2d 1227 (9th Cir. 1980). Minnie testified further that Caron turned to Ron Depo and Russell Caron and said it would hurt them more (than Minnie and Gladue, only hired recently) because they would lose their stocks with the Company, their seniority would be thrown out the window, everyone would be reclassified, and the construction crew would be done away with as construction work would be contracted out. Minnie recalled that Caron stated employees would lose their benefits and would be working without a contract because the Company would not settle on a contract.

During the 45 minutes involved in the discussion, employee David Gladue recalls Caron admonishing employees, stating, "Come on you guys, all you're doing is doing yourselves in," and that Caron continued by saying, "I've been with this Company for quite a few years and I know the way they operate—they'll never settle [a contract] with you. What's going to happen is that they will lay off people, and they'll reassign your job position. You'll lose your seniority." When Caron also stated that Depo and Russell Caron would lose their stocks and was told by an employee that such stocks could not be taken away, he stated they would lose their rights to acquire company stock in the future. Gladue further corroborates Minnie's account of Caron's reference to construction work recalling that Art Caron stated, "Since we were going union, they [the Company] would probably contract out all the work and get rid of a few people." Russell Caron testified:

> He [Art Caron] told us it was going to be very rough on us if we tried to go union because the company was anti-union and he was against the union himself. Because he said if the union gets in there's going to be a lot of people going down the road. Including probably myself. And he said it would include losing stocks for people who had been there a long time, I didn't have any. So I didn't have any stocks to lose. But he said they'd lose stocks, benefits and seniority. And that they were going to contract the construction out. To subcontractors.

Although Ron Depo (by the time of the hearing a supervisor) testified on behalf of the Respondent and was present during the alleged statements by Art Caron, he was not questioned by Respondent as to these statements; nor was Art Caron, Respondent's then second in command and the person reported to have made the statements called by Respondent to testify. Both factors warrant the conclusion that such testimony would not be contrary to the testimony of Minnie and Gladue, whose accounts were further corroborated by the testimony given by Russell Caron at this hearing. Considering such facts, as well as the credibly tendered and completely uncontradicted testimony, it is concluded that on March 26, the day after Respondent received the Union's letter informing it that employees had designated the Union as their bargaining representative and that a petition for "recognition [sic]" would be filed, Respondent, through Art Caron, unlawfully interrogated employees concerning their union activities—(viz, the selection of a shop steward); unlawfully created the impression that the union activities of employees were being kept under close surveillance by Respondent (a conclusion based upon Caron's reference to a four-page report on employee activities being in Respondent's hands and that Respondent knew all about the union meetings and what took place there); and unlawfully threatened employees with a loss of stock ownership, job reclassification, loss of seniority and other benefits, subcontracting of con-

struction work, and layoffs and that Respondent would refuse to bargain in good faith with the Union so that employees would not be working under a collective-bargaining agreement even if they did select the Union as bargaining representative. By such conduct, Respondent violated Section 8(a)(1) of the Act in the described respects. *El Rancho Market*, 235 NLRB 468, 471 (1978) (employer told employees he would not sign a contract); *Computer Sciences Corp.*, 236 NLRB 266 (1978) (employer telling employees he would never negotiate contract with union); *Brodart, Inc.*, 257 NLRB 380 (1981) (employer found to have unlawfully created impression of surveillance by telling employees he knew they were attending union meetings); see also to the same effects, *E. I. du Pont de Nemours & Co.*, 257 NLRB 139 (1981); *Major Cab Co.*, 255 NLRB 1383 (1981) (unlawful interrogation where employer asked employees whether or not they had started union activities); *Holly Manor Nursing Home*, 235 NLRB 426 (1978) (unlawful interrogation to question employee as to who was on bargaining committee); *Hendricks County Rural Electric Membership Corp.*, 236 NLRB 1616 (1978) (interrogation of employees as to identity of hardcore union advocates found unlawful); *Jays Foods*, 228 NLRB 423 (threat to subcontract if employees persisted in union activities found unlawful); *Meyer Jewelry Co.*, 230 NLRB 944 (1977) (threatened loss of profit-sharing benefits if union came in found unlawful); *Coach & Equipment Sales Corp.*, 228 NLRB 440 (1977) (foreman's statement to employee friend they would both be jobless if union won election held unlawful); and *Anchorage Times Publishing Co.*, 237 NLRB 544, 551 (1978) (threats of layoffs and subcontracting if union became employees' bargaining representative).

Shortly afterward, placed by employee Gladue as 2 or 3 days later, and on April 1 by Minnie, Art Caron told employees coming in from work that two or three employees would be laid off, again stating that all construction work was going to be contracted out. Gladue testified without contradiction that Caron gave as the reason, "Since you guys petitioned for a union there's going to be a layoff."

E. *The Layoffs*

On April 3 Minnie and Gladue returned to the shop for lunch and were told to report to Manager Malone's office at 3 p.m. They had been told earlier that morning by Art Caron that there was no longer a construction crew and that construction work was being contracted out. Wanting to know more about why Malone wanted to see him, Minnie went to Art Caron and asked whether there was, in fact, to be a layoff. Caron told Minnie that when Miami (Respondent's home office is located in Miami) heard about the union talk and the union meetings, they wanted to fire his brother Russell Caron because he was the ringleader. Caron continued, according to Minnie, by saying, inter alia that "[he] said that at one time they were thinking about firing the whole construction crew" which consisted of Minnie, Gladue, Russell Caron, and Ron Depo.

In any event, when Gladue and Minnie reported to Malone, they were informed that they were laid off due to lack of work. Employee Thomas Nephew was also laid off that same afternoon and was given the reason that construction work was going to be "farmed out." As Nephew was cleaning out his truck and securing his personal belongings, Art Caron approached him and said:

> I told everybody a long time ago, he said, not to start organizing a union this early. Simply because there were going to be people who would get hurt by it. Certain people are going to go down the road. Don't feel too bad [he said] I'll probably be the next one. Along with a few others.

Based upon the foregoing, it is found that on April 1 Respondent, through Art Caron, further threatened employees with layoff due to their union activities, and that, on April 3, Respondent, through Caron, attributed the cause of employee layoffs in a conversation with Nephew to their union activities, in further violation of Section 8(a)(1) of the Act. *Home Lumber & Supply Co.*, 237 NLRB 322, 325 (1978).

F. *The Alleged Cause for Layoffs*

Respondent alleges that the layoffs of Gladue, Minnie, and Nephew were caused by a long-established company policy against performing construction work with its own employees and that it did not learn about Arthur Caron's construction crew doing such work until March 31 at which time, during a conversation with the company vice president, Malone testified, "[I]t came out through me or Arthur Caron that I had some employees on payroll doing some construction work." Later, on April 3, during a conference telephone call with Miami officials, Malone testified the decision was made to let three of the least senior employees go as a result of the policy-dictated decision to cease construction work with company employees and subcontract it out.

Analysis Concerning the Layoffs

Respondent's defense for laying off the three employees is not supported by the record. To begin with, Malone testified he did not know Art Caron's crew was doing construction work prior to March 31, but he also testified that during the meeting with the company vice president on March 31, it came out for the first time *either* through him or Art Caron that such work was being done. The only way it could have come out through *either* Malone or Caron that such was happening is if Malone did know about it beforehand. In addition, there is abundant evidence in this record tending to establish that Malone knew construction work was, in fact, being done. As first in command of overall operations, it is reasonable to infer Malone knew what work was being performed. In fact, under examination, Malone admitted that his supervisors informed him concerning the work being done. Malone's duties, according to his own testimony, included overseeing the billing for work performed by all employees and this would have included billing for the construction work being performed by Respondent in the Cumberland Head project. In addition, there is undenied employee testimony in the record that

Malone gave employees instruction on using the construction trailer while employees were loading cable prior to leaving for work at the Cumberland Head project, which job involved, as well known, construction work. It is readily apparent that Respondent knew that construction work was being performed all along. The only reason it advanced so frivolous a basis for the layoffs, as described above, on the heels of employee union activities was to cloak the only basis appearing in the record for such action and that is to discourage employees from supporting the Union. Moreover, Respondent failed to explain why such precipitous action as immediate layoffs was warranted against satisfactory workers who could have remained on call that weekend, and beyond, to complete what the record shows was at least enough work to warrant retention beyond April 3. It is well established that unsupported reasons for employee terminations under such circumstances, including employee union activity, employer knowledge, and union animus, especially when coupled with clear violations of employee rights guaranteed under Section 7 of the Act, all occurring at the advent of employee efforts to seek union representation, provide the basis to infer an unlawful motive under the Act. *C & D Transfer*, 258 NLRB 586 (1981); *Burk Bros. v. NLRB*, 117 F.2d 686, 687 (3d Cir. 1941); *A. J. Krajewski Mfg. Co. v. NLRB*, 413 F.2d 673, 675–676 (1st Cir. 1969); and *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966). Furthermore, it follows from the foregoing that, in order to carry out the unlawfully designed layoffs, Respondent, the record shows, subcontracted the construction work formerly performed by its employees to other companies, as treated further below.

Respondent's motives for subcontracting the construction work and laying off three employees are further confirmed by the testimony credibly offered by employees at this hearing, who uniformly described the repeated threats communicated to them by Respondent's second in command, Arthur Caron, that Respondent intended to subcontract the work involved and lay off employees because employees had filed a petition seeking union representation. Caron was in overall charge of all outside work and there can be no doubt that, when Caron informed Nephew after the layoffs that his earlier predictions of layoffs had come true, any question concerning Respondent's proven motive for the layoffs was put to rest.

Respondent, during the course of this proceeding, and in brief, suggested that Arthur Caron actually *favored* the Union and, further, implied that the testimony of Gladue, Minnie, and Nephew bore the taint of self-interest attributable to alleged discriminatees in Board proceedings so that their testimony, as well as the statements attributed to Arthur Caron, who was discharged by Respondent following the layoffs, is not reliable. I consider Respondent's contentions wholly without merit because the fact that a witness is an interested party in litigation standing alone does not and should not invite disbelief as to such testimony and, further, because none of these three witnesses displayed any lack of credibility during their testimony on any central issue in this case. Regarding Respondent's contention that Caron was actually in favor of having a union it must be concluded that, *assuming arguendo* this to be true he must, it follows, have been reflecting Respondent's motives, *apart from his own*, when he ascribed the layoffs and subcontracting as Respondent's retaliation for the employees' union activities. Accordingly, were I to conclude—which I do not—that Respondent had established this unsupported allegation, it would not lend support to the defense raised in this case.

Finally, I note that Supervisor Ron Depo, who was present during the threats made by Arthur Caron and who was called to testify as a witness for Respondent, did not testify in contradiction of the accounts rendered by Nephew, Minnie, and Gladue. For these additional reasons, as well, i.e., the admissions by Respondent's second in command as reported by employee witnesses, and undenied by Supervisor Depo, I find that the General Counsel has proven by a clear preponderance of the evidence that Respondent laid off the three employees and subcontracted the construction work in retaliation for employees' efforts seeking union representation thereby discriminating against employees in violation of Section 8(a)(3) and (1) of the Act. *Valley Oil Co.*, 210 NLRB 370 (1974); see also *Herman Bros. v. NLRB*, 658 F.2d 201, 210 (3d Cir. 1981), quoting *NLRB v. Ferguson*, 257 F.2d 88, 89 (5th Cir. 1958).

G. *Promise of Benefits*

The Union filed a representation petition on May 12, which eventually led to an election being scheduled on June 18. About 2 weeks beforehand, Respondent's vice president of personnel Richard Vura, an admitted agent of Respondent, conducted a meeting of all Respondent's employees at the company office building, lasting about 2 hours. During the meeting, according to the testimony of employees Kenneth Bashnew and Russell Caron, Vura told employees that the Company was against unions and definitely did not want one. He also showed two films to employees, one concerning the Company's expansion into new fields, and the other, a film depicting "roughhouse" employee tactics used trying to get a union in a plant.

According to Russell Caron, Vura told employees he knew that there were a few problems employees had with the Company but that he felt "we" could work them out. Vura then stated that the Company was *looking into* trying to get a better medical benefit plan, a better dental deductible, and another holiday based on the employee's birthday. Bashnew corroborates Caron's account, recalling Vura talking about a reduced deductible or doing away with it as "not really fair" and possibly adding an additional holiday. Vura was not called to deny the employee accounts or explain why, at the advent of a pending election, employees were promised improved employment conditions and new benefits—or even to deny the complaint allegation that such promises were unlawfully motivated. Absent any such explanation or denial, and given the undenied testimony, it is concluded that Respondent announced its intention to improve employment conditions and promised such new benefits as part of an ongoing pattern of preceding con-

duct herein found unlawful in order to discourage employee support for the Union in the shortly forthcoming election, thereby violating Section 8(a)(1) of the Act. *Jamaica Towing*, 236 NLRB 1700, 1705 (1978), and *Harvey's Resort Hotel*, 236 NLRB 1670 (1978)

H. *Unilateral Subcontracting of Installation Work*

It is undisputed that between the date of the election, June 18, and certification of the Union as collective-bargaining representative, on October 8, Respondent subcontracted installation work usually performed by bargaining unit employees to other companies in September, without prior notice to the Union.[3] Although the Union's official certification as bargaining representative between June and October was still pending due to election results involving the resolution of challenged ballots, Respondent made such unilateral changes (viz, the subcontracting of bargaining unit work) under the legally established risk that if the Union were to become certified, such changes would be in violation of Section 8(a)(5) of the Act. *Mike O' Connor Chevrolet Co.*, 209 NLRB 701, 703 (1974), revd. on other grounds 512 F.2d 684 (8th Cir. 1975). As noted therein:

> Such changes have the effect of bypassing, undercutting, and undermining the union's status as the statutory representative of the employees in the event a certification is issued. To hold otherwise would allow an employer to box the union in on future bargaining positions by implementing changes of policy and practice during the period when objections or determinative challenges to the election are pending.

It is clear from the record that the installation work subcontracted out by Respondent was, in the past, performed by unit employees. Moreover, it is plain that unit employees, had the work not been contracted out, could have benefited by the increase in such which Respondent advanced as the necessity behind its decision to subcontract, say, by working overtime at increased pay rates, the hiring by Respondent of additional unit employees thereby enhancing the seniority status of present employees, their employment longevity, and the like, had Respondent fulfilled its duty under law and contacted the Union beforehand with notice of its intentions. It is, moreover, quite clear that a mere increase in orders for installation work—one of Respondent's established services—would in no way act to prevent Respondent from according the Union such notice. Further, even assuming, as argued by Respondent on brief, that an increase in orders for installations constituted a valid economic basis for its action, it is well established that subcontracting pursuant to alleged economic reasons but without notice to the Union and an opportunity to bargain about the subject nevertheless violates the Act. *ACF Industries*, 234 NLRB 1063 (1977); *Appalachian Construction*, 235 NLRB 685 (1978); *Ramos Iron Works*, 234 NLRB 896 (1978); *Equitable Gas Co.*, 245 NLRB 260 (1979); *Pay 'N Save Corp.*, 210 NLRB 311 (1974); and see also *Madison South Convalescent Center*, 260 NLRB 816 (1982). I therefore conclude that Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally subcontracting installation work in September without notice to the Union.

[3] In view thereof, it is unneccesary to decide whether portions of a telephone conversation regarding settlement of this matter are admissible to prove a violation.

III. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent set forth in section II, above, and found to constitute unfair labor practices in violation of Section 8(a)(1), (3), and (5) of the Act, occurring in connection with Respondent's business operations as set forth in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act and is the exclusive certified collective-bargaining representative of employees in the appropriate bargaining unit as described above in section I within the meaning of the Act.
3. By engaging in the conduct described in section II, above, Respondent engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.
4. By subcontracting all construction work and laying off employees Michael Minnie, David Gladue, and Thomas Nephew, Respondent violated Section 8(a)(3) and (1) of the Act.
5. By unilaterally subcontracting installation work, Respondent violated Section 8(a)(5) and (1) of the Act.

THE REMEDY

Having found that Respondent engaged in the unfair labor practices set forth above, I will recommend that it be ordered to cease and desist thereform and to take certain affirmative action designed to effectuate the policies of the Act.

It having been found that Respondent discriminatorily laid off employees Minnie, Gladue, and Nephew on April 3, 1981, but, as conceded by the General Counsel, that Respondent has already offered them reinstatement, it shall be recommended that Respondent be ordered to make them whole for any loss of pay they may have suffered by reason of Respondent's discriminatory actions by payment to them of a sum equal to that which they would have normally received as wages from the date of their termination until Respondent offered them reinstatement, less any net earnings in the interim. Backpay, with interest, is to be computed on a quarterly basis in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and *Florida Steel Corp.*, 231 NLRB 651

(1977).[4] I will also recommend that Respondent be ordered to make available to the Board, on request, payroll and other records in order to facilitate checking the amount of backpay due them and other rights they may be entitled to receive.

Regarding the unlawful subcontracting of construction work, it shall be recommended that Respondent be ordered to return to its former subcontracting policies existing prior to the discriminatory subcontracting of construction work at which time it unlawfully increased the amount of such subcontracting to include work previously performed by unit employees and to resume said operations and restore to such employees said work. Regarding the unlawful subcontracting of installation work, it shall be recommended that Respondent be ordered to restore all such work to the unit until it accords the Union an opportunity to bargain with it over such decision and its effects and otherwise fulfill its bargaining duties under Section 8(a)(5) of the Act.[5]

A broad remedial order will be recommended due to the serious character and widespread scope in Respondent's unfair labor practices to better assure employees their rights as guaranteed under Section 7 of the Act.

[Recommended Order omitted from publication.]

[4] See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962).

[5] See *American Cyanamid Co.*, 235 NLRB 1316 (1978), enfd. 592 F.2d 356 (7th Cir. 1979); *Pay 'N Save Corp.*, supra; and *Equitable Gas Co.*, supra.

Michigan Transportation Company, Inc. *and* Teamsters Local No. 299, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. Cases 7–CA–21504 and 7–CA–21823

14 January 1985

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS HUNTER AND DENNIS

On 28 June 1983 Administrative Law Judge William A. Gershuny issued the attached decision. Counsel for the General Counsel and the Charging Party filed exceptions and supporting briefs, and the Respondent filed a brief in support of the administrative law judge's decision.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions[1] and to adopt the recommended Order.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

[1] The complaint alleges that the Respondent violated Sec. 8(a)(5) and (1) of the Act by, inter alia, a refusal to supply information to the Union pursuant to a 2 December written request. Respondent's answer specifically denies the allegation and avers that "indeed Respondent has scheduled a number of meetings at the request of the Charging Party to present said information to it, which scheduled meetings without notice were not attended by the Charging Party and, subsequently, the Respondent, by Certified Mail, addressed the matters requested by the Charging Party which it was capable of so addressing." We find that the General Counsel has failed to prove this allegation because no testimony was adduced at the hearing to rebut Respondent's averment that it did not agree to supply the requested information. We further note in adopting the administrative law judge's conclusion that the Respondent did not violate Sec. 8(a)(5) and (1) of the Act by refusing to supply information requested by Union Representative Sharon Davies on 2 September 1982, that no allegation concerning this information request is contained in either the complaint or the amended complaint.

DECISION

STATEMENT OF THE CASE

WILLIAM A. GERSHUNY, Administrative Law Judge. A hearing was conducted in Detroit on June 20–21, 1983, on a complaint issued March 30, 1983, alleging principally the unlawful termination of five clerical employees and the contracting out of their bargaining unit work on or about September 1, 1982, in violation of Section 8(a)(3) and (5), following expiration of their labor agreement 5 months earlier.

The principal issue is whether Respondent satisfied its bargaining obligation.

All parties having waived their right to file posthearing briefs and having made closing arguments on the record, I hereby make the following findings of fact and conclusions of law, based on the record evidence as a whole, as credited.

I. JURISDICTION

The complaint alleges, the answer admits, and I find that Respondent is an employer subject to the Act and that Charging Party is a labor organization within the meaning of Section 2(2) of the Act.

II. THE UNFAIR LABOR PRACTICE

Respondent is a specialty carrier with executive offices and terminal in Dearborn and terminals in four other locations in Michigan and Ohio. For many years, its more than 100 drivers have been represented by various Teamsters locals; its five clerical employees in Dearborn by another Teamsters local; and its mechanics by the Machinists. There is no evidence of antiunion sentiment on Respondent's part.

The five office workers, who perform all billing and payroll functions, have been covered by contract since the 1950s, when Respondent agreed to recognize the Teamsters who were seeking to organize the office workers of all specialty carriers in the area. In fact, by 1980, Respondent was the only specialty hauler whose clericals were under contract and its office costs greatly exceeded those of its competitors. Its labor costs in 1982 were in excess of $31,000 per annum per office worker, based on an hourly rate of $11.30 plus benefits and taxes. By 1982, Respondent was in dire financial straits, a condition admittedly recognized by the Union. Between 1979 and 1982, its net worth declined at an alarming rate, from $271,406 to a deficit of ($1,734,608), its revenues declined from $19 million to $14 million and its losses increased from ($203,355) to ($368,610).

Faced with this financial crisis, Respondent, as provided in the office clerks' labor agreement, gave notice of intent to terminate that contract on its March 31, 1982 expiration date. One year earlier, in March 1981, it had obtained an agreement from its five clericals to forgo for 1 year scheduled wage increases under the contract.[1]

In the spring of 1982, a new contract for office clerks was negotiated between the Teamsters Central-States Negotiating Committee and the appropriate employers' association (of which Respondent was not a member), calling for yet higher hourly rates for office clerks. Faced with mounting losses, a need to curb office expenses (its own executives had taken salary cuts) and an inability to purchase needed state-of-the-art data processing equipment, Respondent, through its attorney, David Jerome, initiated discussions with the Union in June 1982, concerning a new office workers contract generally and, more specifically, wage concessions and other alternatives.

[1] The credible evidence is that, while it dealt directly with the employees and their steward, Respondent did advise them to consult with their union representative. Apparently they did not do so. No unfair labor practice charge was filed then or later. A grievance was delivered to the Union by the employees in the summer of 1982, but was dropped by the Union.

The credible—and largely undisputed—evidence establishes that on June 29 Jerome met with local union administrative assistant Barnett, a veteran union official whose position placed him over that of the several business agents, at the local union offices. Jerome reviewed Respondent's financial problems (which were acknowledged by Barnett as well known) and the history of the Teamsters organization of office workers (which left Respondent as the only specialty carrier whose office clerks were organized); he asked for a deviation from the new $12 hourly rate for office workers which had just recently been negotiated; he told Barnett that, without a deviation, Respondent would have to contract out the unit work; and he asked Barnett, with whom he had many dealings in the past on special problems beyond the authority of a business agent, what Respondent could do. Barnett replied that there could be no deviation from the newly negotiated contract for office workers (i.e., no "white paper contract"), particularly since it was an election year; that Respondent could transfer jurisdiction over its Dearborn units to another Teamsters local which did not cover office workers (a "proposal" made in a joking manner); that he "knew" Respondent had to contract out the office work, as was already being done by other carriers; that he could give no guarantees or assurances about strike activity that might follow; and that the Company should "play the game" so that it looks good. Jerome already knew of the "unwavering" Teamsters policy of permitting no deviations from new contract terms.

Following this meeting, Respondent began to negotiate with data processing contractors and, on July 30, entered into a cost-plus contract (based on hourly clerical rates of $4.50) with an independent contractor to perform the work then being performed by the five-employee office unit. The contract was executory, in the sense that no services were to be performed until equipment was obtained by the contractor and work was transferred to it by the company. In fact, no work under that contract was performed until early September 1982, after termination of the five employees on or about September 1.

In late July, Business Agent Fistler, unaware of the earlier discussion between Barnett and Jerome, telephoned Jerome with a request for bargaining over a new office workers contract. Jerome told Fistler to speak with Barnett, so that he might get the "full story" from Barnett of their previous meeting.

On August 10, Jerome and Fistler privately met in the former's law office immediately prior to a scheduled meeting to be attended by the company president and the union steward, Shirley Benitez. Fistler confidentially told Jerome that he had spoken with Barnett, that he understood a contract could not be agreed on and that "we'll go through the motions only, for the benefit of the employees." The two then met in the conference room with the company president and Benitez to "negotiate" a new contract. There was no discussion of any employee grievance over the "give backs" of 1981. Jerome recited the Company's position concerning its inability to pay more than a $6 hourly rate for office workers and its ability to get comparable work outside for even less than that. Fistler stated that it was the master contract and "nothing else." No mention was made of the Company's decision to contract out the work. The parties agreed to "check out some things" (relating to mechanics in another unit) and to "meet again." Fistler never requested another meeting and, on August 31, 1982, was replaced by Business Agent Davie.

In the meantime, by letter dated August 26, Jerome advised Fistler that the office work would be contracted out and the five employees laid off on or about September 1. Davie responded in writing and by telephone, objecting to the contracting out of the work and requested a delay of the layoffs until the end of the week, which was agreed to.

On September 2, Jerome and the company president met with Davie and Barnett. Davie, who admittedly had not been advised by her local union superiors or her predecessor that the labor contract had been lawfully terminated by the Company months before, testified that there was no discussion of a new contract, only one relating to the reason for the layoffs. Jerome testified, credibly, that Davie's request for the name of the contractor was denied and that she asked if anything could be done. Jerome replied that the Union could sign a contract with a $6 hourly rate for office workers. All present considered this remark as an attempt at levity, since it was understood by all, based on the earlier discussions, that the Union could not agree to such a deviation and that each had to play out their parts for the "benefit" of the employees.

Several months later, on December 2, the Union requested information for bargaining. The request was denied.

Throughout, I have credited the testimony of Attorney Jerome, an experienced member of the labor bar generally and, more particularly, an experienced negotiator with Teamsters local unions. His testimony, based on my observation of demeanor on the stand, was clear, candid, and convincing. Moreover, his testimony as to contract negotiations with Union Representatives Barnett and Fistler and as to Teamsters policy against deviations from new contract terms stands unrefuted. Barnett, seriously ill, was not called. Fistler, working in the Detroit area, was not called either by the General Counsel or the Charging Party. Steward Benitez, despite her more than 20 years as steward, demonstrated little knowledge of contract administration and apparently had little or no contact with union officials. As a witness, she was confused and claimed a lack of knowledge that the contract had been terminated and that the employees' grievance over "give backs" had been dropped by the Union. Current Business Agent Davie admittedly did not participate in any of the relevant negotiations and had not been briefed by her predecessor as to those negotiations.

The General Counsel's contentions are twofold: one, that the contracting out of bargaining unit work and the termination of all five bargaining unit employees was retaliatory and unlawful under Section 8(a)(3) in that it was in response to the employees' demand for increased wages and return of "give backs" in 1981; the other, that Respondent's actions were taken without the requisite bargaining.

Neither finds factual support in this record.

As to the former, there simply is nothing in this record to suggest antiunion sentiment on the part of this employer or any retaliatory motive. Respondent's long-standing relationship with the Teamsters and Machinists is uncontroverted and there is no history of union animus. Counsel simply confuses a management decision following unsuccessful bargaining over wage rates with an unlawful motive. This allegation must be dismissed.

As to the bargaining issue, the record evidence (almost entirely uncontroverted) establishes a number of critical facts: on June 29 the parties met and reached impasse over hourly rates for office workers; on June 29 the Union acknowledged that the Respondent would have to contract out the work, as already was being done by other carriers; and on June 29 the Union acknowledged that, for cosmetic purposes only (i.e., for the benefit of the five employees in the unit), it would have to go through the motions of further bargaining.

That Respondent participated with the Union in this charade by conducting a "negotiating session" on August 10 does nothing to alter the irrefutable fact—admitted at the time by union representatives responsible for this unit—that agreement on a new contract was an impossibility. That the current business agent was unaware of the negotiating activities of her predecessor and superior similarly cannot undo those actions or reverse their legal and factual effect. That the Company did not specifically inform the steward on August 10 of its decision to contract out the work cannot alter the fact that the Union already knew the Company would have to contract out the work and the reasons for that decision.

Once impasse in fact is reached, the law imposes no obligation on an employer to continue as a participant in showcase meetings which a union may, for whatever reasons, deem essential for the pacification of certain of its members. Here, the Union approached the bargaining table in June with a fixed, inflexible position—the master contract with its $31,000 price tag per office worker per year or subcontracting, with the attendant risk of strike activity. Without reading any further between the lines, I note that no strike activity ensued and I have to conclude that this Union recognized the impossibility of its bargaining posture as to these office workers, given the economic climate which threatened the security of other of its members in the trucking industry.

Respondent having satisfied, as a matter of fact, its bargaining obligation, this allegation and the one relating to information is dismissed.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[2]

ORDER

It is ordered and directed that the complaint be dismissed.

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[2] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

West Florida Hospital, Inc. *and* William M. Hicks.
Case 15-CA-8213

14 January 1985

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS HUNTER AND DENNIS

On 17 September 1982 Administrative Law Judge Philip P. McLeod issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed a memorandum in support of the judge's decision.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions only to the extent consistent with this Decision and Order.

The Respondent admittedly discharged William Hicks because he was involved in union activity; the only issue is whether Hicks was an employee within the meaning of the Act or a supervisor. We find that he was a supervisor, and accordingly we will dismiss the complaint.

Hicks was "Evening Coordinator" in the Respondent's operating room, a position equivalent in the Respondent's organization to assistant head nurse; from 5:30 to 11 p.m. each day, he was the person of highest authority assigned to the operating room on a full-time basis. Above Hicks in the hospital hierarchy, only the house supervisor was present in the hospital, and she was responsible for the Respondent's entire division of nursing services, with 400 beds, in which the operating room was only 1 of 24 units. By Hicks' admission, the house supervisor stopped in the operating room on her rounds no more than twice in an evening, for no more than 10 or 15 minutes altogether; in essence, Hicks testified, she might stop to chat over a cup of coffee. The General Counsel's witnesses maintained that Hicks would consult with higher supervision if a "serious" problem arose, but the only examples of such problems they were able to cite involved conflicts between the operating room and other departments. Thus Hicks was effectively in charge of the 15 evening shift employees in the operating room; this alone is strong evidence that he was a supervisor.[2]

The evening coordinator also scheduled any surgery called in during the evening shift, and assigned employees—both professional and technical—to it. In assigning employees, Hicks needed to assess their skills and to consider their preferences and availability, thus exercising independent judgment in the interest of the Respondent. While Hicks testified that other registered nurses sometimes substituted for him, he also admitted that this generally occurred when a nurse was feeling ill indicating that this did not happen regularly. Although the judge found that Hicks regularly assigned work, he minimized the significance of Hicks' authority because it only occupied 10 to 15 percent of Hicks' time. We view the amount of time spent as substantial especially considering that this authority is regularly exercised.[3]

The record demonstrates that Hicks, as evening coordinator, had substantial influence in the evaluation of other employees. We note the written evaluations of two employees in the record, including recommendations for salary increases; while the record does not show that those recommendations were adopted ultimately, it is nonetheless significant that Hicks' opinion was sought. The same is true of the "assessment" of a part-time registered nurse: that Hicks made only positive comments about this employee does not detract from the evidence that he was in a position to affect the employee's status.[4] We note that Hicks not only completed the evaluation forms in each case but discussed them with the affected employees before submitting the evaluations to higher supervision; this is further evidence that Hicks performed as a supervisor and was regarded as one. We do not see any relevance in the judge's observations that two of the employees involved were "a mere orderly and a technician completing his probationary period." Nor do we see any basis for the judge's conclusion that Hicks must not have made other evaluations because only these two were introduced. Someone who supervises lower-level employees is a supervisor, and evaluation is no less a form of supervision when it occurs at such times as completion of an employee's probationary period.

Beyond the written evaluations in evidence, the record shows that Hicks had continuing oral input into the evaluation of evening shift employees. While the judge attempted to minimize the importance of this input, the Respondent's former operating room supervisor, testifying for the General

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] See *Northwoods Manor*, 260 NLRB 854 (1982); *Emory Convalescent Home*, 260 NLRB 540 (1982); *Wright Memorial Hospital*, 255 NLRB 1319 (1981); *Jeffrey Mfg. Division*, 248 NLRB 33, 61 fn. 123 (1980).

[3] Compare *Northwoods Manor*, supra, in which the charge nurses spent 20 percent of their time in supervisory duties.

[4] Cf. *ITT Corp. v. NLRB*, 712 F.2d 40 (2d Cir. 1983), and cases cited (authority of prounion supervisors considered with respect to election objections).

Counsel and credited by the judge, admitted that she evaluated these employees with little or no direct knowledge of their ongoing performance and development, thus necessarily relying on Hicks' recommendations.

Hicks admitted that he exercised other authority over employees. For instance, he testified that, if he noticed an employee overstaying a break or not working, he would warn that employee to get back to work. Also, employees who wished to leave work early sought permission from Hicks who, in the exercise of his judgment, sometimes granted such requests and other times did not. Likewise, Hicks authorized overtime when he believed it was needed and, although he informed the operating room supervisor afterwards that overtime had been worked, the record does not show that his decisions in this regard were ever questioned.

In sum, as evening coordinator William Hicks assigned employees, evaluated their performance, and directed or authorized them in returning from breaks, leaving work early, and working overtime. That is, he had authority to assign employees, responsibly to direct them, and effectively to recommend that they be disciplined, rewarded, or promoted. Each of these responsibilities required, and Hicks exercised, independent judgment to ensure that employees carried out the Respondent's requirements of them. Moreover, during most of the evening shift the evening coordinator was the person of highest authority in the operating room; if he was not a supervisor, this crucial department of the Respondent's operation, with 15 employees, was unsupervised for about 6 hours each day—an unlikely situation. These facts establish that Hicks was a supervisor, and we need not discuss any secondary indicia of supervisory status.[5] Because Hicks was a supervisor, not an employee within the meaning of the Act, we will dismiss the complaint.

ORDER

The complaint is dismissed.

MEMBER DENNIS, dissenting.

I would find that the Respondent violated Section 8(a)(3) and (1) of the Act by discharging William Hicks because of his union activity. I agree with the judge, for the reasons he stated, that Hicks is an employee rather than a supervisor within the meaning of the Act.

[5] We note that the judge erred in finding that Hicks had less vacation than any admitted supervisors; the record indicates that the head nurse, like Hicks, had 2 weeks of vacation.

DECISION

STATEMENT OF THE CASE

PHILIP P. MCLEOD, Administrative Law Judge. On June 18, 1981, a charge was filed in this proceding against West Florida Hospital, Inc. (Respondent) by William M. Hicks. On July 15, 1981, a complaint and notice of hearing issued alleging that Respondent has violated Section 8(a)(1) and (3) of the National Labor Relations Act (the Act), by creating the impression of surveillance of employee union activities by telling an employee (Hicks) that Respondent was aware of his attendance at a union meeting and by terminating Hicks because of his membership in and activities on behalf of District 1199, International Union of Hospital and Health Care Employees, RWDSU, AFL-CIO (the Union). In its answer to the complaint, Respondent admits all facts alleged regarding its business operation, but denies the legal conclusion that it is an employer within the meaning of Section 2(2), (6), and (7) of the Act. Respondent admitted that at all times material Barbara Thames occupied the position of director of special services, but denied the legal conclusion that Thames was a supervisor and agent of Respondent within the meaning of Section 2(11) and (13) of the Act. In its answer, Respondent admits that about June 8, 1981, Respondent terminated Hicks, but denies it did so because of Hicks' membership in or activities on behalf of the Union. Respondent denies having engaged in any conduct which would constitute an unfair labor practice.

A trial was held before me on June 7, 1982, in Pensacola, Florida, at which all parties were represented and were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence. At the close of the trial, the General Counsel availed himself of the opportunity to argue orally. Thereafter, the General Counsel and Respondent both filed briefs which have been duly considered.[1]

On the entire record in this case, and from my observation of the witnesses, I make the following

[1] Following receipt of briefs from both parties, Respondent filed a motion to strike the brief of the General Counsel because, at the conclusion of the trial, the General Counsel did not specifically request of the judge the opportunity to file a brief and because counsel for Respondent did not receive a copy of the brief filed by the Counsel.

In its statement in opposition to Respondent's motion, the General Counsel points out that it did attempt to serve a copy of the brief on counsel for Respondent, but that the brief was inadvertently mailed to the wrong address. Another copy of the brief was served along with the statement in opposition to Respondent's motion. Since briefs are filed simultaneously and there is no opportunity for a reply brief, I conclude that no harm has been done by the delay experienced by counsel for Respondent in receiving the brief of the General Counsel.

I also note that neither party herein specifically requested permission to file a brief with me. I inquired and was informed by counsel for Respondent that he intended to file a brief. I thereafter set a due date for the receipt of briefs. The General Counsel did not waive the right to file a brief herein, and the briefs received were timely filed by both parties. Accordingly, the briefs of both parties have been accepted by me and have been given due consideration.

FINDINGS OF FACT

I. JURISDICTION

Respondent is a Florida corporation engaged in the operation of a hospital facility in Pensacola, Florida, where it provides nursing and health care services. During the past 12 months, a representative period, Respondent derived gross revenues in excess of $250,000 and purchased and received goods and materials valued in excess of $50,000 directly from points located outside the State of Florida.

I find that Respondent is, and has been at all times material herein, a health care institution within the meaning of Section 2(14) of the Act and an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION

District 1199, National Union of Hospital and Health Care Employees, RWDSU, AFL-CIO is, and has been at all times material a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. *Allegations and Issues*

The General Counsel contends that on June 8, 1981, Respondent created the impression of surveillance of employee union activities by telling Hicks that Respondent was aware of Hicks' attendance at a union meeting. He also contends that Hicks was discharged during that same conversation for having attended the union meeting in question.

At the trial Respondent admitted having discharged Hicks because of his activities on behalf of the Union. However, it denied doing so because of any meeting Hicks attended Rather, according to Respondent, the activities on behalf of the Union which Hicks engaged in and which led to his termination were his support of the Union and his encouragement of other employees to join and support the Union.

The real issue in this case relates to Hicks' status. Respondent contends that Hicks' position with Respondent was that of a supervisor and that, as such, Hicks is not entitled to the protection of the Act. Although this affirmative defense was not raised in its answer to the complaint, the General Counsel did not claim surprise when Respondent raised this issue at the trial. The issue of Hicks' supervisory status was fully litigated, and in fact took up the greater portion of this trial. Accordingly, that issue is considered on its merits.

B. *Facts Regarding Hicks' Status as a Supervisor*

Respondent is a 400-bed hospital facility in Pensacola, Florida. Hicks worked for Respondent from May 1977 until his discharge on June 8, 1981. During that time, Hicks worked as a graduate registered nurse from the time he was hired in May 1977 until August 1977 when he passed the state medical board examinations and became a staff nurse. In December 1978, Hicks was promoted to the position of evening coordinator in the operating room. Hicks held this position until the time of his discharge. The duties of that position are considered at length below.

Within Respondent's hospital there are several departments, one of which is the division of nursing services headed by a person entitled "Director of Nursing Services." Below the director of nursing services are several assistant directors of nursing services, one of whom is responsible for a defined area of the hospital which includes the operating room. Below them are administrative assistants, also known as house supervisors who are responsible for the overall functioning of the shift to which they are assigned. Below house supervisors are department supervisors who, in turn, are assisted by head nurses and assistant head nurses.

The operating room supervisor, a department supervisor, is responsible for the overall supervision and operation of the operating room 24 hours a day. The operating room supervisor, hereafter called the O R supervisor, is assisted on the day shift by a head nurse and on the evening shift, which runs from 3 until 11 p.m., by the evening coordinator. At the time of his discharge, Hicks filled the position of evening coordinator.

The O R supervisor, charged with the overall supervision of the operating room, is responsible for coordinating the surgery schedule and handling all personnel-related matters. The O R supervisor works until approximately 5:30 p.m. and consequently has a normal workday which overlaps the beginning of the evening shift for about 2-1/2 hours. The O R supervisor is responsible for correlating the surgery schedules for both the day and evening shifts. The O R supervisor has authority to hire and fire employees. Neither the head nurse nor the evening coordinator possesses such authority. Even the O R supervisor would have to confer with the assistant director of nursing services before terminating an employee. In addition to correlating surgery schedules, the primary functions of the O R supervisor are to make out work schedules of employees, assign vacation times, conduct performance and merit evaluations of employees, and take disciplinary actions against employees where necessary. In addition, the O R supervisor makes budget recommendations to her superiors regarding the operating room.

As previously indicated, the O R supervisor is assisted on the day shift by a head nurse and on the evening shift by the evening coordinator. The authority and functions of the O R supervisor described above are exclusive to her and are not shared with nor exercised by either the head nurse or the evening coordinator, except as noted below. Further, while both the head nurse and evening coordinator assist the O R supervisor, their functions and authorities are also different from one another. The head nurse does not generally scrub and circulate among patients. Rather, because there are more employees assigned to the operating room on the day shift and because the operating room is generally busier during the day shift than it is on the evening shift, most of the head nurse's time is spent making work assignments to employees and providing overall direction in the department. The head nurse does conduct performance and

merit evaluations of employees who work in the operating room on the day shift, including staff nurses. She participates in counseling and disciplining of employees to the extent of making recommendations to the O R supervisor. The head nurse reviews and approves the timecards of all employees below her in the operating room, including employees who work on the evening shift, and the evening coordinator himself.

There is no head nurse in the operating room on the evening shift. Rather, the operating room is under the direct supervision and control of the O R supervisor from 3 until approximately 5:30 p.m. After 5:30 p.m. the evening coordinator is the person of highest authority assigned to the operating room on a full-time basis.

Respondent points to the job description of the evening coordinator as one of the primary bases for finding that position to be a supervisor within the meaning of the Act. That job description describes the specific duties of the evening coordinator in part as follows:

> In addition to the duties of the operating room staff nurse, the evening coordinator will:
>
> 1. Coordinate the completion of scheduled procedures which extend beyond the day shift.
> 2. Make shift assignments for evening personnel.
>
> . . . .
>
> 5. Supervise and provide guidance to all evening personnel.
> 6. Assist with counseling and guidance when needed; document and communicate outcomes.
> 7. Assist in evaluating staff members; identifying needs, recommending appropriate interventions and supporting strengths, leading toward the fulfillment and unit goals.

It is primarily these enumerated functions to which Respondent points in support of its position that the evening coordinator is a supervisor. Reliance on the job description, however, tends to beg the question. A job description prepared by management stating that the evening coordinator shall exercise supervisory functions does not establish that the evening coordinator is, in fact, a supervisor. The determination of that question turns on what functions Hicks as evening coordinator actually performed. *Valley Hospital*, 226 NLRB 309, 312 (1976). Respondent argues that, as evening coordinator, Hicks exercised five indicia of supervisory authority which warrant a conclusion that he was a supervisor within the meaning of the Act. These five indicia are: making work assignments to employees; evaluating employees; disciplining employees; granting employees time off; and, finally, the absence of other supervisors in the operating room on the evening shift.

With regard to Hicks' actual duties, the record reflects the following.

As evening coordinator, Hicks had no authority to hire or discharge, suspend or transfer, lay off, or recall, nor promote or demote employees. Hicks had no authority to alter the work schedules of employees established by the O R supervisor, and he played no part in the assignment of vacation times.

As evening coordinator, Hicks spent approximately 85 to 90 percent of his time performing routine staff nursing functions, including scrubbing and circulating cases, setting up equipment for surgical procedures, and stocking surgical supplies for the operating rooms. In addition to his base wage rate, Hicks received an hourly shift differential which was received by all employees working on the evening shift. In addition, he received 50 cents per hour more than a staff nurse for his duties as evening coordinator. Unlike the head nurse or the O R supervisor, Hicks was required like other staff nurses to make himself available on-call from 11 p.m. to 7 a.m. on 5 out of every 10 workdays during which he was subject to being called back to the hospital by the house supervisor to assist physicians in emergency operations. Also, unlike the head nurse and the O R supervisor, both of whom received 3 weeks' paid vacation per year, Hicks received only 2 weeks.

As evening coordinator, Hicks correlated some of the surgery to be scheduled on the evening shift, sometimes with the help of the O R supervisor prior to her leaving in the evening and sometimes on his own. The 10 to 15 percent of Hicks' time not spent in the actual performace of routine staff nursing functions was spent primarily assigning work to other employees in the operating room on the evening shift. The record is clear that Hicks did regularly assign work to such employees and that these assignments called for the use of at least some independent judgment. I credit Hicks, however, that these assignments were routinely made on the basis of various nurses' known special skills and preferences. Thus, employees with specialized skills in these areas were routinely assigned to cardiac, neurological, and orthopedic cases. The remaining employees were then assigned to surgery cases based on their availability. Thus, most assignments were the same night after night with little variance. I also credit Hicks that if he was busy performing routine nursing functions himself, thus not behind the desk to make an assignment at a time when the need arose, other registered nurses on the shift regularly took it on themselves to make the necessary assignments.

Regarding Hicks' role in the performance evaluation of employees, Respondent introduced two evaluations of employees in which Hicks had a direct part. The first involved an orderly named Timothy Cremshaw. This evaluation was dated November 23, but undated as to the year. The evaluation was filled out by Hicks and signed by him as "RN-evening coordinator." Below Hicks' signature are also the signatures of Frances Traynon as "O.R. Supervisor" and Barbara Thames as "Director of Special Services." Prior to July 1980, Traynon was head nurse under O R supervisor Faye Lewis. In July 1980, Lewis left and Traynon took over as O R supervisor, a position she still holds. In the section of this evaluation entitled "recommendation," Hicks checked one of five available options indicating that Cremshaw should receive a salary increase. The record is silent as to whether Cremshaw, in fact, got that increase.

The second evaluation introduced by Respondent involved an operating room technician named Stephen Nichols. It is dated August 14, 1980. The front page of this evaluation indicates that it is one conducted at the end of an employee's first 90 days of employment. The

evaluation is signed jointly by Traynon as "O.R. Supervisor" and by Hicks as "evening coordinator." Traynon's name appears above Hicks. Below their joint signatures, Traynon's signature appears again on the line denoted "department supervisor." Below Traynon's second signature appears the signature of Barbara Thames as "director of special services." In the "recommendations" section of this evaluation, the choice "salary increase" is also checked. Apparently to show they were effective, Respondent asked Traynon whether Hicks' recommendations for salary increases were followed. Traynon answered that they were, but failed to provide any specific instance to support her assertion and failed to mention either Nichols or Cremshaw as having received raises based on Hicks' recommendation. On cross-examination, Traynon admitted that the only recommendation she could recall was that of Nichols and that Nichols was not given the recommended wage increase.

I conclude that the evaluations of Cremshaw and Nichols were the only evaluations actually completed by Hicks for if there were others Respondent would surely have introduced them. Traynon testified that, in addition to completing these evaluations, Hicks was consulted by her before she evaluated other employees on the evening shift. Traynon asserted that she relied heavily on Hicks' reports since Traynon was not on the evening shift past 5:30 p.m. Traynon, who became rather unnerved and upset under cross-examination, struck me as a biased witness whose testimony is largely unworthy of belief. Regarding Hicks' real degree of authority, I find it significant that the two evaluations actually completed by Hicks involved a mere orderly and a technician completing his probationary period. All other employees on the shift, including nurses, were evaluated by the O R supervisor. I found the testimony of former O R Supervisor Faye Lewis, who is no longer employed by Respondent, to be much more candid and straightforward regarding Hicks' actual duties than the testimony of any of Respondent's current supervisors. I credit Lewis, and on the basis of her testimony I conclude that, while Hicks did have some input into employees' annual evaluations, it was substantially more limited than suggested by Traynon and was not independently relied upon. I believe the degree of Hicks' actual authority was well exemplified by Lewis' testimony that, if Hicks thought an employee was not performing properly, Hicks could report it to the head nurse or the O R supervisor, who would investigate the matter.

Regarding Hicks' role in assessing discipline, Respondent introduced one "behavior assessment" form completed by Hicks regarding part-time registered nurse Alphonso Vacarro dated November 5, 1980. The reason Hicks had occasion to fill out this form is not clear from the record. Hicks testified without contradiction that a "behavior assessment" form such as that introduced by Respondent is not the same as an employee reprimand. According to Hicks, a reprimand involved adverse action being taken against an employee. The evening coordinator clearly had no authority to issue reprimands. A behavior assessment, as near as I can tell from Hicks' testimony, was more in the nature of a notice to an employee that he/she was engaging in some behavior which required correction. Thus, it was more in the nature of a preliminary warning.

The behavior assessment form itself contains the following direction to the person completing it:

> Please make comments on the individual's performance in the following areas: . . . .

Twelve areas of professional and generalized skills are enumerated and listed. The lower right hand corner of the form contains a signature line which is designated "head nurse signature." As indicated, the testimony of all witnesses suggests that "behavior assessment" forms of this type play some role in the discipline of employees. The remarks of Hicks, however, on the form in question are all positive comments such as "good," "satisfactory," or "excellent." Thus, it would appear that on the one occasion when Hicks completed such a form it served more as an evaluation of the employee than as part of discipline imposed on the employee. I find the "behavior assessment" form introduced by Respondent to be of little probative weight regarding Hicks' role in imposing discipline on employees for that reason and for an additional reason. In the lower left hand corner of the form, there is a signature line on which the employee is expected to place his/her signature. The form introduced by Respondent is unsigned by the employee in question. This is the only such form introduced by Respondent signed by Hicks. There is no indication the employee in question received, or was intended to receive, this particular form which Hicks completed. These facts and the additional fact that all of the comments by Hicks on the form are positive lead me to believe that on this occasion the form was not used regarding the discipline of an employee, but rather was used in some preliminary way with regard to an employee evaluation. Its use in this manner is consistent with the evidence discussed above concerning Hicks' role in the evaluation of employees, and is considered as such. It reveals little about Hicks' role in the discipline of employees, and I rely instead on the testimony of former O R Supervisor Faye Lewis, which I credit, regarding that subject. I credit Lewis that, as evening coordinator, Hicks could independently take care of only minor disciplinary matters, such as reminding people to return from coffeebreak or pointing out to a person the fact that they were breaking sterile techniques.

Whenever problems of a more serious nature arose, Hicks would be expected to contact the head nurse, the O R supervisor, or the house supervisor. If Hicks reported such a problem to one of his superiors, the superior would first conduct an independent investigation before meting out discipline. All witnesses agree that Hicks never attempted to send someone home for the day as a disciplinary action. I discredit the assertion of some of Respondent's witnesses, particularly Traynon, that even though he never exercised it, Hicks possessed such authority. Rather, I credit Lewis that Hicks did not have such authority and that if such a serious situation arose Hicks would be expected to contact the house supervisor or to telephone the O R supervisor at home. Lewis testified credibly that whenever problems of any major con-

sequence arose, including even scheduling problems in the operating room, Hicks would be expected to and did call in the house supervisor. I credit Lewis that the house supervisor on the evening shift was very often involved in resolving matters related to the operating room.

Regarding Hicks' authority to grant time off, the record reflects that Hicks did possess such authority under certain circumstances. Hicks played no part in establishing the work schedules of employees. Schedules were established by the O R supervisor, and Hicks had no authority to alter the established work schedule. Hicks did possess authority to allow employees on the evening shift to clock out and go home early when the workload was slack and there was no need for staff personnel. I note, however, that Hicks was limited to granting a request to go home initiated by an employee. Hicks had no authority to make an independent judgment that employees were no longer needed and direct them to clock out. I also note that the timecards of all employees on the evening shift, including Hicks, had to be approved by the head nurse. In view of all the above, I find that the circumstances under which Hicks could exercise the authority to grant time off were so limited and circumscribed that Hicks had little real authority.

Finally, Respondent argues that Hicks should be found to be a supervisor because he is the person of highest authority in the operating room during the evening shift. I must note, however, that Respondent concedes the O R supervisor is responsible for the overall supervision of the operating room 24 hours per day. Further, I am convinced that it is by no means accidental that while the day shift ends at 3 p.m., the O R supervisor works a schedule which overlaps the beginning of the evening shift for approximately 2-1/2 hours. While Hicks correlated some of the surgery to be scheduled on the evening shift, it was most often with the help of the O R supervisor prior to her leaving and only sometimes on his own. The overlap in work schedules of the O R supervisor allowed her to oversee coordination of the surgery schedule for the evening shift and to assure herself that everything was functioning smoothly before she left, and would continue to do so in her absence. As I have found above, Hicks' authority vis-a-vis other employees was limited. Whenever a problem of any serious nature arose, Hicks was expected to contact the house supervisor on duty or, if necessary, to even telephone the O R supervisor at home. As I have found above, the house supervisor was in fact very often involved in seeing to it that the operating room functioned smoothly on the evening shift.

In conclusion, my review of all the evidence leads me to the conclusion that Hicks' role in evaluating employees was primarily advisory. There is nothing on which to base a finding that his recommendations were followed and, in fact, the evidence is to the contrary. Further, any negative remarks or recommendations made by Hicks would be investigated independently by his superior before being acted on, and contrary to Respondent's claim, I conclude Hicks did not play any effective role in the discipline of employees. Hicks' authority to grant time off was circumscribed and could be exercised only when an employee requested to go home. Hicks had no authority to independently determine that employees were not needed and send them home. Hicks played no part in establishing work schedules and had no authority to change the established schedule. Hicks possessed no real authority vis-a-vis other employees, and whenever a problem of any serious nature arose, he was expected to contact the house supervisor or, if necessary, the O R supervisor. Hicks had no authority to hire, discharge, suspend, transfer, lay off, recall, promote, demote, or reprimand employees. Hicks spent 85 to 90 percent of his time performing routine staff nursing functions. The only authority really exercised by Hicks which might be supervisory in nature was his assignment of work to other employees on the evening shift. Even this, however, was minimal, requiring no more than 10 to 15 percent of his time. Respondent concedes that Hicks possessed no more authority than, and that his title as evening coordinator was interchangeable with, assistant head nurse. Hicks' assignment of work to other employees, while involving the use of some independent judgment, tended to be routine, made primarily on the basis of various nurses' known special skills and preferences. Accordingly, I conclude and find that Hicks was not a supervisor but rather was an employee within the meaning of the Act. *Milwaukee Children's Hospital*, 255 NLRB 1009 (1981); *Mount Airy Psychiatric Center*, 253 NLRB 1003 (1981); *Victor Valley Hospital*, 227 NLRB 513 (1976); *Valley Hospital*, supra. Cases cited by Respondent are inapposite for in each of those cases the individual found to be a supervisor possessed significantly greater authority than that exercised by Hicks.

C. *Hicks' Discharge*

The General Counsel and Respondent do not disagree that Hicks engaged in prounion activities. Respondent in fact admits that these activities led to Hicks' discharge and does not contend that the activities are, in any way, unprotected by the Act when engaged in by a statutory employee. As noted, Respondent simply argues that Hicks' discharge was unprotected because he was a supervisor within the meaning of the Act. Nevertheless, testimony was introduced both by the General Counsel and the counsel for Respondent regarding the conversations between Director of Special Services Thames, O R Supervisor Traynon, and Hicks during which Hicks was discharged. Some of Hicks' testimony is disputed by Thames and Traynon. The reason testimony was introduced regarding this conversation is because the General Counsel alleges that during the conversation Thames created the impression that Hicks' union activities were under surveillance by stating that Respondent was aware of Hicks' attendance at a union meeting. This was also specifically alleged in the complaint.

I credit the testimony of Hicks over that of Thames and Traynon where there is direct conflict. For example, Thames testified that during the conversation, she asked Hicks if he considered himself to be a part of management, and Hicks stated that he did. Hicks denied this. Hicks testified that during the meeting Thames asserted Hicks was a supervisor, but denied he, too, said he con-

sidered himself to be a part of management. I credit Hicks.

It is undisputed that when Thames told Hicks he was being discharged because of his prounion activities and his alleged status as a supervisor, Hicks offered to resign his position as evening coordinator and remain a staff nurse. Thames informed Hicks that was not an option available to him and that he was being discharged. Following the conversation with Thames, Hicks asked and was allowed to meet with Personnel Director Kenneth Korff. Korff also informed Hicks that resigning as evening coordinator was not an available option and that he was being discharged.

The General Counsel argues that in the conversation between Thames, Traynon, and Hicks, Thames stated that Hicks had broken the law as a first line supervisor by going to a union meeting. Thames and Traynon testified that it was Hicks who first raised the subject of the union meeting. More specifically, they testified that Hicks stated he had not been told that his actions or activities on behalf of the Union "would get him into this kind of trouble, even at the meeting he attended." Traynon and Thames testified that they did not bring up the subject of union meetings and that neither of them was aware Hicks had attended a meeting. In Hicks' cross-examination, he candidly admitted that in the conversation with Thames and Traynon he may well have been the one to begin the discussion regarding the union meeting by saying he had not been told that as a supervisor he could not attend the meeting. Accordingly, I do not believe there is a direct conflict between the testimony of Hicks and that of Thames and Traynon. Rather, I conclude that counsel for General Counsel's argument regarding the facts is not clearly supported by the record. Accordingly, I find that the General Counsel has not established by a preponderance of the evidence that Thames made the alleged remark. Therefore, while Hicks clearly was discharged because of his support for and activities on behalf of the Union, itself in violation of Section 8(a)(1) and (3) of the Act, I do not specifically find that Respondent otherwise created the impression of surveillance of employee union activities.

CONCLUSIONS OF LAW

1. The Respondent, West Florida Hospital, Inc., is a health care institution within the meaning of Section 2(14) of the Act and an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. District 1199, National Union of Hospital and Health Care Employees, RWDSU, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. William M. Hicks, prior to and at the time of his discharge on June 8, 1981, was an employee within the meaning of the Act.

4. Respondent discharged Hicks because of his support for and activities on behalf of the Union in violation of Section 8(a)(1) and (3) of the Act.

5. The unfair labor practices which Respondent has been found to have engaged in, as described above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices in violation of Section 8(a)(1) and (3) of the Act, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative actions designed to effectuate the policies of the Act.

[Recommended Order omitted from publication.]

Glaziers, Architectural Metal & Glassworkers, Local Union No. 513 *and* SK Consultants and Carpenters District Council of Greater St Louis. Case 14–CD–702

15 January 1985

DECISION AND DETERMINATION OF DISPUTE

BY CHAIRMAN DOTSON AND MEMBERS HUNTER AND DENNIS

The charge in this Section 10(k) proceeding was filed 11 September 1984[1] by the Employer, alleging that the Respondent, Glaziers, violated Section 8(b)(4)(D) of the National Labor Relations Act by engaging in proscribed activity with an object of forcing the Employer to assign certain work to employees it represents rather than to employees represented by Carpenters. The hearing was held on 4 October before Hearing Officer Lynette K. Zuch.

The Board affirms the hearing officer's rulings, finding them free from prejudicial error. On the entire record, the Board makes the following findings.

I. JURISDICTION

The Employer, SK Consultants, a sole proprietorship with her principal office and place of business located in Godfrey, Illinois, is engaged in the installation of aluminum windows. The Employer commenced operations on 2 January 1984 and will annually perform window installation services valued in excess of $50,000 directly to customers located outside the State of Illinois. The parties stipulate, and we find, that the Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that Glaziers and Carpenters are labor organizations within the meaning of Section 2(5) of the Act.

II. THE DISPUTE

A. *Background and Facts of Dispute*

The Employer contracted to install operable and fixed aluminum replacement windows at the St. Louis Public Library and has a collective-bargaining agreement with Carpenters. The Employer commenced work at the jobsite in June 1984, and assigned the installation of both fixed and operable aluminum replacement windows to its six employees who are represented by Carpenters.

On 24 August Carpenters and Glaziers entered into a memorandum of understanding covering the St. Louis area which provided that operable and fixed aluminum replacement windows would be installed by a composite crew of Carpenters and Glaziers. Thereafter, about 10 September, a Glaziers representative spoke to the Employer's agent and claimed the work being performed at the St. Louis Public Library jobsite, and threatened to have pickets on the job. The following day, pickets for Glaziers appeared on the jobsite with an "area standards" picket legend. A Glaziers representative testified that the picketing would have stopped if the work had been assigned to the employees represented by Glaziers in accordance with the memorandum of understanding.

At the hearing, the Carpenters business representative claimed the work in accord with the memorandum of understanding. However, the Employer's employees, who are represented by Carpenters, at the hearing claimed all of the work involved in the installation of both operable and fixed aluminum replacement windows at the St. Louis Public Library jobsite.

B. *Work in Dispute*

The disputed work involves the installation of operable and fixed aluminum replacement windows at the St. Louis Public Library at 1301 Olive Street, St. Louis, Missouri.

C. *Contentions of the Parties*

The Employer contends that reasonable cause exists to believe that Glaziers has violated Section 8(b)(4)(D) of the Act. It argues that the picketing violated Section 8(b)(4)(D) because it constituted unlawful coercion. The Employer contends that the work in dispute should be awarded to employees represented by Carpenters based on its collective-bargaining agreement with Carpenters; the Employer's past practice; relative skills; economy and efficiency of operations; and the Employer's preference. It further contends that it is not a party to the memorandum of understanding executed between Glaziers and Carpenters and that there is no area or industry practice to use glaziers to perform the installation of aluminum replacement windows.

Glaziers contends that no reasonable cause exists to believe that it has violated Section 8(b)(4)(D) of the Act. Glaziers contends that the purpose of the picketing was to protect the area standards established by Glaziers. Furthermore, Glaziers contends that there is no jurisdictional dispute because Glaziers and Carpenters have entered into a memorandum of understanding which provides that a composite crew of carpenters and glaziers shall install operable and fixed replacement windows, and that Carpenters has disclaimed work relating to the

[1] All dates are in 1984.

glazing of windows and the installation of fixed window systems.

Carpenters contends that the work in dispute should be awarded to a composite crew of employees represented by Glaziers and Carpenters, consistent with the memorandum of understanding.

D. *Applicability of the Statute*

Before the Board may proceed with a determination of a dispute pursuant to Section 10(k) of the Act, it must be satisfied that there is reasonable cause to believe that Section 8(b)(4)(D) has been violated and that the parties have not agreed on a method for voluntary adjustment of the dispute.

The record shows that pickets for Glaziers appeared on the jobsite with an "area standards" picket legend. However, there is no support for a finding that the picketing had solely an area standards purpose as the record shows that the Glaziers business representative testified that the picketing would have stopped if the installation of fixed and operable aluminum replacement windows had been assigned to employees represented by Glaziers in accordance with the memorandum of understanding. Therefore, we find reasonable cause to believe that the picketing had an object of forcing and requiring the Employer to assign the disputed work to Glaziers-represented employees, and that a violation of Section 8(b)(4)(D) has occurred. The parties stipulated that there exists no agreed-on method for voluntary adjustment of the dispute within the meaning of Section 10(k) of the Act. Accordingly, we find that the dispute is properly before the Board for determination.[2]

E. *Merits of the Dispute*

Section 10(k) requires the Board to make an affirmative award of disputed work after considering various factors. *NLRB v. Electrical Workers IBEW Local 1212 (Columbia Broadcasting)*, 364 U.S. 573 (1961). The Board has held that its determination in a jurisdictional dispute is an act of judgment based on common sense and experience, reached by balancing the factors involved in a particular case. *Machinists Lodge 1743 (J. A. Jones Construction)*, 135 NLRB 1402 (1962).

The following factors are relevant in making the determination of this dispute.

1. Certification and collective-bargaining agreements

Neither labor organization has been certified by the Board as the collective-bargaining representative of the Employer's employees in an appropriate unit. However, the Employer currently has a collective-bargaining agreement with Carpenters which covers "the installation of replacement windows into existing buildings." We find that the collective-bargaining agreement is sufficient to cover the work in dispute. The Employer has no collective-bargaining agreement with Glaziers. We therefore find that the factor of collective-bargaining agreements favors an award of the disputed work to the Employer's employees represented by Carpenters.

2. Company preference, assignment, and past practice

It is undisputed that the employees represented by Carpenters have installed operable and all fixed aluminum replacement windows in the past for the Employer and are presently assigned to do so. The Employer has never assigned this type of work to glaziers. We find that the Employer's assignment and practice favors an award to its employees represented by Carpenters.

The Employer, at the hearing and in her brief, has expressed her preference that the disputed work continue to be performed by her employees represented by Carpenters. While we do not afford controlling weight to this factor, we find that it favors an award of the work in dispute to employees represented by Carpenters.

3. Area and industry practice

The Employer's agent testified that generally other employers in the St. Louis area have assigned the installation of fixed and operable aluminum replacement windows to employees having skills normally associated with Carpenters-represented employees. The Employer also presented the testimony of a manufacturer of replacement windows that Glaziers-represented employees have not been assigned this work in the St. Louis area. Glaziers presented testimony that employees it represents have been assigned to glaze windows and to install fixed aluminum replacement windows in the St. Louis area, and this testimony was corroborated by the business representative for Carpenters. Furthermore, as noted above, Glaziers and Carpenters entered into a memorandum of understanding after the Employer commenced work at the jobsite, which provided that fixed and operable replacement windows would be installed by a composite

[2] Contrary to Glaziers' contention, we find that a jurisdictional dispute exists despite the agreement reached by the two Unions because conflicting claims still exist between Glaziers and individual Carpenters-represented employees. *Teamsters Local 326 (Greggo & Ferrara)*, 269 NLRB 729 (1984). We therefore also find ineffective any purported disclaimer of the disputed work by Carpenters.

crew of employees represented by both Glaziers and Carpenters respectively.[3] The Employer's agent further testified that in his 17 to 18 years of experience in the industry employees represented by Glaziers did not perform work similar to that in dispute. However, it is clear from the record that his testimony was limited to the companies for whom he had worked in the past in the St. Louis area. Accordingly, we find the factors of area and industry practice are inconclusive.

4. Relative skills

The Employer presented undisputed testimony that her employees represented by Carpenters are specially trained to install operable and fixed replacement windows. A Glaziers representative testified that Glaziers-represented employees possess the skills to install fixed aluminum replacement windows, but traditionally have not installed operable aluminum replacement windows. Accordingly, we find that the factor of relative skills favors awarding the disputed work to employees represented by Carpenters.

5. Economy and efficiency of operations

The Employer presented undisputed testimony that, if the Employer were to assign the installation of aluminum replacement windows to a composite crew of Carpenters-represented employees and Glaziers-represented employees, the employees represented by Glaziers would stand idle during periods of the installation process. The record also reflects that Carpenters-represented employees, unlike Glaziers-represented employees, are able to work with all construction mediums, whether they are metal or wood. Therefore, Carpenters-represented employees, unlike Glaziers-represented employees, can perform and are assigned a variety of tasks at the jobsite, resulting in greater economy and efficiency than can be achieved by a composite crew of Carpenters-represented and Glaziers-represented employees. Glaziers has not shown that an award of the work to employees represented by it would be as economical and/or result in the same flexibility in adjusting to the jobsite requirements as an award of the disputed work to employees represented by Carpenters. Accordingly, we find that the factors of economy and efficiency favor an award of the disputed work to employees represented by Carpenters.

Conclusions

After considering all the relevant factors, we conclude that employees represented by Carpenters are entitled to perform the work in dispute. We reach this conclusion relying on the Employer's collective-bargaining agreement with Carpenters; the Employer's preference, assignment, and past practice; relative skills; and economy and efficiency of operations. In making this determination, we are awarding the work to employees represented by Carpenters, not to that Union or its members. The determination is limited to the controversy that gave rise to this proceeding.

DETERMINATION OF DISPUTE

The National Labor Relations Board makes the following Determination of Dispute.

1. Employees of SK Consultants represented by Carpenters District Council of Greater St. Louis are entitled to perform the installation of fixed and operable aluminum replacement windows at the St. Louis Public Library at 1301 Olive Street, St. Louis, Missouri.

2. Glaziers, Architectural Metal & Glassworkers, Local Union No. 513 is not entitled by means proscribed by Section 8(b)(4)(D) of the Act to force SK Consultants to assign the disputed work to employees represented by it.

3. Within 10 days from this date, Glaziers, Architectural Metal & Glassworkers, Local Union No. 513 shall notify the Regional Director for Region 14 in writing whether it will refrain from forcing the Employer, by means proscribed by Section 8(b)(4)(D), to assign the disputed work in a manner inconsistent with this determination.

[3] While we have considered the memorandum of understanding in determining the dispute, we find that it is not controlling.

Florida Gulf Coast Building Trades Council, AFL–CIO *and* The Edward J. DeBartolo Corporation. Case 12–CC–1062

15 January 1985

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS HUNTER AND DENNIS

On 30 September 1980 the National Labor Relations Board issued a decision in this proceeding[1] finding that the Respondent, Florida Gulf Coast Building Trades Council, AFL–CIO, did not violate Section 8(b)(4)(ii)(B) of the National Labor Relations Act by distributing handbills urging a consumer boycott of a mall owner and all mall tenants. The Respondent had a primary labor dispute with H. J. High Construction Company (High), which had contracted to construct a store at the mall for H. J. Wilson Co. (Wilson's). Although the Respondent had no labor dispute with mall owner The Edward J. DeBartolo Corporation (DeBartolo), Wilson's, or any mall tenants, the Board reasoned that there was a "symbiotic" relationship between DeBartolo and its tenants and that they all would derive a substantial benefit from the "product" High was constructing for Wilson's. The Board concluded that High's contribution to the shopping center enterprise made it a "producer" within the meaning of that term as used in the publicity proviso of Section 8(b)(4) and therefore the proviso protected the Respondent's handbilling. The Board did not decide whether the handbilling constituted "coercion" or "restraint" within the meaning of Section 8(b)(4) or pass on the Respondent's contention that the first amendment protected it.[2] On 20 October 1981 the United States Court of Appeals for the Fourth Circuit enforced the Board's decision.[3]

On 24 June 1983, after having granted certiorari, the Supreme Court rejected the Board's "symbiotic relationship" analysis and held that the Board erred in concluding that the handbills came within the publicity proviso's protection. The court declined to decide whether the first amendment protected the Respondent's conduct. Noting that the Board did not decide whether the handbilling fell within the "coercion" or "restraint" terms of Section 8(b)(4)(ii)(B), the Court stated that, until that statutory question was resolved, review of the constitutional question was premature. Accordingly, the court vacated the court of appeals' judgment and remanded the case for further proceedings consistent with its opinion.

On 2 November 1983 the Board advised the parties of their right to file statements of position regarding the issues the remand raised. Thereafter, DeBartolo, the General Counsel, and the Respondent filed statements of position with the Board. The Associated General Contractors of America (AGC) moved for permission to file an amicus curiae brief.[4]

Pursuant to the Supreme Court's direction, we consider whether Section 8(b)(4)(ii)(B) prohibits the Respondent's conduct. We first briefly summarize the facts. High began building a store for Wilson's at East Lake Square Mall in late 1979. The Respondent claimed High paid substandard compensation to its employees. On 13 December 1979 the Respondent began distributing handbills to potential customers at all four entrances to the mall. The handbills stated:

> PLEASE *DON'T SHOP AT EAST LAKE SQUARE MALL* PLEASE
>
> The FLA. GULF COAST BUILDING TRADES COUNCIL, AFL–CIO is requesting that you do not shop at the stores in the East Lake Square Mall because of The Mall ownership's contribution to substandard wages.
>
> The Wilson's Department Store under construction on these premises is being built by contractors who pay substandard wages and fringe benefits. In the past, the Mall's owner, The Edward J. DeBartolo Corporation, has supported labor and our local economy by insuring that the Mall and its stores be built by contractors who pay fair wages and fringe benefits. Now, however, and for no apparent reason, the Mall owners have taken a giant step backwards by permitting our standards to be torn down. The payment of substandard wages not only diminishes the working persons's [sic] ability to purchase with earned, rather than borrowed, dollars, but it also undercuts the wage standard of the entire community. Since low construction wages at this time of inflation means decreased purchasing power, do the owners of East Lake Mall intend to compensate for the decreased purchasing power of workers of the community by encouraging the stores in East Lake Mall to cut their prices and lower their profits?

[1] 252 NLRB 702 (1980).

[2] Member Penello dissented on the ground that the Board should not have accepted the parties' stipulated record.

[3] 662 F.2d 264 (1981).

[4] We grant the AGC's motion and accept its brief.

> CUT-RATE WAGES ARE NOT FAIR UNLESS MERCHANDISE PRICES ARE ALSO CUT-RATE.
>
> We ask for your support in our protest against substandard wages. Please do not patronize the stores in the East Lake Square Mall until the Mall's owner publicly promises that all construction at the Mall will be done using contractors who pay their employees fair wages and fringe benefits.
>
> IF YOU MUST ENTER THE MALL TO DO BUSINESS, please express to the store managers your concern over substandard wages and your support of our efforts.
>
> We are appealing only to the public—the consumer. We are not seeking to induce any person to cease work or to refuse to make deliveries.

The Respondent continued handbilling until 4 January 1980, when the Thirteenth Judicial Circuit, Hillsborough County, Florida, enjoined its conduct.

Section 8(b)(4)(ii)(B) provides that a labor organization commits an unfair labor practice by threatening, coercing, or restraining any person engaged in commerce (the secondary employer), if an object is to force or require the secondary employer to stop dealing in the products of or to cease doing business with any other person (the primary employer).[5] We find that Section 8(b)(4)(ii)(B) proscribed the Respondent's conduct.

In *Television Artists AFTRA Local 55 (Great Western Broadcasting)*, 150 NLRB 467 (1964), enfd. 356 F.2d 434 (9th Cir. 1966), in response to the Ninth Circuit's remand instructions to determine whether handbilling and other activity urging a consumer boycott constituted coercion, 310 F.2d 591 (1962), the Board held that such activity was coercive. In *Typographical Union 37 (Hawaii Press)*, 167 NLRB 1030 (1967), enfd. 401 F.2d 952 (D.C. Cir. 1968), the Board cited with approval *Great Western*'s statement that handbills appealing to the public not to patronize neutral employers constitute coercion violative of Section 8(b)(4)(ii)(B). See also *Service Employees Local 399 (Delta Air Lines)*, 263 NLRB 996 (1982); *Electrical Workers IBEW Local 662 (Middle South Broadcasting)*, 133 NLRB 1968 (1961).[6]

In sum, we find that the Respondent, by distributing handbills requesting the public not to patronize mall tenants because High allegedly pays substandard wages and fringe benefits to its employees constructing a store for Wilson's, coerced the mall tenants, and that an object of the Respondent's conduct was to force the mall tenants to cease doing business with DeBartolo in order to force DeBartolo and/or Wilson's not to do business with High.[7] Having found that the Respondent engaged in conduct coercive within the meaning of Section 8(b)(4)(ii), we conclude that the Respondent violated Section 8(b)(4)(ii)(B) of the Act.[8]

The Respondent contends that the first amendment protects its handbilling and urges that we dismiss the complaint in order to avoid a conflict with the Constitution. We are persuaded, however, that the statute's literal language and the applicable case law require that we find a violation. We shall not consider the question whether the first amendment protects the Respondent's conduct because we find that the Act prohibits it. The court did not ask us to consider such an issue, and as a congressionally created administrative agency, we will presume the constitutionality of the Act we administer. We find that Congress, in enacting Section 8(b)(4)(ii)(B), intended to proscribe the Respondent's conduct, and we presume that this proscription accords with the Constitution.[9]

CONCLUSIONS OF LAW

By distributing handbills urging potential customers not to shop at East Lake Square Mall, the Respondent has coerced the mall tenants with an object of forcing the mall tenants to cease doing business with DeBartolo in order to force DeBartolo and/or Wilson's to cease doing business with High, thereby violating Section 8(b)(4)(ii)(B) of the Act.

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[5] The statute reads in relevant part: "It shall be an unfair labor practice for a labor organization or its agents . . . to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is . . . forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person."

[6] In *Middle South Broadcasting*, the judge reviewed the Taft-Hartley legislative history and concluded that the threats directed at secondary employers Congress intended to prohibit included, in addition to strikes and picketing, "other economic retaliation." Appealing to the public not to patronize secondary employers is an attempt to inflict economic harm on the secondary employers by causing them to lose business. As the case law makes clear, such appeals constitute "economic retaliation" and are therefore a form of coercion.

[7] We will not determine whether the Respondent's conduct coerced DeBartolo on a stipulated record in which the complaint does not so allege.

[8] The Respondent asked customers to forgo shopping at the mall entirely; it did not merely ask them not to deal with High. Thus, it did not limit its appeal to the "struck product," and its conduct does not fall within the privilege to engage in product boycotts recognized in *NLRB v. Fruit & Vegetable Packers Local 760*, 377 U.S. 58 (1964).

[9] *Delta Airlines*, 263 NLRB at 999.

ORDER

The National Labor Relations Board orders that the Respondent, Florida Gulf Coast Building Trades Council, AFL–CIO, Tampa, Florida, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Coercing the mall tenants by distributing handbills urging potential customers not to shop at East Lake Square Mall, with an object of forcing the mall tenants to cease doing business with DeBartolo in order to force DeBartolo and/or Wilson's to cease doing business with High.

(b) In any like or related manner restraining or coercing the East Lake Square Mall tenants, with an object of forcing them to cease doing business with DeBartolo in order to force DeBartolo and/or Wilson's to cease doing business with High.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Post at its offices and meeting places copies of the attached notice marked "Appendix."[10] Copies of the notice, on forms provided by the Regional Director for Region 12, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(b) Sign and return to the Regional Director sufficient copies of the notice for posting by DeBartolo and its mall tenants, if willing, at places where notices to employees are customarily posted.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES AND MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT coerce the mall tenants by distributing handbills urging potential customers not to shop at East Lake Square Mall, with an object of forcing mall tenants to cease doing business with The Edward J. DeBartolo Corporation in order to force DeBartolo and/or H. J. Wilson Co. to cease doing business with H. J. High Construction Company.

WE WILL NOT in any like or related manner restrain or coerce the East Lake Square Mall tenants, with an object of forcing them to cease doing business with DeBartolo in order to force DeBartolo and/or Wilson's to cease doing business with High.

FLORIDA GULF COAST BUILDING
TRADES COUNCIL, AFL–CIO

[10] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Brady-Stannard Motor Co., Inc. *and* Local 259, United Automobile, Aerospace and Agricultural Implement Workers of America. Case 2-CA-19219

15 January 1985

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS HUNTER AND DENNIS

On 7 November 1983 Administrative Law Judge Arline Pacht issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed a brief in support of the decision.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

The judge found that the Respondent, after bargaining to impasse with the Union, violated Section 8(a)(5) when it paid its striker replacements a higher hourly wage rate than that offered to the Union during negotiations. The judge noted that after impasse is reached an employer is free to change existing terms and conditions of employment if those changes are "reasonably comprehended" within its final offer. The judge found that the change in hourly wage rates here was inconsistent with the Respondent's final offer to the Union and thus was an unlawful unilateral change. The judge further found this conduct to have been inherently destructive of employee rights and thus also violative of Section 8(a)(3). The judge also found that by these acts the Respondent prolonged the strike and thereby converted it into an unfair labor practice strike. Consequently, the judge concluded that the Respondent also violated Section 8(a)(1) and (3) by failing to promptly reinstate unfair labor practice strikers on their unconditional offer to return to work.

We disagree. Contrary to the judge, we find that the actual wages paid to the striker replacements were consistent with those offered the Union in the Respondent's final proposal. Consequently, we find that the Respondent did not unilaterally change the terms and conditions of employment in violation of Section 8(a)(5). Consistent with this finding we also reverse the judge's further findings of 8(a)(1) and (3) violations set forth above, all of which were premised on the unlawful unilateral change.

The facts are as follows. The parties reached impasse on 27 July 1982 after six bargaining sessions had taken place. At the 27 July meeting the Respondent offered an hourly wage rate of $9.38 with the number of hours worked to be computed from what is known in the trade as the Factory Book.[1] Alternatively, the Respondent offered to continue the expired contract for 1 year. The contract guaranteed a minimum weekly wage of $310. It further provided for $8.85 per hour, with the number of hours worked to be computed from the Chilton Book. No agreement was reached and a strike ensued.

In August the Respondent hired permanent replacements for the strikers. In determining a wage formula, the Respondent reviewed its competitive position. In order to improve its efficiency, it decided to use the more economical Factory Book as it had proposed, and so to set an hourly rate of $9.75 per hour with a 35-hour-minimum weekly guarantee total of $341.25. Because the hourly rate and, more importantly, the guaranteed minimum were higher than that paid the strikers, the judge concluded that the Respondent had violated Section 8(a)(5) by paying the replacements that wage. The Respondent, however, excepts to this conclusion, arguing, as it did before the judge, that a violation should not be predicated on the formula used for determining wages, rather, the Board should examine actual earnings over the 6-month period to determine if the Respondent's implemented wage package was reasonably comprehended within its alternative proposals to the Union. We find the Respondent's exception persuasive, particularly where, as here, earnings can vary significantly based on the numbers of tasks performed, and the numbers of hours alloted to a task for purposes of calculating wages. Thus, contrary to the judge, we would not focus on the minimum guarantee, when we can examine actual earnings over a significant period of time.

Using this analysis the record shows that the actual wages received by the replacements over a 6-month period in 1983 were generally the same or less than the strikers had earned during a similar period in 1982 under the terms of the expired contract. Thus, while the replacements' hourly rate was higher than that of the expired contract, their actual earnings did not correspondingly increase because the number of hours paid was no longer calculated on the Chilton Book. Accordingly, the actual wages paid to the replacements were not higher than those offered to the Union but, rather, were consistent with one of the Respondent's alternative final offers, i.e., its offer to continue the

[1] The Factory Book and the Chilton Book are industry manuals each of which specifies time allotments for tasks performed. Mechanics' wages are based not on actual hours worked but on hours deemed to have been worked as set forth in the respective manuals. Generally, the Chilton Book has more generous time allotments.

terms of the collective-bargaining agreement.[2] In these circumstances, we find that the wages paid the replacements were reasonably comprehended within the Respondent's final proposal to the Union and that the Respondent did not unilaterally change the terms and conditions of employment in violation of Section 8(a)(5).[3]

ORDER

The complaint is dismissed in its entirety.

MEMBER DENNIS, dissenting.

Contrary to my colleagues, I do not think that the Respondent's final proposals to the Union reasonably comprehended the wage package the Respondent unilaterally implemented for striker replacements.

The Respondent made two alternative offers to the Union: (1) $9.38 per hour calculated on the "Factory Book," with no minimum guarantee; and (2) $8.85 per hour calculated on the "Chilton Book," with a $310-per-week minimum guarantee (continuation of existing contract). The Respondent gave replacements $9.75 per hour calculated on the "Factory Book," with a $341.25 minimum guarantee. Thus, the "Factory Book" terms the Respondent gave the replacements were incontestably better than the "Factory Book" offer made to the Union in both hourly rate ($9.75 versus $9.38) and minimum guarantee ($341.25 versus nothing). In my view, this comparison alone establishes a violation; the Respondent was not entitled unilaterally to implement "Factory Book" terms more generous than the "Factory Book" offer it made to the Union. My colleagues argue, however, that the unilaterally implemented "Factory Book" terms proved to be no more advantageous to the replacements, in actual earnings, than the "Chilton Book" contractual terms had been to the strikers.

Assuming arguendo that the implemented "Factory Book" terms were lawful if they were no more generous than the contractual "Chilton Book" terms that the Respondent offered to continue, I nevertheless would find a violation. Here, because of the different time allotments in the two books, it is difficult to compare the implemented "Factory Book" hourly rate with the "Chilton Book" hourly rate. Minimum weekly guarantees can be compared, however, because they are stated in dollar amounts. The implemented minimum guarantee was $341.25, compared with $310 under the "Chilton Book" offer. Thus, the implemented minimum guarantee was better than either of the Respondent's alternative offers. Moreover, as the judge observed, the implemented terms yielded higher holiday, personal day, and sick leave pay rates than either of the Respondent's offers.

In looking to gross actual earnings over a 6-month period, my colleagues use the wrong measuring stick. The normal methodology in this type of case is to compare the *terms* that were implemented with the *terms* that were offered. The Board must judge the terms on their face (as the parties must do at the bargaining table), rather than look with hindsight at actual earnings experience.

The Union here might have chosen to accept the implemented "Factory Book" terms, as they appeared better on their face than the offered alternatives. Whether acceptance would have proven advantageous for the Union is unclear, because actual earnings depend on numerous variables, such as individual skill and productivity and the amount and type of work available to be performed. The strikers might have earned more than their replacements did, or they might not have. The critical point, however, is that the Respondent never gave the Union the opportunity to consider the implemented "Factory Book" terms, which had significant advantages over the terms the Respondent did offer. The Respondent thereby violated Section 8(a)(5) and (3), as the judge found.

DECISION

STATEMENT OF THE CASE

ARLINE PACHT, Administrative Law Judge. This case was heard in New York, New York, on August 1, 2, 3, and 10, 1983, pursuant to a charge filed on November 3, 1982, and amended on April 25, 1983. The complaint and notice of hearing, issued on June 31, 1983, and amended on July 20, 1983, alleges that Brady-Stannard Motor Co., Inc. (the Respondent) violated Section 8(a)(1), (3), and (5) of the National Labor Relations Act (the Act). Specifically the Respondent is alleged to have unilaterally offered and paid an hourly wage rate and a weekly minimum wage guarantee to replacement workers higher

[2] Thus, contrary to the judge, it is not significant that the replacements' minimum weekly guarantee, holiday, personal leave, and sick pay were higher than the strikers' under the expired contract, because, even including these higher earnings, the replacements still did not average more than the strikers in terms of actual earnings. Accordingly, the terms implemented for the replacements were consistent with those offered the Union. In contrast, our dissenting colleague concludes that the terms implemented for the replacements "had significant advantages" over those offered the Union. In so doing, however, she ignores evidence of the replacements' actual earnings which effectively disproves her contention. Instead, she relies on the implemented terms "on their face"; however, our colleague does concede that it is "unclear" whether the implemented terms really are more advantageous than those offered the Union due to the many variables present here. Precisely because of these many variables, it is impossible to weigh the relative advantages of the implemented terms vis-a-vis those offered the Union merely by appraising those terms "on their face," and it is improper to conclude that one is better than the other based on such a superficial analysis. Thus, it is our dissenting colleague, rather than we, who uses "the wrong measuring stick." We prefer to rely on the clear facts which show that the replacements' actual wages were not higher than those offered the Union.

[3] *Richard O'Brien Plastering Co.*, 268 NLRB 676 (1984).

than that ever offered to Local 259, United Automobile, Aerospace and Agricultural Implement Workers of America (the Union) during contract negotiations. The complaint also alleges that when the Respondent's striking service department employees learned of this their economic strike was converted into an unfair labor practice strike. The complaint further alleges that the Respondent violated Section 8(a)(1) and (3) of the Act by failing to reinstate all of the striking employees after the Union forwarded on their behalf an unconditional offer to return. The Respondent denies the commission of any unfair labor practice, and contends that the wages paid to replacement workers were reasonably comprehended within its final bargaining proposals.

All parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, to argue orally, and to file briefs. Briefs, which were filed on behalf of the General Counsel and the Respondent, have been carefully considered together with all the evidence in this case. On the entire record, and from my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent is, and at all times material herein has been, a New York corporation with an office and place of business in Brewster, New York, where it is engaged in the retail sale, service, and repair of new and used automobiles. Annually, in the course and conduct of its business operations, the Respondent derives gross revenues in excess of $500,000; sells and ships from its facility products, goods, and materials valued in excess of $50,000 directly to firms located outside the State of New York; and purchases and receives at its facility products, goods, and materials valued in excess of $50,000 directly from firms located outside the State of New York. Accordingly, the complaint alleges, the Respondent admits, and I find that the Respondent is now, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The Union is now, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

Operating under franchise, the Respondent sells new Cadillacs, Oldsmobiles, and Chevrolets, and services both new and used vehicles at its Brewster, New York facility. Its 32 employees are organized into four operating divisions: administration, sales, service, and parts. Since July 1979, the Union has represented the 17 employees in the service and parts division in the following unit:

> All service shop employees, including service writers, mechanics, "A" parts persons, "B" parts persons, drivers, polishers, foremen polishers, utility persons, tow truck drivers, and dispatchers employed by the Respondent at its facility, excluding office clerical employees, new and used car salesmen, guards, watchmen, professional employees and supervisors as defined in the Act.

The unit employees were covered by a collective-bargaining agreement which was effective from July 16, 1979, to July 15, 1982. The agreement provided, among other things, that as of July 1981 mechanics, also referred to as Class A technicians, would be paid an hourly rate of $8.85 and guaranteed a 35-hour workweek. In other words, mechanics were assured of a minimum weekly wage of $310. Although the contract called for a 40-hour workweek, mechanics' wages were not calculated by simply multiplying their $8.85 hourly wage rate by the literal number of clock hours worked. Rather, wages were calculated on a flat-rate or productive-hour basis according to three different methods. First, for all work under warranty, the amount of time allocated to perform a particular repair was itemized by year and model of car in a trade manual referred to as the Factory Book. The amount of time provided to complete repairs which were not under warranty was specified in a separate reference work, the Chilton Book. As a general rule, the Chilton Book provided more time for a job than did the Factory Book. For example, whereas the Chilton Book prescribed 5.5 hours to overhaul a transmission in a 1980 Chevrolet, only 3.5 hours were allowed for the identical function in the Factory Book. However, it is not invariably true that the Chilton Book set more generous times than did the Factory Book. On some operations the manuals varied only slightly if at all. One witness with extensive experience in the trade suggested that for 90 percent of the jobs the Chilton Book allocated 30 percent more time for a given job than did the Factory Book. It also appeared true, however, that the Chilton Book differed more significantly from the Factory Book when the jobs were complex than when they were more simple.

To summarize then, the Chilton and Factory Books are identical in that each establishes specific amounts of time for the completion of given repairs in various types of cars. The books differ as to the length of time allocated for each repair. In addition, the Respondent established a third method of calculating an employee's productive time. It created a "menu" or list of common repairs not under warranty, and established flat-rate times which were generally less than the Chilton times for those jobs in order to reduce the cost to the customer.

A mechanic's weekly wage was calculated in the following manner: the employee entered a brief description of each assigned job on a timecard and indicated whether the job was under warranty, customer-paid, or on the menu. Management then determined the amount of time allowed for each job by referring to the appropriate manual or menu. The total productive hours accumulated during a 5-day week multiplied by the $8.85 hourly rate determined the employee's weekly wage, but only if the productive hours exceeded 35. If a mechanic's productive time fell below 35 hours, he would receive a

guaranteed minimum wage of $310 (35 multiplied by $8.85).

In addition to wages being calculated on a flat-rate basis as described above, the contract also provided for certain wages to be earned on a straight-time basis. Thus, each year 11 paid holidays, 6 sick leave days, 2 personal days, school training days (typically 6 to 10 a year), bereavement, and call-in pay[1] all were determined by multiplying 8 clock hours by the $8.85 hourly wage rate.

B. *Collective-Bargaining Negotiations*

During the 2-month period of time prior to the expiration of the collective-bargaining agreement, the parties conferred on six occasions in an effort to negotiate a new contract. Economic issues were the central concerns of both the Respondent and the Union. The Company, like others affected by the recession in the automobile industry, wanted far-reaching concessions from the unionized workers. Not unnaturally, the Union hoped to obtain increased benefits and wages. Joe Lewis, the Union's business agent and principal negotiator, conceded without hesitation that from the outset the Respondent's position was that all work should be calculated in accordance with the Factory Book, that the hourly wage rate should not be raised, that the weekly guarantee should be abolished, and that job classifications should be revised to provide for Class B mechanics. However, the Union sought an expansion of the guaranteed workweek from 35 to 40 hours and a 12-1/2-percent increase in wages with continued reliance on the Chilton Book. During the next several bargaining sessions, both sides made certain concessions. Although the record is somewhat obscure as to the parties' positions vis-a-vis the hourly weekly wage, it appears that at one of the meetings the Respondent agreed to retain the 35-hour guarantee, but failed to come to terms with the Union on an hourly wage rate. At a subsequent meeting, the Respondent agreed to retain the 35-hour guarantee, but attempted to tie it to a productivity clause. Thereafter, the Respondent agreed to a 5-percent increase in the $8.85 hourly rate and the Union retreated from its demand for a 12-1/2-percent increase and a 25-percent increase for the polisher and parts driver to a 10-1/2 percent increase over 2 years.

On July 27, the Respondent raised its offer to a 6-percent increase on the $8.85 hourly rate based on the Factory Book. The Union, in turn, trimmed its request to a 9-percent increase on the $8.85 rate with a retention of the Chilton Book. In a final effort to avert a strike, the Respondent alternatively offered to continue operations under the current contract for another year.

When the negotiating team presented the Respondent's alternative proposals to the members of the bargaining unit, they voted unanimously to reject them and to strike. Thus, on July 27, when the strike vote was taken, the parties had failed to agree on an hourly wage rate, on the exclusive use of the Factory Book, on revised job classifications, or on a weekly guarantee. The following day, the 17 service department employees went out on strike; picketers bearing placards began a vigil outside the Respondent's premises. Although bargaining continued after the strike commenced, the parties were unable to resolve their differences. In November, the Company raised its offer from 6 to 7 percent over the $8.85 hourly wage rate on the Factory Book. This proposal was unacceptable to the Union, although it did acquiesce to the establishment of a Class B mechanic position.

C. *The Strike*

In the latter part of August, as the strike persisted, the Respondent placed advertisements in several local newspapers for striker replacements. The Respondent's business manager Robert Murphy instructed the company's bookkeeper Robin Morgan to review the striking employees' wages during the preceding year as a means of establishing an appropriate wage which could be offered to the replacements. Pursuant to these instructions Morgan prepared an analysis, introduced into evidence as Respondent's Exhibit 1, from which she concluded that the Class A technicians had earned an average hourly of $9.93.[2] On the basis of her analysis, management decided to offer replacement workers $9.75 an hour on the Factory Book with a 35-hour guaranteed workweek.

On September 10, a job applicant emerged from an interview with the supervisor of the service department and disclosed to Larry Devita, a striking technician walking the picket line, that he had been offered a hourly rate of $9.75 and a 35-hour guaranteed workweek. He agreed to allow DeVita to make copies of a piece of paper given to him by the supervisor on which these terms were written. DeVita left the picket line briefly and then returned with copies of the paper which he shared with his fellow strikers. By the account of several other mechanics who were on the picket line that day, the pickets became exceedingly angry on learning of the Respondent's offer. By the next day, all of the striking employees had knowledge of Brady-Stannard's terms. It became a source of constant comment on the picket line with strikers expressing anger and bitterness that the Respondent was willing to offer better terms to people "off the street" than to its own employees, many of whom had more than 10 years' seniority. As DeVita described it, the strikers were "fuming mad . . . . They were cursing up and down, they couldn't believe that after being there for so many years and their seniority . . . they could offer these guys more money."

[1] The call-in pay provision apparently guaranteed 8 hours' pay for an employee who reported to work when, in fact, work was not available.

[2] Although I have no doubt that Morgan made a good-faith effort to analyze the employees' weekly wages in order to derive an average hourly rate, her study builds on several generalized assumptions which make its conclusions imperfect and unreliable. For example, the entire analysis is based on the assumption that each mechanic spent 27 percent of his productive hours for a 6-month period on warranty work. Yet, the 27-percent figure was calculated on records for only 1 month. Moreover, that percentage was used to estimate the percentage of all employees' productive time spent on customer-paid work, rather than obtaining this figure from actual records for the months involved. Morgan also accepted as true the assumption that the amount of productive hours allocated for all customer-paid labor was uniformly 30 percent greater than for warranty work. Any slight variation in these broad assumptions could significantly alter Morgan's conclusion that the average hourly rate for mechanics was $9.93.

On the day after this revelation, Ronald Miller, another striking Class A mechanic and shop steward, contacted Business Agent Lewis about the Company's $9.75 offer. Early the next week, Lewis met with the strikers and promised to seek legal advice from the Union's counsel as to how to proceed. In the interim, according to employees who testified at the hearing, the Respondent's wage offer was a constant source of discussion and hostile comment among the union members. Although the strikers admittedly did not know whether the Respondent would use the Factory or Chilton Book to calculate the replacement workers' productive hours, they believed that with a $9.75 hourly rate the replacements would be earning more. However, they also voiced outrage that the Respondent offered a 35-hour guaranteed workweek at the higher hourly rate to the replacements, a concern which went beyond the question of which manual would be used. Thus, Shop Steward Miller was unable to predict whether mechanics would take home greater wages at a $9.75 rate on the Factory Book than an employee making $8.85 an hour on the Chilton Book because of all the variables involved, but he was certain that the weekly guarantee at $9.75 would result in a minimum weekly wage higher than anything offered to the strikers. Another mechanic, George Caimi, also had no doubt as to what the Respondent's offer entailed. He noted that the union members "had never been offered anywheres near that amount of money as an hourly rate." He then related that he had taken a scrap of paper and found that when he multiplied "9.75 times 35 comes out to be a greater number than 8.85 times 35. It comes out to more money." When Larry DeVita was asked whether he calculated the difference between the hourly rate offered to replacements and his own, he answered without hesitation: "You bet I did . . . $9.75 x 8 hours x 35 hours come out to about $31.60 more than I was going to get even with a 6% increase." Miller also pointed out that the higher wage rate offered to replacement increased the amount of pay earned for holidays, personal days, and school training days.

As promised, Lewis consulted with the Union's attorney and on November 3, an unfair labor practice charge was filed with the Board accusing the Respondent of violating Section 8(a)(1), (3), and (5) of the Act by offering the higher hourly rate to the replacement workers when it had not previously been proposed to the Union. On November 10, Lewis again met with the strikers explaining the steps the Union had taken. New picket signs appeared shortly thereafter accusing Brady-Stannard of being unfair.

D. *The Strikers' Offer to Return*

After picketing for almost 7 months and with the onset of cold weather, the employees decided to offer to return to work. The Union telegraphed the Respondent on February 15 on behalf of the strikers stating that they were unconditionally prepared to return to work. In a telegram dated February 17, the Company responded that there were no current vacancies, but promised to recall the men if any openings arose. Beginning on March 2, the Respondent wrote to 8 of the 10 strikers offering them reinstatement. After conferring with one another, the employees realized that offers had not been extended to all of them. Consequently, they all agreed to reject the reinstatement offers and remain on strike. The strike and the picketing at the Respondent's facility still were in progress at the time of this proceeding.

E. *Discussion*

1. Positions of the parties

There is no allegation that the Respondent refused to bargain in good faith or that the strike was not economic in origin. Rather, the complaint is narrowly drawn and alleges only that the strike became an unfair labor practice strike when the Respondent unilaterally offered and paid to replacement workers a greater hourly wage rate and a guaranteed minimum workweek which exceeded any offer made to the Union during collective-bargaining negotiations in violation of Section 8(a)(1), (3), and (5) of the Act. The complaint further alleges that the Respondent's refusal to reinstate all of the strikers after they tendered an unconditional offer to return also violated the Act and further prolonged the strike.

The Respondent's defense rests on its claim that the post-impasse wages paid to replacement workers were lower than those earned by Class A mechanics prior to the strike. Since these wage payments were reasonably comprehended by the Respondent's final bargaining proposals, no unfair labor practice was committed and the strike remained economic in nature. Therefore, the Respondent maintains, it was under no obligation to offer immediate reinstatement to all of the strikers pursuant to their offer to return.

2. Respondent's unfair labor practices

It is well settled that an employer may institute changes in existing terms and conditions of employment after impasse has been reached following good-faith negotiations, provided that the changes are "reasonably comprehended" in its final proposal. *Taft Broadcasting Co.*, 163 NLRB 475 (1967), enfd. sub nom. *Television & Radio Artists v. NLRB*, 395 F.2d 622 (D.C. Cir. 1968). Put another way, any revisions in the terms which the employer puts into effect subsequent to impasse may not be "substantially different from, or greater than, any which the employer has proposed during its negotiations." *NLRB v. Crompton Highland Mills*, 337 U.S. 217, 225 (1949).

The parties do not disagree that an impasse occurred on July 27, 1982, after six bargaining sessions had taken place.[3] Although each side demonstrated flexibility and made concessions from its initial position, differences remained on economic issues, including the amount of the hourly wage rate, whether the Chilton Book would be retained, whether mechanics' job classifications would be expanded to include additional job categories, and whether the guaranteed 35-hour workweek would be maintained. Since good-faith bargaining did not bring about a resolution of these key issues, since the parties apparently understood that a rejection of the Respondent's final alternative proposals would precipitate a strike, and since neither party seemed committed to

making additional concessions at the July 27 meeting, the conclusion is warranted that an impasse existed at that time. In addition, the employees' rejection of the Company's final proposals provides compelling evidence that they regarded negotiations at that time as deadlocked. The fact that bargaining resumed in August and continued on various dates in November and December is not inconsistent with a finding of impasse, for throughout the subsequent negotiations the parties drew no closer together on the issues which divided them on July 27.

The first critical question which must be resolved, then, is whether the Respondent's post-impasse offer and payment to striker replacement mechanics were "reasonably comprehended" within its final alternative proposals to the Union. For the reasons set forth below, I find that the Respondent unilaterally offered and implemented terms of employment for the replacements greater than those offered during collective bargaining and that such conduct violated Section 8(a)(1), (3), and (5) of the Act.

The Respondent stipulated at the hearing that in early September 1982 it offered and did, in fact, begin paying three newly hired Class A mechanics an hourly rate of $9.75 based on the Factory Book, accompanied by a guaranteed 35-hour weekly minimum wage. Moreover, the Respondent stipulated that it never offered the same terms to the Union throughout their negotiations, nor has it notified and offered to bargain with the Union about them. The Respondent further admitted that at no time during negotiations did it propose hourly rates and weekly guarantees to the Union which matched or exceeded those paid to the replacements.

Without belaboring the point, it is obvious that $9.75 is a greater hourly rate than $9.38 or $8.85, the final figures offered to the Union. By the same token, it is clear that the weekly guarantee of $341.25, the product derived by multiplying 35 hours times $9.75, exceeds both the minimum weekly wage guaranteed to the members of the bargaining unit under their expired contract or the $328.30 sum resulting from the Respondent's offer to increase the hourly wage rate to $9.38. It also follows that the $9.75 hourly rate led to other inequities when comparing the proposals to the bargaining unit employees to the offer and payments to replacement workers. Thus, the Respondent conceded that replacements would be eligible for holiday, sick leave, school training, and personal days at a wage rate calculated by multiplying a straight time of 8 hours by the higher $9.75 hourly rate.

The Respondent relies on a document submitted into evidence which compares the actual earnings of replacement workers during the first two quarters of 1983 with those of the strikers for the same time period in 1982, arguing that this exhibit proves that the replacements' earnings were less than those of the strikers.[4]

Numerous flaws inhere in the Respondent's arguments, the most serious of which stems from its reliance on the replacements' actual wages. By comparing their 6 months earnings to those of the bargaining unit members, the Respondent has apparently missed the essential thrust of the complaint. The harm alleged in the complaint is not directed to the *maximum* which might be earned under one hourly rate or the other; rather, it focuses on the *minimum* weekly wage guaranteed to replacements which exceeded that proposed for bargaining unit employees.[5]

This is a matter which has significance independent of whether or not the Chilton Book is eliminated. Thus, the Union's business agent and chief negotiator testified without controversion that the parties bargained about the guaranteed weekly wage as a separate item and that it continued to be a critical and unresolved issue throughout the negotiations. The strikers, too, expressed discontent not only about their perception that the replacements would earn greater wages, but also that the new formula for a weekly guarantee assured them a higher minimum wage rate than the Union was offered. Given Brady-Stannard's business decline, the strikers' concern as to a guaranteed weekly minimum wage was hardly academic. Indeed, the record shows that the replacement workers relied heavily on their guarantee. One of the newly hired mechanics drew on the minimum wage 30 out of the 41 weeks he worked, another resorted to the guarantee in 12 of 33 weeks, while a third drew on the guarantee for 12 of his 44 workweeks. It stresses the obvious to point out that, if the striking employees were to have invoked their guarantee at the rate offered to them by the Respondent during negotiations, they would have taken home $31.50 less per week than that paid to the replacements.

Even apart from the issue of the guaranteed weekly wage, it is not at all certain that wages calculated wholly on the Factory Book at $9.75 an hour would necessarily result in a reduction of mechanics' earnings, as the Respondent contends. There are, as one of the strikers suggested, too many variables between the circumstances which govern the wages earned by the bargaining unit members and those by the replacement workers to determine with any degree of accuracy that the elimination of the Chilton Book mandated a decrease in real earnings. It is true, as the witnesses conceded, that the Chilton

[4] The following figures are taken from G.C. Exh. 13:

Strikers—1982	
DeVita Sr.	$ 9,728.27
Miller	10,002.26
Palochick	10,362.83
DeVita Jr.	19,985.83
Caimi	13,602.87
McCarley	11,304.40
Romano	13,578.92
Replacements—1983	
Hagley	$10,665.20
Schmidt	9,367.59
O'Connor	9,862.62

[5] It is this distinction which makes the Respondent's analysis of the strikers' average hourly wage rate largely irrelevant to a determination of the threshold issue in this case. (See R. Exh. 1.) Whatever the average hourly wage rate based on actual earnings of the striking mechanics may have been, it has little bearing on a comparison between the contractual hourly wage rate and guaranteed workweek offered to union members and the terms subsequently implemented for replacements.

manual was more generous in times allotted to certain repairs and, therefore, generally more advantageous to the mechanic. Nevertheless, in determining whether or not the Chilton Book made a difference in calculating real earnings, it is important to bear in mind that only a portion, approximately 40 percent, of the mechanics' productive hours were calculated on the basis of Chilton timeframes. Moreover, for some of the repairs performed by the mechanics, no distinctions or only insignificant ones existed between the times allotted in either manual. Consequently, it is impossible to accurately predict whether calculating all productivity at a $9.75 hourly rate on the basis of the Factory Book would, in fact, produce a weekly wage less than that comprehended in the Respondent's final proposal to the Union.

There are other variables which make a valid comparison problematic. For example, it may be appropriate to make allowances for the fact that the replacements took longer to perform their tasks out of an unfamiliarity with a new workplace, to factor into the equation the continuation impact of a general decline in the automobile industry, or to acknowledge the loss of business occasioned by the strike. In addition, the Respondent unilaterally revised the menu after the strike commenced and also eliminated a $10.45 special hourly rate previously paid to mechanics for heavy-duty work on trucks. The Union was not notified of either of these actions and they were apparently never mentioned during collective bargaining. Therefore, they should not be taken into account in deciding the central issue in this case since it is impossible to state what position the Union would have taken had it been permitted to bargain over these matters.

Further, the record does not wholly support the Respondent's contention that the formula established to determine wages for the replacements necessarily produced decreased earnings. General Counsel's Exhibit 1 shows that one of the mechanics hired subsequent to the strike, Brian Hagley, earned a higher average weekly wage then did four of the bargaining unit technicians, while another new employee, O'Connor, earned more than the senior DeVita.

In sum, given all the variable circumstances which existed before the strike and afterwards, it requires a leap of faith to conclude that the wage package offered and given to replacement workers was less favorable overall than that offered to the Union during negotiations. There is one matter, however, which remains beyond speculation—that is, that the replacement mechanics were offered a higher hourly rate and a guaranteed workweek which had to produce income greater than that ever offered to the Union. There can be no doubt that $9.75 times 35 hours assures a greater minimum wage than does $8.85 multiplied by a 35-hour workweek, and that $9.75 multiplied by 8 hours straight time is greater than $8.85 per hour for holidays, personal days, or sick leave. By offering and granting to replacement workers these terms of employment, more desirable than any offered to the strikers, the Respondent violated Section 8(a)(1) and (5) of the Act. Moreover, the Board has held, in somewhat parallel circumstances, that such actions have a potentially devastating impact on the right of employees to strike for they are inherently destructive of employees' rights. Therefore, Section 8(a)(3) of the Act is violated as well. *Burlington Homes*, 246 NLRB 1029, 1030 (1979); *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 226 (1963).[6]

3. The strike's conversion into an unfair labor practice strike

The next question to be considered is whether the Respondent's unlawful conduct in offering and paying a higher hourly wage rate together with a 35-hour weekly guarantee to replacement workers converted an economic strike into an unfair labor practice strike.

The resolution of this question turns on proof that the unfair conduct was causally connected to the continuation or prolongation of the strike. Compare *Whisper Soft Mills*, 267 NLRB 813 (1983), and *Robbins Co.*, 233 NLRB 549 (1977), with *Burlington Homes*, supra at 1032, and *Winter Gardens Citrus Products v. NLRB*, 238 F.2d 128 (5th Cir. 1956). Here, there is convincing evidence to support the conclusion that the Respondent's unfair labor practices described above contributed in substantial measure to alienating the strikers and thereby prolonging the strike.

There is no dispute that striking employees learned of the Respondent's wage offer to a replacement mechanic on September 10. What the Respondent controverts is the contention that their knowledge contributed to a prolongation of the strike. In this regard, it could be argued that the strikers' testimony as to their hostile receipt of this information was self-serving.[7] But it is not possible easily to disregard the strong evidence of the workers' anger and their perception of their employer's conduct as unfair. Thus, the record shows that the union members took certain unambiguous actions. First, DeVita, swiftly reacting to what he perceived as an unjust offer, persuaded the applicant to accompany him while he made copies of the paper containing the damaging terms. Immediately thereafter, he shared the information with his fellow picketers. By the following day all the strikers were aware of the Respondent's action. On September 11, the shop steward sought the union business agent's advice as to how to proceed on this issue. Thereafter, the business agent met with the strikers and assured them that he would pursue the matter. He did so and within a reasonable time period the Union filed an unfair labor practice charge devoted exclusively to its protest of the Respondent's wage offer. Finally, the picket signs were changed to reflect the fact that the focus of the strike was to protest an unfair labor practice. There is no precise way to measure the degree to which the Respondent's unfair labor practices determined the employees' decision to see the strike to the finish, for motivation is

[6] The Respondent contends that it chose the $9.75 hourly rate solely to attract applicants with a fair wage offer. However, specific evidence of discriminatory motivation is unnecessary since the Respondent's conduct "by its very nature contain[s] the implications of the required intent." *NLRB v. Erie Resistor Corp.*, supra at 227. See also *Radio Officers v. NLRB*, 347 U.S. 17 (1954).

[7] With some limited exceptions, the collective-bargaining agreement requires that a full investigation be made prior to a discharge. Other arbitrators, who have heard cases involving the Company, have held that the "full investigation" requirement may be met without the need to interview the employee affected.

not a matter which can be quantified with certainty, especially when the events which affected or changed their motivation occurred while the employees were on strike. It is unnecessary to divine subjective intent, however, for there is visible objective evidence here which provides ample proof that "the strikers' resolve to continue the strike was strengthened by what they perceived as another unfair labor practice committed by Respondent."[8] The fact that the strike continued without any sign of weakening until February 15 when the strikers unconditionally offered to return to work provides further proof of the intensity of the strikers' resolve.

To be sure, the strike continued to have economic objectives throughout its duration. However, a strike, such as the one at issue here, may be converted into an unfair labor practice strike "if only one cause, even if not the primary cause, was the employer's unfair labor practice, notwithstanding the presence of economic issues." *Superior National Bank*, 246 NLRB 721, 724 (1979), quoting *National Fresh Fruit & Vegetable Co.*, 227 NLRB 2014 (1977), enf. denied on other grounds 565 F.2d 1331 (5th Cir. 1978). There is compelling proof that the unit members continued to strike against Brady-Stannard at least in part because of the Respondent's unlawful conduct in offering a higher hourly wage rate and a higher guaranteed weekly wage to striker replacements than was offered to the Union during negotiations. I conclude, therefore, that the strike became an unfair labor practice strike on September 10, 1982.

4. Respondent's obligation to reinstate strikers

When a strike which is economic at its inception is converted into an unfair labor practice strike, the strikers acquire the full reinstatement rights of unfair labor practice strikers on the date of conversion. See *Carpenters Local 1780*, 244 NLRB 277, 281 (1979). Accordingly, an employer is obligated to immediately reinstate any striker who was not permanently replaced prior to the date of conversion to his former or substantially equivalent position of employment on his unconditional application to return to work, even if striker replacements must be terminated to make way for the returning employee. *NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333 (1938). As found above, a strike, economic in nature, became an unfair labor practice protest on September 10, and on February 15 the employees requested reinstatement without conditions. At this juncture, the Respondent was required to offer immediate reemployment to all bargaining unit employees who had not been permanently replaced prior to September 10.[9]

Instead, on February 17 the Respondent declined to reinstate any of its former employees claiming that there were no vacancies. In its brief, the Respondent denies that it had a legal obligation to offer reinstatement to all unreplaced strikers since the strike remained an economic one at all times. Having found to the contrary that it was converted to an unfair labor practice strike, the Respondent was obliged to promptly accept the returning workers even if it entailed dismissing replacements. The Respondent's refusal to do so violates Section 8(a)(1) and (3) of the Act and clearly prolonged the strike. See *Tufts Bros.*, 235 NLRB 808, 823 (1978).

Beyond this, the Respondent again violated the Act when it subsequently offered to reinstate most but not all of the strikers. Because of its failure to offer reemployment to the two service advisers, Strobino and Smith, the other striking employees rejected the reinstatement offers and chose to continue the strike. In these circumstances, the strikers were entitled to refuse to return to work and by doing so did not forfeit their status or reinstatement rights as unfair labor practice strikers. Condoning similar conduct by striking employees in *Southwestern Pipe*, 179 NLRB 364 (1969), modified 444 F.2d 340 (5th Cir. 1971), the Board ruled:

> [E]mployees do not lose their right to reinstatement by engaging in a continued strike to protest their employer's failure to offer reinstatement to other strikers. They merely revert to their status as unfair labor practice strikers until such time as the employer accedes to their demands or until they terminate the strike. [Id. at 365.]

Thus, the mechanics' decision to remain on strike does not alter their right to reinstatement. However, the Respondent's subsequent offer of reemployment to some of the strikers limits its duty to compensate them for lost wages to a period from February 17 to the dates on which job offers subsequently were extended. As to the two service advisors to whom no reinstatement offers were made, the Respondent is obligated to promptly offer them their positions back and make them whole for any loss of earnings incurred as a result of its continuing refusal to reinstate them.

[8] See Member Jenkins' dissent in *Burlington Homes*, supra at 1033. The majority in that case disagreed with Member Jenkins' view that the strike was converted into an unfair labor practice strike, since the strikers were unaware of the employer's wage offer and, even after the General Counsel learned of the employer's unlawful conduct during an investigation of the original charge, no amended charge was ever filed alleging that the wage offer to the replacements was unlawful. See *Burlington Homes*, supra at 1032 fn. 11. These factors distinguish *Burlington* from the present case.

[9] Striking employees who were permanently replaced prior to the September 10 conversion date are entitled to reinstatement to their former or substantially similar jobs as they become available before those jobs are offered to new employees. See *Laidlaw Corp.*, 171 NLRB 1366 (1968), enfd. 414 F.2d 99, 103–105 (7th Cir. 1969), cert. denied 397 U.S. 920 (1970). Jt. Exh. 1 attempts to detail the employment history of the replacement workers but I find that document somewhat confusing. An examination of this exhibit suggests that only Ronald Morgan was permanently replaced by an employee hired prior to September 10. Should his position become available by the departure of the replacement, he must be recalled unless he has obtained regular and substantially equivalent employment elsewhere. Another new employee, J. Astrologo, was hired as a polisher on September 2 to replace David Churchill, but Astrologo was terminated a month later. At that point in time, Churchill was entitled to be recalled on offering unconditionally to return. Instead, the Respondent hired another replacement, Giordino, on June 30. Additionally, the General Counsel submits that Lyke, a parts driver, was permanently replaced. However, Jt. Exh. 1 shows that Lyke was rehired and terminated again in August. I leave the unraveling of Lyke's ambiguous employment status, as well as other questions affecting which employees may have been permanently replaced, to the compliance stage of this proceeding.

CONCLUSIONS OF LAW

1. The Respondent is engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. At all times material herein, the Union has been the exclusive collective-bargaining representative of employees in the following appropriate unit:

> All service shop employees, including service writers, mechanics, "A" parts persons, "B" parts persons, drivers, polishers, foremen polishers, utility persons, tow truck drivers, and dispatchers employed by the Respondent at its facility, excluding office clerical employees, new and used car salesmen, guards, watchmen, professional employees and supervisors as defined in the Act.

4. Since about September 1, 1982, the Respondent violated Section 8(a)(1), (3), and (5) of the Act by unilaterally, without prior notice to and consultation or bargaining with Local 259, United Automobile, Aerospace and Agricultural Implement Workers of America, offering to pay and paying its replacement mechanics a greater hourly wage rate and a higher weekly minimum wage than was offered to the Union during contract negotiations.

5. The strike which began on July 27, 1982, was prolonged by the Respondent's unfair labor practices as described in paragraph 4 above, thereby converting the striking employees into unfair labor practice strikers on September 10, 1982.

6. Notwithstanding the Union's unconditional request for reemployment on behalf of the strikers, the Respondent denied them prompt reinstatement, thereby discriminating against Ronald Miller, Lawrence C. DeVita, George Caimi, William McCauley, Edward Palocnick, Vincent Romano, Timothy Jaczola, Lawrence J. DeVita, George Smith, and Edward Strobino, in violation of Section 8(a)(1) and (3) of the Act.

7. By failing at all times to offer reinstatement to two of the strikers, Edward Strobino and George Smith, notwithstanding their unconditional requests to return, the Respondent prolonged the strike in violation of Section 8(a)(3) and (1) of the Act.

8. The above-described unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall recommend that it be required to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. As found above, the Respondent unilaterally and without consultation with the Union granted an increase in the hourly wage rate and a higher guaranteed workweek to striker replacements without bargaining with the Union as the exclusive representative of the employees in the appropriate unit and such conduct unlawfully discriminated against the strikers. Accordingly, the Respondent shall be ordered to cease and desist from engaging further in such practices and, on request, the Respondent shall revoke all unilateral changes in the terms and conditions of employment in the aforesaid unit.

The Respondent also was found to have violated Section 8(a)(3) and (1) of the Act by denying reinstatement to the strikers after they unconditionally requested reemployment to their former or substantially equivalent positions. Subsequently, the Respondent offered reinstatement to eight of the strikers but failed to offer positions to the two service advisers. Consequently, I shall recommend that the Respondent be ordered to offer to the strikers who were not permanently replaced prior to September 10, 1982, immediate reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other rights which they formerly enjoyed, discharging any replacements if necessary. Further, I shall recommend that the Respondent be required to make all strikers whole for any loss of earnings they may have suffered as a result of the Respondent's failure to reinstate them immediately on their tendering unconditional offers to return to work. Such compensation shall be computed from the date of the Respondent's refusal to return them to work to the date that offers of reinstatement may have been made in accordance with the formula set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and *Florida Steel Corp.*, 231 NLRB 651 (1977). See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962). Payroll and other records in the Respondent's possession shall be made available to the Board or its agents to assist the backpay computation.

While the unfair labor practice findings herein are not inconsequential, the record does not reflect any previous history of similar findings against the Respondent nor does it demonstrate union animus or bad faith in the negotiations. Under these circumstances, I find it appropriate to recommend the narrow injunctive language "in any like or related manner." See *Hickmott Foods*, 242 NLRB 1357 (1979).

[Recommended Order omitted from publication.]

Greyhound Lines, Inc. *and* **Harry Lehman.** Case 2-CA-18223

15 January 1985

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS HUNTER AND DENNIS

On 29 March 1983 Administrative Law Judge Raymond P. Green issued the attached decision. The Respondent filed exceptions and a supporting brief,[1] and the General Counsel filed a brief in support of the judge's decision.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions[3] and to adopt the recommended Order as modified.

The judge found, and we agree, that the Respondent violated Section 8(a)(1) of the Act under *NLRB v. J. Weingarten*, 420 U.S. 251 (1975), by preventing employee Lehman's union representative from participating in an investigatory interview of Lehman. As a remedy for the *Weingarten* violation, the judge, applying *Kraft Foods*, 251 NLRB 598 (1980), recommended that the Respondent be required to make whole employee Lehman for lost wages resulting from the Respondent's discipline of him for alleged insubordination. However, in our recent decision in *Taracorp Inc.*, 273 NLRB 221 (1984), we overruled *Kraft Foods* and held that Section 10(c) of the Act precludes a make-whole remedy for *Weingarten* violations where the discipline of an employee is for cause.[4] Accordingly, consistent with *Taracorp*, we shall modify the judge's recommended Order to delete the make-whole and expunction remedies. We shall order the Respondent to cease and desist from depriving any employee of his right to union representation at an investigatory interview which the employee reasonably believes might result in disciplinary action, by requiring the union representative to remain silent throughout the interview. We shall further order the Respondent to post an appropriate notice.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Greyhound Lines, Inc., Phoenix, Arizona, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Delete paragraphs 2(a), (b), and (c) and reletter the subsequent paragraphs accordingly.

2. Substitute the attached notice for that of the administrative law judge.

[1] In its exceptions the Respondent contends that the Union waived the right of employees to have union representation at investigatory interviews by failing to file a grievance over the Respondent's written policy of requiring union representatives to remain silent at such interviews. Member Hunter notes that, although the judge did not address this issue, it is undisputed that such policy was not embodied in the parties' collective-bargaining agreement and that the Union did not otherwise expressly agree to the policy. Furthermore, he notes that the record contains evidence that the Union opposed the Respondent's policy in communications with the Respondent's corporate headquarters and by filing unfair labor practice charges. Without reaching the issue of whether a union can waive employees' *Weingarten* rights, Member Hunter finds that in the circumstances here the Union did not clearly and unmistakably waive such rights.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

At fn. 16 of his decision the judge referred to "Section 8(c)" of the Act, whereas it is clear from the context that he meant to refer to Sec. 10(c). This inadvertent error does not affect our decision.

[3] Member Hunter notes that at fn. 13 of his decision, the judge cited *Pacific Telephone & Telegraph Co.*, 262 NLRB 1048 (1982), a case in which Member Hunter dissented. Since the judge did not rely on that case to find a violation Member Hunter's disagreement with that case does not affect his view of the present case. Member Dennis finds it unnecessary to pass on *Pacific Telephone & Telegraph Co.*

[4] As further explained in *Taracorp*, discipline is "for cause" within the meaning of Sec. 10(c) if the employee was not disciplined for union or other protected concerted activity and the reason for the discipline was not, itself, an unfair labor practice. Since it is clear in the present case that employee Lehman was not disciplined for asserting his right to union representation in the investigatory interview, but for alleged insubordination, his discipline was "for cause" within the meaning of Sec. 10(c) and a make-whole remedy is therefore precluded.

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT deprive any employee of his right to union representation at an investigatory interview which the employee reasonably believes may

result in disciplinary action, by requiring the union representative to remain silent throughout the interview.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

GREYHOUND LINES, INC.

DECISION

STATEMENT OF THE CASE

RAYMOND P. GREEN, Administrative Law Judge. This case was heard by me in New York, New York, on December 16, 1982.[1] The charge in the case was filed on July 20, 1981, and the complaint was issued by the Regional Director for Region 2 of the Board on October 26, 1981.

In substance, the complaint alleges that on March 11, 1981, the Respondent conducted an investigatory interview with Harry Lehman, during which it did not allow Lehman's union representative to participate. As a consequence, the General Counsel contends that the Respondent is liable for the subsequent discharge of Lehman and is required to make him whole from the date of his discharge until the date that he was subsequently reinstated pursuant to an arbitration award.

The Respondent denies that it did not allow the union representative to participate in the aforesaid interview. It also asserts that the decision to discharge Lehman was made prior to the interview and that it did not base its decision upon any information received during the interview. Thus, according to the Respondent, even if it is concluded that the interview was not conducted in accordance with the standards set forth in *NLRB v. J. Weingarten*[2] the Respondent nevertheless is not liable for backpay because it would have discharged Lehman notwithstanding the interview.

Based on the entire record in this proceeding, including my observation of the demeanor of the witnesses, and upon the arguments of counsel, I make the following

FINDINGS OF FACT

I. JURISDICTION

Greyhound Lines, Inc. is a California corporation engaged in the business of providing interstate bus transportation. It has facilities and terminals throughout the United States, including the terminal involved, located at 625 Eighth Avenue, New York, New York. Annually, the Company derives gross revenues in excess of $50,000 from the transportation of passengers, freight, and commodities from New York to points located outside the State of New York. It is conceded by the Respondent and therefore concluded that it is an employer engaged in interstate commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

It is agreed by the parties that Local 1202, Amalgamated Transit Union, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.

It appears that the Respondent has maintained a collective-bargaining relationship with the Amalgamated Transit Union for many years and that Local 1202 has been the local union recognized as the representative of certain of the Respondent's New York employees, including employees who work at 625 Eighth Avenue. Lehman, the Charging Party, is a member of Local 1202.

III. THE OPERATIVE FACTS

It seems that when the Supreme Court issued its decision in *NLRB v. J. Weingarten*, supra, the Company instituted a policy whereby at investigatory interviews an employee who requested union representation would be afforded that opportunity, but the representative would not be allowed to participate in the interview. Accordingly, the testimony in this case indicates that it was customary for management to ritually announce at the outset of all such interviews that, although a union representative was entitled to be present, the representative would be required to remain silent. In relation to this practice, it also appears that this came about not as a result of any agreement with the Union, but rather as a policy unilaterally promulgated by the Company.

On March 9, 1981, Harry Lehman had an altercation with his supervisor, Fred Perez. Basically, Lehman was asked to remove a sweater he was wearing and to put on the jacket which was part of his uniform. When Lehman refused, he got into an argument with Perez and made a few intemperate remarks to the latter. As a consequence, Lehman was told to punch out for the remainder of his shift and to report on March 10 to the office of the director of terminals, Robert Langan. On the same day, the Company made a check of Lehman's bank (cash register), but found everything to be in order.[3]

On March 10 Lehman went to the terminal but found that Langan was not in. He was told to go home and not to punch in. He also was told to report to Langan's office on the following day.

About 10 a.m. on March 11 Lehman called the Union and asked to have a representative accompany him to the interview scheduled for that afternoon. As none of the union representatives were available and, as the Company refused to postpone the meeting, an employee named Pierri (who formerly was a shop steward) was designated by the Union to represent Lehman. On the same morning, Langan notified Union Agent Axelrod that Lehman was going to need a representative for the interview.[4]

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[1] Although previously consolidated with Cases 2–CA–18738 and 2–CA–18830, the General Counsel moved to sever those cases and have them remanded to the Regional Director in view of an agreement by the parties to have the issues therein submitted to arbitration. I granted this motion.

[2] 420 U.S. 251 (1975).

[3] Lehman had previously been suspended in December 1980 for failing to follow instructions.

[4] Apparently this was during a telephone conversation when Axelrod asked the Company to postpone the meeting because no union agents were available.

The meeting commenced about 1 p.m. and present for the Company were O'Toole and Langan. According to Pierri and Lehman, at the outset of the meeting they were told that, although Pierri could be present, he had to remain silent during the interview. From that point on Lehman was asked a series of questions based on reports previously submitted on March 10 by Perez and a Mr. Simpson. Lehman responded to the questions and to a large extent admitted the matters contained in the aforementioned reports. At one point during the meeting, Pierri started to ask a question, and was told that, although he normally would not be allowed to speak, he would be given some leeway because he had not been a union representative for some time.[5] Pierri testified that, although he did ask one question, he thereafter remained silent because he understood the Company's instructions and policy to mean that he was not permitted to participate in the interview. At the close of the interview, Lehman indicated that he might have been a little uptight on March 9, as his wife was sick and he was under a lot of pressure. At this point, the interview concluded and Lehman and Pierri were asked to leave for about 10 to 15 minutes. When they returned, Lehman was told that his employment was being terminated and he was handed a document called a "Form Six," which read as follows:

> On the above date you committed the below listed infractions.
>
> 1. You failed to comply with your supervisors instructions.
>
> 2. You used loud and abusive lanaguage and acted in an ungentlemanly like manner in front of Greyhound customers.
>
> 3. You showed gross disrespect towards your supervisor.
>
> Your record is hereby charged with the above listed infractions.
>
> Due to the seriousness of the infractions listed above, you are hereby discharged from Greyhound Lines Inc. effective 3-11-81.[6]

Respondent's witnesses, O'Toole and Langan, asserted that the decision to discharge Lehman was made on March 10, based on the reports submitted that day by Perez and Simpson. In essence, they assert that the interview was, in reality, a formality held in part because a few arbitrators had concluded, in agreement with the Union's contention, that such interviews were required under the collective-bargaining agreement as a precondition for discharge.[7] However, it is clear that at no time prior to the interview, and at no time during the interview itself, did O'Toole or Langan tell Lehman that either a decision to discharge him had been made or that such a decision was ever contemplated. Indeed, from Lehman's point of view (and mine), it seems that the Company's representatives were conducting a thorough and searching interrogation of Lehman so as to ascertain whether the latter contested or admitted the facts reported by Perez and Simpson. In fact, Lehman admitted most of the facts and it was only after the interview was concluded that he was told of the discharge decision. Also, it was only after the interview had ended that the form 6 was prepared and given to Lehman. Moreover, although Langan testified that the decision had been made before the interview commenced, he did acknowledge that he could have been persuaded to change his mind if the interview had adduced evidence of other mitigating circumstances. For example, Langan stated that if he had learned that Lehman was faced with a serious family illness he would have been "very sympathetic to him." As noted above, Lehman did refer to an illness to his wife, but the details thereof were not explored. Perhaps if Pierri did not feel inhibited by the Company's policy of barring his participation, this might have been an area in which he could have elicited facts in support of Lehman.

With respect to Pierri's involvement in the meeting, both Langan and O'Toole testified that when Pierri tried to interject, they told him that although they normally would not allow the representative to speak, they would make an "exception" in his case. In this regard, they conceded, however, that this exception was contrary to company policy as it existed at that time.

Subsequent to his discharge, Lehman filed a grievance on March 27, 1981, and an arbitration hearing was held on February 5, 1982. The issue presented for arbitration was solely whether the discharge of Lehman was for sufficient cause under the collective-bargaining agreement. The issue in this case, involving whether Lehman was denied his right to union representation at the interview on March 11, 1981, was neither presented to the arbitration forum nor decided.[8] It is noted that at the arbitration hearing the Company attempted to put into evidence the transcript of the March 11 interview, no doubt to show that Lehman had previously admitted the alleged acts of misconduct upon which the Company based its discharge decision. However, these notes were rejected by the arbitration panel and were not received into evidence.

On April 23, 1982, Arbitrator Thomas A. Knowlton issued a decision concluding that Lehman's conduct on March 9 was not sufficiently serious so as to warrant his discharge. Accordingly, the Company was ordered to reinstate Lehman to his former job and the Company complied. However, the arbitrator refused to grant Lehman any backpay for the period that he was unemployed.

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[5] During the interview, Langan made handwritten notes which were typed up in the form of a transcript.

[6] Shortly thereafter, Lehman was given a corrected copy of the form 6 which changed the final sentence to, "Due to the seriousness of the infractions listed above, and your past work record, you are hereby discharged from Greyhound Line Inc. effective 3-11-81."

[7] With some limited exceptions, the collective-bargaining agreement requires that a full investigation be made prior to a discharge. Other arbitrators, who have heard cases involving the Company, have held that the "full investigation" requirement may be met without the need to interview the employee affected.

[8] The Respondent does not contend that this case should be deferred to the arbitrator's award under the standards of *Spielberg Mfg. Co.*, 112 NLRB 1080 (1955).

IV. ANALYSIS

In *NLRB v. J. Weingarten*, 420 U.S. 251 (1975), the Supreme Court held that an employee has a Section 7 right to request union representation at an investigatory interview where the employee reasonably believes that the investigation will result in disciplinary action. In reaching this conclusion the Court approved the Board's rationale and stated:

> The Board's construction also gives recognition to the right when it is most useful to both employee and employer. A single employee confronted by an employer investigating whether certain conduct deserves discipline may be too fearful or inarticulate to relate accurately the incident being investigated, or too ignorant to raise extenuating factors. A knowledgeable union representative could assist the employer by eliciting favorable facts, and save the employer production time by getting to the bottom of the incident occasioning the interview. Certainly his presence need not transform the interview into an adversary contest. Respondent suggests nonetheless that union representation at this stage is unnecessary because a decision as to employee culpability or disciplinary action can be corrected after the decision to impose discipline has become final. In other words, respondent would defer representation until the filing of a formal grievance challenging the employer's determination of guilt after the employee has been discharged or otherwise disciplined. At that point, however, it becomes increasingly difficult for the employee to vindicate himself, and the value of representation is correspondingly diminished. The employer may then be more concerned with justifying his actions than re-examining them.

While the Supreme Court dealt with the question of whether an employer may deny a request for union representation in investigatory interviews, it did not specifically address another and older line of cases where the Board had concluded that an employer violates the Act when it denies an employee union representation during a disciplinary interview.[9] Thus, it is settled that the right to union representation is held at an investigatory interview, but that such a right does not adhere to "run-of-the mill shop floor conversations, as for example, the giving of instructions on training or needed corrections of work techniques."[10]

Subsequent to the Board's decision in *Certified Grocers*, 227 NLRB 1211 (1977),[11] where it held that the *Weingarten* rights applied to disciplinary meetings, the Board reversed itself in *Baton Rouge Water Works*, 246 NLRB 995 (1979). In the latter case, a majority of the Board drew a distinction between those meetings where the *sole* purpose was to notify an employer of disciplinary action already decided and those meetings where the purpose was otherwise. As to the former, the Board concluded that an employee had no right to union representation whereas such a right existed in the context of investigatory meetings. Yet even here, the distinction was narrowly drawn and the Board noted (246 NLRB at 997):

> We stress that we are *not* holding today that there is no right to the presence of a union representative at any "disciplinary" interview. Indeed, if the employer engages in any conduct beyond merely informing the employee of a previously made disciplinary decision, the full panoply of protections accorded the employee under *Weingarten* may be applicable. Thus, for example, were the employer to inform the employee of a disciplinary action and then seek facts or evidence in support of that action, or to attempt to have the employee admit his alleged wrongdoing or to sign a statement to that effect, or to sign statements relating to such matters as workmen's compensation, such conduct would remove the meeting from the narrow holding of the instant case, and the employee's right to union representation would attach. In contrast, the fact that the employer and employee thereafter engaged in a conversation at the employee's behest or instigation concerning the reasons for the previously determined discipline will not, alone, convert the meeting to an interview at which the *Weingarten* protections apply.
>
> In summary, as long as the employer has reached a final, binding decision to impose certain discipline on the employee prior to the interview, based on facts and evidence obtained prior to the interview, no Section 7 right to union representation exists under *Weingarten* when the employer meets with the employee simply to inform him of, or impose, that previously determined discipline. To the extent that the Board has in the past distinguished between investigatory and disciplinary interviews, in light of *Weingarten* and our instant holding, we no longer believe such a distinction to be workable or desirable. It was this distinction which *Certified Grocers* abandoned, and to that extent we still believe the decision was correct. Thus, the full purview of protections accorded employees under *Weingarten* apply to both "investigatory" and "disciplinary" interviews, save only those conducted for the exclusive purpose of notifying an employee of previously determined disciplinary action.[12]

Following the Supreme Court's decision in *NLRB v. Weingarten*, supra, there existed some confusion as to precisely what role a union representative would play during the course of a meeting and it appears that some companies, like Greyhound, took the position that the union representative should remain silent. On August 27, 1980, the Board issued two decisions which dealt with this issue, each of which concluded that an employer could not insist or require a union representative to remain silent at an interview at which the employee had

[9] See, e.g., *Texaco*, 168 NLRB 361 (1967); *Chevron Oil Co.*, 168 NLRB 574 (1967); *Jacobe-Pearson Ford*, 172 NLRB 594 (1968).

[10] *Quality Mfg. Co.*, 195 NLRB 195, 199 (1972), enfd. sub nom. *Ladies Garment Workers v. Quality Mfg. Co.*, 420 U.S. 276 (1975).

[11] The Board's decision was denied enforcement by the Ninth Circuit Court of Appeals at 578 F.2d 449 (1978).

[12] See also *Gulf States Mfgrs.*, 261 NLRB 852 (1982).

the right to have his representative present. *Southwestern Bell Telephone Co.*, 251 NLRB 612 (1980), and *Texaco*, 251 NLRB 633 (1980).[13] In the former case the Board stated:

> In agreeing with the Administrative Law Judge's findings and conclusions on this issue, it is our view that the Supreme Court, in the course of its *Weingarten* decision, intended to strike a careful balance between the right of an employer to investigate the conduct of its employees at a personal interview, and the role to be played by a statutory representative who is present at such an interview. It is clear from the Supreme Court's decision that the role of the statutory representative at an investigatory interview is to provide "assistance" and "counsel" to the employee being interrogated. However, the Supreme Court made it equally clear that the presence of the statutory representative "need not transform the interview into an adversary contest," or indeed, any type of collective-bargaining confrontation. Clearly, then, an employer's right to regulate the role of the statutory represntative at an investigatory interview is limited to a reasonable prevention of such a collective-bargaining or adversary confrontation with the statutory representative.
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> In the instant case, the Respondent, by demanding the silence of Gottschalk's union steward until after Gottschalk had confessed to the charges, did not engage in a reasonable prevention of a collective-bargaining or adversary confrontation with the statutory representative. Rather, the Respondent attempted from the very outset of the interview to stifle any participation by the union steward during the intervew. At the time that Hubbard demanded McQuiller's silence, there was no indication that McQuiller had sought or would seek to turn the interview into a collective-bargaining or adversary confrontation.
>
> We note, further, that the interview itself, as well as its outcome, demonstrates the critical need for the rights granted to employees under *Weingarten*. For as the Supreme Court stated in *Weingarten*, often "an investigative interview is conducted by security specialists; the employee does not confront a supervisor who is known or familiar to him, but a stranger trained in interrogation techniques." Similarly, Gottschalk was confronted at the interview by Hubbard, a security supervisor and former FBI agent who was trained in interrogation techniques and who used those techniques to procure a total written confession from Gottschalk. Obviously, the mere silent presence of Gottschalk's union steward at the interview was insufficient to alter the imbalance which the Supreme Court sought to alleviate in its *Weingarten* opinion.

In enforcing the Board's decision in *Texaco*, supra, the court, in *NLRB v. Texaco*, 659 F.2d 124, stated:

> The more novel and significant contention advanced by Texaco is that the right to a union representative at an investigatory interview does not encompass any right to have the union representative speak. Texaco cites language from *Weingarten*, in which the Court, after noting that the employer has no duty to bargain with the union representative at an interview, stated:
>
> > "The representative is present to assist the employee, and may attempt to clarify the facts or suggest other employees who may have knowledge of them. The employer, however, is free to insist that he is only interested, at that time, in hearing the employee's own account of the matter under investigation." Brief for Petitioner, at 22.
>
> 420 U.S. at 260, 95 S.Ct. at 965. We agree with the Board here that this language (taken by the Court from the Board's brief in *Weingarten*) is directed toward avoiding a bargaining session or a purely adversary confrontation with the union representative and to assure the employer the opportunity to hear the employee's own account of the incident under investigation. The passage does not state that the employer may bar the union representative from any participation. Such an inference is wholly contrary to other language in the *Weingarten* opinion which explains that the representative should be able to take an active role in assisting the employee to present the facts.
>
> . . . .
>
> In refusing to permit the representative to speak, and relegating him to the role of a passive observer, the respondent did not afford the employee the representation to which he was entitled. The Board properly found that *Texaco* violated section 8(a)(1) of the Act.

In relation to these types of cases, another problem has had to be dealt with, namely the question of remedial relief. In this respect, the problem arises because there are circumstances where even though an interview was conducted in violation of the employees' Section 7 rights, it nevertheless is apparent that the discipline was justified and not issued for discriminatory reasons.[14] In *Kraft Foods*, 251 NLRB 598 (1980), a Board majority (Member Jenkins dissenting in part) reversed the recommendation of an administrative law judge to the effect that the employee be reinstated with backpay, because it

[13] The Board's decision in *Texaco* was enforced in the Ninth Circuit Court of Appeals on October 16, 1981, 659 F.2d 124.

It is noted that in *Pacific Telephone & Telegraph Co.*, 262 NLRB 1048 (1982), the Board concluded that the Company violated the Act when it refused to permit employees to consult with their union representatives prior to interviews which they had reason to believe would result in discipline.

[14] Sec. 10(c) of the National Labor Relations Act provides, inter alia, that "[n]o order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause."

was shown that the employer's decision was not based on any information obtained during the unlawful interview.[15] In this respect, the Board announced the following standard to be applied:

> In determining the appropriate remedy for a respondent's violation of an employee's *Weingarten* rights, the Board applies the following analysis. Initially, we determine whether the General Counsel has made a *prima facie* showing that a make-whole remedy such as reinstatement, backpay, and expungement of all disciplinary records is warranted. The General Counsel can make this showing by proving that respondent conducted an investigatory interview in violation of *Weingarten* and that the employee whose rights were violated was subsequently disciplined for the conduct which was the subject of the unlawful interview.
>
> In the face of such a showing, the burden shifts to the respondent. Thus, in order to negate the *prima facie* showing of the appropriateness of a make-whole remedy, the respondent must demonstrate that its decision to discipline the employee in question was not based on information obtained at the unlawful interview. Where the respondent meets its burden, a make-whole remedy will not be ordered. Instead, we will provide our traditional cease-and-desist order in remedy of the 8(a)(1) violation.[16]

There is no question in my mind that when Lehman was notified to report to Langan on March 10 and 11, after his altercation with Supervisor Perez on March 9, 1981 (and after his bank had also been checked), that he had a reasonable basis for believing that the forthcoming interview might lead to disciplinary action. Also, the facts show that on March 10 Lehman asked to have a union representative accompany him to the interview, a request which was communicated to Langan on that date by Union Agent Axelrod who asked for a postponement due to the unavailability of any current union officials. In fact, during a conversation between Axelrod and Langan on March 10, the latter specifically stated that Lehman was going to need a representative for the upcoming interview.

I am also of the opinion that at the commencement of the interview on March 11, the Company, as per its policy and practice, advised Pierri (designated by the Union to represent Lehman) that although he could be present as a witness he would have to remain silent and not participate. The fact that this instruction is not contained in the notes made of this meeting by Langan does not alter my conclusion in this respect as it appears that this was, at the time, the Company's policy, was invariably expressed at the outset of such interviews and was, in a sense, a form or ritualized notice made preliminary to these kinds of meetings. As such, a preliminary notice of this nature would not likely be written down in a set of notes which, on their face, deal with the substantive discussion that took place. As I am of the opinion that Pierri and Lehman were honest and credible witnesses, I therefore conclude that such a notice was given to Pierri at the outset of the interview. In addition, although O'Toole and Langan testified that during the meeting they told Pierri that they would make an exception to his participation in the meeting, Langan's notes merely reflect that Pierri on one occasion was told that he would be allowed some leeway. Apart from asking one question, Pierri did not otherwise participate. Given the initial notice, and the admitted company policy to preclude union representatives from participating in investigatory interviews, I do not believe that the Company's statement that it would allow Pierri some "leeway" was sufficient to lead him to reasonably conclude that his participation would be unfettered. In fact, Pierri credibly testified that, although he may have asked one or possibly two questions, he essentially remained silent becaue he was aware that it was the Company's policy to preclude union representatives from participating in investigatory interviews, and that this policy was reiterated at the outset of the meeting.

In view of the above, it therefore is concluded that the Respondent violated Section 8(a)(1) of the Act by telling Lehman's union representative that he could not participate in the interview, such notification not being sufficiently mitigated by the statement that he would be allowed some leeway.

Notwithstanding my conclusion that the Respondent violated Section 8(a)(1) of the Act, it seems to me that the issue as to whether to order backpay in this case is not free from doubt. Recognizing that some of the circuit courts (the Sixth, Seventh, and Eighth) have refused to enforce such remedies in similar cases, I am nevertheless constrained to follow Board precedent.[17] Yet even

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[15] In *Kraft Foods*, the employee denied, at the interview, that he was involved in a fight. The employer's decision to discharge the employee was based on interviews with other witnesses who had observed the fight.

[16] See also *Ohio Masonic Homes*, 251 NLRB 606 (1980); *Coyne Cylinder Co.*, 251 NLRB 1503 (1980); *ITT Corp.*, 261 NLRB 229 (1982).

It is noted however that some of the circuit courts have taken a somewhat different approach from the Board regarding the remedy. In *NLRB v. Potter Signal Co.*, 600 F.2d 120 (8th Cir. 1979), that court held that even where an employee was denied his right to representation, a backpay and reinstatement order was precluded by Sec. 8(c) of the Act, if the discharge was motivated by misconduct and not because the employee insisted on his representational rights. See also *Montgomery Ward & Co. v. NLRB*, 664 F.2d 1095 (8th Cir. 1981); *General Motors Corp. v. NLRB*, 674 F.2d 576 (6th Cir. 1982); and *NLRB v. Kahns & Co.*, 694 F.2d 1070 (6th Cir. 1982).

Also, in *NLRB v. Illinois Bell Telephone Co.*, 674 F.2d 618 (7th Cir. 1982), it appears that the court disagreed with the Board regarding its apportionment of the respective burdens of proof. The court stated:

> In order to balance the need of the Company to maintain an honest and efficient workforce, with the duty to enforce the policies of the Act, we believe that Illinois Bell is entitled to show that its discharge of Hatfield was not solely dependent upon evidence obtained from her during the unlawful interview, but that that discharge is and was supported by other independent evidence which was available to the Company at the time of the discharge. Upon this record, we can not say that there is substantial evidence to support a finding that Hatfield's discharge stemmed solely from the Company's unfair labor practice of forcing her to participate in an interview without representation.

[17] *Insurance Agents*, 119 NLRB 768, 773 (1957). In that case the Board stated:

Continued

applying Board precedent to the facts herein is not unambiguous.

On one hand, there is no dispute that Lehman was admittedly involved in misconduct which was reported to the Company by witnesses prior to the interview. It also seems evident that, based on those reports, the Company's representatives made at least a tentative decision to impose some sort of discipline on Lehman. If I were convinced that a final and binding decision to discharge Lehman had been made prior to his interview, based solely on the reported allegations of misconduct, I would not recommend that he be made whole, notwithstanding my conclusion that he was denied his rights of representation.[18]

On the other hand, I am not convinced by the evidence that such a final or binding decision was made before the interview began. Nor am I persuaded that the information elicited from Lehman during the interview did not play a part in the final decision to discharge him. As noted above, Langan conceded that had Lehman offered a sufficient explanation for his conduct (by way of offering mitigating circumstances) he might have been persuaded to change his mind. Also it is clear that the discharge notice was not prepared until after the interview had ended, thereby tending to support the conclusion that no final decision had been made before its commencement. Additionally, it is clear that, during the interview itself, the Company did obtain vital information to support a decision for discharge, namely, Lehman's admission of the acts alleged.[19] While it cannot be said with absolute certainty whether the Company would have discharged Lehman if he had simply denied the allegations, it may also be surmised that these admissions were construed as being significant before making the decision to discharge him. Indeed, this is shown, at least in some degree, by the Company's attempt to offer into evidence, before the arbitrator, the notes of the interview containing Lehman's admissions. Thus, it may be implied that by seeking and obtaining such admissions, the Company recognized that a decision to discharge Lehman would likely be upheld in any subsequent arbitration proceeding. By the same token, had Lehman denied or adequately explained away the alleged misconduct, the Company might not have discharged him because of a perception that its chances of winning a subsequent arbitration case would be significantly reduced.

Recognizing that there exists a degree of uncertainty as to whether the Company's decision to discharge Lehman was based on information obtained during the interview or whether that decision was based solely on other independent evidence of his misconduct, it seems to me, pursuant to the authority of *Kraft Foods*, that the burden of persuasion is placed on the Respondent. As I am not sufficiently persuaded that the Respondent has met its burden in this respect, it is concluded that a make-whole remedy is appropriate in this case.

CONCLUSIONS OF LAW

1. Greyhound Lines, Inc. is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Local 1202, Amalgamated Transit Union, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. By instructing employee Harry Lehman's union representative to remain silent during an investigatory interview which Lehman was required to attend, the Respondent unlawfully deprived Lehman of his right to his union representative's counsel and assistance during the interview, thereby interfering with his rights under Section 7 of the Act.

THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, it is recommended that it be ordered to cease and desist therefrom, and that it take certain affirmative action to effectuate the policies of the Act.

As I have concluded above, that Respondent has not met its burden of proof for establishing that the decision to discharge Lehman was made prior to the investigatory interview and that the decision was not based solely on information received as part from the interview, it is recommended that Lehman be made whole for the period when he was unemployed[20] and that the Respondent expunge and remove from its records and files any and all reference to the interview with Lehman on March 11, 1981. As to Lehman's loss of earnings, the amount of backpay shall be computed in the manner set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest computed in the manner set forth in *Florida Steel Corp.*, 231 NLRB 651 (1977). See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[21]

ORDER

The Respondent, Greyhound Lines, Inc., Phoenix, Arizona, its officers, agents, successors, and assigns, shall

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It has been the Board's consistent policy for itself to determine whether to acquiesce in the contrary views of a circuit court of appeals or whether, with due deference to the court's opinion, to adhere to its previous holding until the Supreme Court of the United States has ruled otherwise. But it is not for a Trial Examiner to speculate as to what course the Board should follow where a circuit court has expressed disagreement with its views. On the contrary, it remains the Trial Examiner's duty to apply established Board precedent which the Board or the Supreme Court has not reversed. Only by such recognition of the legal authority of Board precedent will a uniform and orderly administration of a national act, such as the National Labor Relations Act, be achieved.

See also *Typographic Service*, 238 NLRB 1565, 1568, 1573 fn. 13 (1978); *Charles D. Bonanno Linen Service*, 229 NLRB 624 (1977).

[18] See, e.g., *Coyne Cylinder Co.*, 251 NLRB 1503, 1504 (1980); *ITT Corp.*, 261 NLRB 229 (1982); *Houston Coca-Cola*, 265 NLRB 1488 (1982).

[19] See, e.g., *Illinois Bell Telephone Co.*, 251 NLRB 932 (1980); *Southwestern Bell Telephone Co.*, 251 NLRB 612 (1980). But see *Montgomery Ward & Co.*, 644 F.2d 1095 (1981).

[20] As Lehman already has been reinstated pursuant to an arbitrator's award, a reinstatement remedy is not required.

[21] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

1. Cease and desist from

(a) Depriving any employee of his right to union representation at an investigatory interview which the employee reasonably believes might result in disciplinary action, by requiring the union representative to remain silent throughout the interview.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make whole Harry Lehman for any loss of earnings he may have suffered by reason of Respondent's discharge of him on March 11, 1981, as set forth in the section of this decision entitled "The Remedy."

(b) Expunge from its records and files the notes of the interview conducted on March 11, 1981, with Harry Lehman as well as any references to any disciplinary action taken against him as a result of that interview.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its place of business copies of the attached notice marked "Appendix."[21] Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

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[21] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Mead Packaging *and* Printing Specialties and Paper Products Union, Local #527

Mead Products *and* Printing Specialties and Paper Products Union, Local #527. Cases 10–CA–16871 and 10–CA–16878

15 January 1985

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS HUNTER AND DENNIS

On 14 February 1983 Administrative Law Judge Robert A. Gritta issued the attached supplemental decision.[1] The General Counsel and the Respondents filed exceptions and supporting briefs, and the Respondents filed an answering brief to the General Counsel's exceptions.

The Board has considered the supplemental decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order only to the extent consistent with this Decision and Order.

The judge found that the Respondent Mead Products had violated Section 8(a)(5) and (1) of the Act by unilaterally ceasing to provide certain contractual benefits to a union officer who was on a union-related leave of absence. He also found, however, that the provision of such benefits to union officers *beyond the contractually established maximum time periods* for union-related leaves of absence discriminated in favor of employees elected to, or selected for, union office. He recommended, therefore, that the 8(a)(5) allegations regarding Respondent Mead Packaging's unilateral cessation of similar benefits to three other union officers be dismissed since these three had been on leaves of absence longer than permitted by the applicable collective-bargaining agreements.

The Respondents except to the judge's failure to dismiss the complaint in its entirety. They contend that these contractual benefits (a) constituted "payments" to the union officers which were proscribed by Section 302 of the Act and/or (b) unlawfully discriminated against employees who were not union officers. The Respondents contend, therefore, that their unilateral discontinuance of such assertedly unlawful payments did not violate Section 8(a)(5). For the reasons set forth below, we agree with the Respondents that the complaint should be dismissed in its entirety.

Sections 8(a)(3) and 8(b)(2) of the Act prohibit employers and unions, respectively, from discriminating against employees "in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . . ." Absent appropriate justification, employer or union policies are unlawful if they treat employees disparately according to their level of union activity.[2] In addition, the Board has held that collective-bargaining agreements which discourage or encourage union activities through a disparate grant of benefits are unlawful unless providing the benefit on such a basis serves legitimate statutory purposes and indirectly benefits all unit employees. Thus, in *Dairylea Cooperative*, 219 NLRB 656 (1975),[3] the Board found contract clauses which provided union stewards with superseniority for purposes of layoff and recall to be lawful because this extra benefit helped assure the presence of stewards on the job to process grievances and otherwise police the collective-bargaining relationship. On the other hand, the Board found similar clauses unlawful to the extent that they accorded stewards other job benefits which were unrelated to their on-the-job steward activities.

Recently, in *Gulton Electro-Voice*, 266 NLRB 406 (1983), enfd. sub nom. *Electrical Workers UE Local 900 v. NLRB*, 727 F.2d 1184 (D.C. Cir. 1984), we reaffirmed *Dairylea*, but overruled cases decided subsequent to it in which the Board had expanded the *Dairylea* holding to allow clauses which gave superseniority to union officials who do not perform steward or other on-the-job contract administration functions. We rejected the rationale set forth in those cases that superseniority for nonsteward union officers was lawful because it promoted "the effective and efficient representation of employees by their collective-bargaining representatives." *Gulton*, supra at 408, quoting *Electrical Workers UE Local 623 (Limpco Mfg.)*, 230 NLRB 406, 407 (1977), enfd. sub nom. *Anna M. D'Amico v. NLRB*, 582 F.2d 820 (3d Cir. 1978). In sum, we found, in agreement with former Members Jenkins' and Penello's dissent in *Limpco*, that "the Board should not be in the business of assuring that a union has an efficient and effective organization to conduct collective bargaining where this results in the linkage of job rights and benefits to union activities . . . . To broaden the proper objective of super-seniority; i.e., to protect the whole process of collective bargaining . . . discriminatorily tips the balance against individual employee rights." *Gulton*, supra at 409 quoting 230 NLRB at 409.

[1] On 26 January 1982, the judge withdrew his initial decision in this proceeding, dated 12 January 1983. His supplemental decision supersedes his initial decision for all purposes.

[2] *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693 (1983), and *Radio Officers v. NLRB*, 347 U.S. 17 (1954).

[3] Enfd. sub nom. *NLRB v. Teamsters Local 338*, 531 F.2d 1162 (2d Cir. 1976).

Under the Respondents' collective-bargaining agreements with the Union as implemented by the Respondents' supplemental related policies, employees may take leaves of absence for up to 4 years in order to accept employment as officers of the Union. During these union-related leaves, they continue to receive coverage under the Respondents' group insurance programs as well as contractual increases in pension benefit multipliers.[4] In contrast, employees who take other types of leave are limited to considerably shorter time periods, do not receive insurance coverage and/or pension multiplier increases for as long a time, and are prohibited from engaging in gainful employment while on leave.

As of 31 March 1981, union officers Meers, Moss, and Currie had been on union-related leaves of absence from their employment with the Respondent Mead Packaging for periods ranging from 10 to 16 years. Union Officer Turner had been on a similar leave of absence from his employment with Respondent Mead Products for nearly 4 years. While on leave, these four individuals were employed by the Union and acted as the representatives of employees of the Respondents and other employers. They engaged in contractual negotiations and arbitrations and generally monitored the employers' compliance with applicable collective-bargaining agreements. Until 31 March 1981, when the Respondents unilaterally ceased providing these benefits, they received coverage under the Respondents' group insurance programs and contractual increases in the pension multipliers.

It is apparent that the Respondents provided benefits to union officers which were not available to other employees. In order to be found lawful, this disparate treatment must "further the effective administration of bargaining agreements on the plant level by encouraging the continued presence of the steward on the job." *Dairylea*, supra at 658. We find that the Respondents' provision of these extra benefits to union officers did not meet this standard and, therefore, that the discriminatory impact on nonunion officer employees is much more than simply an incidental side effect of a more general benefit accorded all employees. Ibid.[5]

The General Counsel contends that these benefits were provided legitimately to the union officers because, if the benefits were unavailable, individuals would be unwilling to serve as union officers for extended periods. The Union thus would lose continuity and experience in its leadership and effectiveness as the employees' collective-bargaining representative. As noted above, however, we rejected this position in *Gulton*, where we found that "assuring that a union has effective and efficient organization" was insufficient justification for linking job rights and benefits to union activities.

In light of the above, if the issue were before us, we would find that the Respondents' provision of additional benefits to union officers under their collective-bargaining agreements with the Union violated Sections 8(a)(3) and 8(b)(2) of the Act. Since the Respondents merely declined to continue to provide a benefit to the union officers which, as discussed above, had an unlawful disparate impact on employees, we find that they did not violate Section 8(a)(5) and (1) by doing so without bargaining with the Union. See *Interstate Paper Supply Co.*, 251 NLRB 1423, 1424 (1980).[6] Accordingly, we shall dismiss the complaint in its entirety.

ORDER

The complaint is dismissed.

[4] Under the Respondents' pension plans, employees receive a flat dollar benefit for each year of credited service. For example, an employee with 20 years of credited service and a pension benefit multiplier of $10 per month would receive $200 per month in retirement benefits. The pension benefit multiplier has increased periodically over the years.

[5] See *Radio Officers v. NLRB*, supra, and *Scofield v. NLRB*, 394 U.S. 423 (1969).

[6] In light of our decision herein, we find it unnecessary to reach the Respondents' contention that these additional "payments" to the union officers were unlawful under Sec. 302 of the Act.

DECISION

STATEMENT OF THE CASE[1]

ROBERT A. GRITTA, Administrative Law Judge. This case was tried before me on October 13, 1982, in Atlanta, Georgia, based on charges filed by Printing Specialties & Paper Products Union, Local 527 (the Union), on April 9 and 10, 1981, and complaint issued by the Regional Director for Region 10 of the National Labor Relations Board on May 22, 1981. The complaints allege that Mead Packaging and Mead Products (Respondents) violated Section 8(a)(1) and (5) of the National Labor Relations Act by unilaterally, without notice to or consultation with the Union, ceasing coverage under group insurance plans and pension plans for certain employees on leave of absence. Respondents' timely answers deny the commission of any unfair labor practices.

All parties were afforded full opportunity to be heard. The parties stipulated all facts and introduced joint exhibits. In addition each party submitted a brief. Both briefs were duly considered.

On the entire record in this case, I make the following

[1] On January 12, 1983, my decision, JD-(ATL)-120-82 issued. The decision contained a substantive error and on January 26, 1983, I requested that the decision be remanded to me for correction and reissuance. This supplemental decision supersedes for all purposes that prior decision.

FINDINGS OF FACT

I. JURISDICTION AND STATUS OF LABOR ORGANIZATION—PRELIMINARY CONCLUSIONS OF LAW

The complaints allege, Respondents admit, and I find that Mead Packaging and Mead Products, Divisions of the Mead Corporation, an Ohio corporation, are engaged in the manufacture of school and office supplies and paper cartons in Atlanta, Georgia. Jurisdiction is not in issue. Mead Packaging and Mead Products in the past 12 months, in the course and conduct of their business operations, shipped products from their Atlanta, Georgia facilities valued in excess of $50,000 directly to points located outside the State of Georgia. I conclude and find that Mead Packaging and Mead Products are employers engaged in commerce and in operations affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The complaints allege, Respondents admit, and I conclude and find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ISSUES

A. Whether Respondent Mead Packaging's cessation of providing pension benefits to employees Ralph Meers, Wilbert Currie, and Charles Moss was a violation of its statutory duty to bargain.

B. Whether Respondent Mead Packaging's cessation of group insurance coverage to employees Ralph Meers, Wilbert Currie, and Charles Moss was a violation of its statutory duty to bargain.

C. Whether Respondent Mead Products' cessation of providing pension benefits to employee Albert Turner Jr. was a violation of its statutory duty to bargain.

D. Whether Respondent Mead Products' cessation of group insurance coverage to employee Albert Turner Jr. was a violation of its statutory duty to bargain.

III. FACTS

A. *Admissions in Pleadings*

1. Respondent Mead Packaging, Case 10–CA–16871

All production and maintenance employees employed at its packaging and container manufacturing plants located at 950 and 1010 West Marietta Street, Atlanta, Georgia, and all auxiliary warehouses in Atlanta, Georgia, including warehouse employees, plant clerical employees, city truck drivers, leadmen, laboratory technicians; but excluding office clerical employees, planning and scheduling employees, production art employees, production control employees, professional and technical employees, guards, mail room employees, office janitors, chauffeurs, over-the-road drivers, lithographic production employees, sample makers and tracers (and assistants), inventory clerks, and supervisors as defined in the Act, constitute a unit appropriate for collective bargaining within the meaning of Section 9(b) of the Act.

Respondent and the Union are parties to a collective-bargaining agreement, effective from March 28, 1981, until February 15, 1984, covering the employees of Respondent in the unit described in the paragraph above.

At all times since about February 15, 1979, the Union has been, and is, the representative of a majority of the employees in the unit described in the paragraph above for the purpose of collective bargaining and, by virtue of Section 9(a) of the Act, has been, and is, the exclusive representative of all employees in said unit for the purpose of collective bargaining.

2. Respondent Mead Products, Case 10–CA–16878

All production and maintenance employees and truck drivers, employed at its Atlanta, Georgia plant, including plant clerical employees and employees who work in the store-for-employees, but excluding office clerical employees in the industrial engineering department, professional employees, guards, manufacturing manager, personnel director, traffic manager, superintendents, foremen, stock control supervisor, and all other supervisors as defined in the Act, constitute a unit appropriate for collective bargaining within the meaning of Section 9(b) of the Act.

Respondent and the Union are parties to a collective-bargaining agreement, effective from March 1, 1980, until February 27, 1983, covering employees of Respondent in the unit described in the paragraph above.

At all times since about March 1, 1980, the Union has been, and is, the representative of a majority of the employees in the unit described in the paragraph above for the purposes of collective bargaining and, by virtue of Section 9(a) of the Act, has been, and is, the exclusive representative of all employees in said unit for the purposes of collective bargaining.

B. *Stipulated Facts*

At all times since about January 1, 1960, the Union has been the representative of a majority of the employees in the bargaining unit at Respondent Mead Packaging, for the purpose of collective bargaining and, by virtue of Section 9(a) of the Act, has been the exclusive representative of all employees in this unit for the purpose of collective bargaining.

At all times since about January 1, 1970, the Union has been the representative of a majority of the employees in the bargaining unit at Respondent Mead Products, for the purpose of collective bargaining and, by virtue of Section 9(a) of the Act, has been the exclusive representative of all employees in this unit for the purpose of collective bargaining.

At all times material here, pursuant to the applicable labor agreement, Respondents Mead Packaging and Mead Products have each maintained a group insurance program covering employees in their respective bargaining units.

At all times material here, pursuant to the applicable labor agreement, Respondents Mead Packaging and Mead Products have each maintained a pension plan for employees in their respective bargaining units. Under these pension plans, employees receive a flat dollar benefit for each year of credited service (e.g., $10 per month x 20 years of credited service = $200 per month retire-

ment benefit). The pension benefit multiplier (e.g., $10 per month) has periodically increased over the years through negotiations with the Union.

Ralph Meers, Wilbert Currie, Charles Moss, and Albert Turner Jr. are, and at all times material here have been, agents, officers, representatives, and employees of the Union. At all times material here, these individuals have acted on behalf of the Union in dealing with the Respondents and other employers, including acting as representatives of employees of Respondents and other employers, and being involved in negotiations and in arbitrations, and otherwise overseeing the Respondents' and other employers' compliance with the applicable labor agreements.

Since about October 4, 1965, Ralph Meers has been on leave of absence from Respondent Mead Packaging to hold a full-time position as president of the Union. During this time, Meers has been employed full time by the Union, has been compensated for his employment by the Union, and has performed no work for Respondent Mead Packaging. Prior to October 4, 1965, Ralph Meers was employed by Respondent Mead Packaging in the bargaining unit.

Since about January 11, 1971, Wilbert Currie has been on leave of absence from Respondent Mead Packaging to hold full-time positions as vice president and then secretary-treasurer business agent of the Union. During this time, Currie has been employed full time by the Union, has been compensated for this employment by the Union, and has performed no work for Respondent Mead Packaging. Prior to January 11, 1971, Wilbert Currie was employed by Respondent Mead Packaging in the bargaining unit.

Since about November 1, 1965, Charles Moss has been on leave of absence from Respondent Mead Packaging to hold full-time positions as secretary-treasurer business agent and then secretary-treasurer representative at the district level of the Union. During this time, Moss has been employed full time by the Union, has been compensated for this employment by the Union, and has performed no work for Respondent Mead Packaging. Prior to November 1, 1965, Charles Moss was employed by Respondent Mead Packaging in the bargaining unit.

Since about May 2, 1977, Albert Turner Jr. has been on leave of absence from Respondent Mead Products to hold a full-time position as vice president of the Union. During this time, Turner has been employed full time by the Union, has been compensated for this employment by the Union, and has performed no work for Respondent Mead Products. Prior to May 2, 1977, Albert Turner Jr. was employed by Respondent Mead Products in the bargaining unit.

Prior to April 1, 1981, while on leave of absence, Ralph Meers, Wilbert Currie, Charles Moss, and Albert Turner Jr. were covered under the respective group insurance programs. During this period, Respondent Mead Packaging paid all group insurance premiums for Meers, Currie, and Moss, as it did for active bargaining unit employees. During this period, Respondent Mead Products partially paid Turner's group insurance premiums, as it did for active bargaining unit employees. In the year 1980, for example, Respondent Mead Packaging paid monthly insurance premiums of $133.15 per individual for Meers, Currie, and Moss. In 1980, Respondent Mead Products paid monthly insurance premiums of $29.47 for Turner.

Prior to April 1, 1981, while on leaves of absence, Ralph Meers, Wilbert Currie, Charles Moss, and Albert Turner Jr. received the negotiated improvements in the pension benefit multiplier.

About April 1, 1981, Respondent Mead Packaging, by letter, individually informed Ralph Meers, Wilbert Currie, and Charles Moss that their participation in Respondent Mead Packaging's group insurance program would be discontinued effective April 30, 1981, and that their pension benefits under Respondent Mead Packaging's pension plan would be frozen as of March 31, 1981, with no future increases in the pension benefit multiplier. Respondent Mead Packaging notified the above individuals that this action was being taken upon advice of legal counsel that continuation of these benefits, while they were on leaves of absence for full-time employment with the Union, violated the provisions of Section 302, Labor Management Relations Act, 29 U.S.C., § 186. This was the first notification to these individuals of the intended action. The Union, through Meers, responded in writing to the Company on April 14.

About March 31, 1981, Respondent Mead Products informed Albert Turner Jr. that his participation in Respondent Mead Products' group insurance program would be discontinued effective April 30, 1981, and that his pension benefits under Respondent Mead Products' pension plan would be frozen as of March 31, 1981, with no future increases in the pension benefit multiplier. Respondent Mead Products notified Turner that this action was being taken upon advice of legal counsel that continuation of these benefits, while he was on leave of absence for full-time employment with the Union, violated the provisions of Section 302, Labor Management Relations Act, 29 U.S.C., § 186. This was the first notification to Turner of the intended action. The Union, through Meers, responded to the Company in writing on April 14, 1981.

Other than for union employment as elected or appointed union officials, Respondents Mead Packaging and Mead Products never allow a leave of absence to take another job.

Under the Mead Products labor agreement, leaves of absence, other than for union employment as elected or appointed union officials, are limited to 2 years. Mead Products employees on leave of absence, for any reason other than union employment as elected or appointed union officials, cannot continue and have not continued to participate in the group insurance program or to receive negotiated improvements in the pension benefit multiplier for a period longer than 2 years.

At all times material here, the policy of Respondent Mead Packaging, and the practice under that policy, has been as follows: personal leaves of absence are less than 1 year; individuals on medical leaves of absence are not permitted to continue participation in the group insurance program for more than 18 months and medical leaves of absence are less than 3 years. Mead Packaging

employees on leave of absence for any reason other than union employment as elected or appointed union officials cannot continue, and have not continued, to participate in the group insurance program for longer than 18 months or to receive negotiated improvements in the pension benefit multiplier for longer than 3 years. This specific policy was not established through negotiations with the Union.

Participation in Respondent Mead Packaging or Respondent Mead Products' group insurance plan, even if the individual pays the full premium, is a substantial benefit and thing of value to the individual. Premiums under either of Respondents' group insurance plans are much lower than premiums for equivalent coverage under an individual policy. For example, the full premium cost per individual under Mead Products' group insurance plan is $84.50 per month. However, the premium cost if an individual converts from Mead Products' group plan to an individual policy of comparable, but less inclusive, coverage is $169.70 per month.

Analysis and Conclusions

In order to prove a violation of Section 8(a)(5), the General Counsel must prove that a company unilaterally changed conditions of employment either embodied in the collective-bargaining agreement or established as a past practice. It is undisputed that a change was made by the Respondents and without notice to, or consultation with, the Union. However, whether the admitted unilateral change constitutes a violation of Section 8(a)(5) is another matter.[2]

The General Counsel contends that because pension plans and health insurance benefits are mandatory subjects of bargaining and because employees on leaves of absence can participate in such benefits through the Respondents' past practices, any change in benefits received must be negotiated between the parties. To support its contention, the General Counsel quotes Board language, "the bargaining representative is entitled to an opportunity to present arguments to the employer, to dissuade him from effecting the change, and also an opportunity to propose alternatives or compromises which might moderate the change so as to accommodate the interests of the *employees* as well as the employer." (Emphasis added.) The General Counsel argues that to allow the Respondents to alter the benefits received by employees on leaves of absence would dissuade employees from serving their Union because they would be unwilling to sacrifice their pension and health benefits which in turn would cause unions to lose continuity and experience of leadership.

Respondents contend that the change was made to correct what had progressed into a violation of Section 302, thus requiring the Respondents to discontinue the benefits or be liable for a Section 302 violation.

The General Counsel correctly states that the Board does not possess jurisdiction to construe substantive provisions of Section 302 and has in the past declined to do so.[3] However, the Board cannot and does not ignore the language nor the intent of Section 302 when deciding unfair labor practices. As in the *Metal Workers* case there is a balance to be struck.

Respondents would tip this balance toward immunity for unilateral changes resulting in a refusal to bargain, citing the *Boyle* case.[4]

In my view, both the *Sheet Metal Workers* case and the *Boyle* case are distinguishable from the instant case. The *Sheet Metal Workers* case turned on the Board's refusal to analyze a trust agreement in terms of compliance with Section 302. Thus, the Board would not determine that an agreement was valid under Section 302 and enforce compliance therewith. In *Boyle*, the Board simply acknowledged the expressed language of Section 302 and determined that it could not force an employer to affirmatively perform under a contract where the conduct would not conform to Section 302. In neither case was the Board dealing with past affirmative conduct that in itself constituted an alleged refusal to bargain. Here, admitted conduct in the past has been changed and that change is alleged as a refusal to bargain.

The facts of this case, albeit simple, do not lessen the paradoxical nature of the circumstances.

All parties acknowledge and claim the dual capacity of the individuals involved supports their respective contentions. In my view, such dual capacity presents the real issue to be resolved. I find the single identity of Meers as a claimant for benefits and the spokesman of the Union arguing for enforcement of the contract and past practices to be instructive to my determination. I find further support for this instruction in the General Counsel's contention (supported by facts) that, failing an unfair labor practice finding, unions could not get employees to serve as officers because the officers would not be allowed preferential treatment.

The parties negotiated terms for leaves of absence for employees. The terms in the contracts place limitations and restrictions on such employee leaves of absence. The past practice of implementing the leave clauses of the contracts also enforces limitations on employees granted a leave of absence. The maximum leave of absence which can be granted is 4 years for employees elected or appointed to official positions with the Union. Clearly, the parties contracted that an employee on leave of absence to serve the Union could only do so for 4 years.[5] At the end of the 4 years the employee could either return to his employment classification with no loss of seniority and other benefits, or the employee could continue with the Union and sever his employee relationship. No other purposes could be served for a 4-year limitation.[6] Additionally, only employees granted union-re-

[3] *NLRB v. Katz*, 369 U.S. 736 (1962).

[4] *Sheet Metal Workers (Central Florida Sheet Metal)*, 234 NLRB 1238 (1978)

[5] *John F. Boyle Co.*, 222 NLRB 1309 (1976).

[6] The contracts state that the leave is restricted to 2 years, but can be extended for an additional 2 years by agreement.

[7] Thus, all leaves of absence would have the same effect under the contracts.

lated leaves of absence can be employed while on leave from Respondent. Under the contracts' terms and preexisting practices, employee leaves of absence for reasons unrelated to the Union were more restricted in that leaves were not allowed in excess of 3 years with some leaves limited to less than 1 year. In all nonunion employee leaves of absence, the maximum enjoyment of contractual benefits, including group health insurance and pension benefits, was for 3 years.[7]

Of the four individuals involved only one, Turner, had been on a union-related leave less than 4 years at the time of Respondent's unilateral change in benefits. The other three, Meers, Moss, and Currie, have exceeded the 4-year restriction considerably. In each case the group insurance benefits and the pension benefits have continued as if each was an active employee on the Respondents' payrolls or otherwise entitled to such benefits by past practices or by contract.

Respondents recognized the continued receipt of employee benefits as an error and corrected it by ceasing benefits for all. The General Counsel and the Union view the cessation as a violation since the Respondent did not bargain over the cessations but rather unilaterally ceased the benefits.

The General Counsel's case is based upon the contract terms respecting leaves of absence which the Union negotiated with Respondent and the past practices employed under the negotiated contract. One thing is crystal clear. The Union and the Respondent could not negotiate a leave of absence clause that would dictate loss of benefits for nonunion employee leaves of absence while allowing union-related employee leaves of absence to continue enjoying contractual benefits ad infinitum. Such attempts would be proscribed because the receipt of benefits would be discriminatory in favor of employees elected or selected to union offices. Albeit terms of union leaves can, by contract, be in excess of any other leaves of absence, the ultimate employment relationship cannot be jeopardized or favored depending upon any employee's union affiliation. Likewise employees granted union-related leaves of absence can engage in outside employment (for the Union) throughout the term of the leave but at its termination the employee must make an election to return to the bargaining unit or remain in the Union's employ. All employees must be treated equally with regard to the contractual benefits received as a result of the employment relationship. To allow otherwise would place a greater emphasis upon serving the union in an official capacity and would unnecessarily involve the employer in encouraging union participation at expense of the employee work force. I find no probative support for the General Counsel's case in the fact that Meers and Moss have received contractual benefits from Respondent Packaging for the 16 years that each has been an officer of the Union pursuant to a union-related leave of absence begun in 1965. Nor is Turner's similar situation since 1977 and Currie's since 1971 any different. The General Counsel's argument in brief that any cessation of benefits for the union officials would be detrimental to the Union's administration of its affairs is unavailing on two counts. The Union could not demand in negotiations preferential treatment for prounion employees, resulting in greater benefits for the prounion employees, than for employees in the bargaining unit who have no desire to serve the Union. Additionally, Respondents are not required to negotiate aid for administration of the affairs of the Union. Contract terms are negotiated for the benefit of employees in the bargaining unit and must be uniform for all employees without regard for individual desires to serve the Union outside the workplace.

Respondents cite *Kaiser Steel Corp. v. Mullins*, 109 LRRM 2268, 92 LC ¶ 13,128 (1982), reversing 642 F.2d 1302 (1982), for the proposition that the Federal court must consider an 8(e) defense, notwithstanding the National Labor Relations Board's special jurisdiction of Sections 7 and 8 of the National Labor Relations Act. The high court stated that a Federal court has a duty to determine whether a contract violates Federal law before enforcing it. The court acknowledged the general rule that illegal promises (contract terms) will not be enforced in cases controlled by Federal law.

No less of a duty exists for the Board when substantive terms of a contract are subject to scrutiny. Particularly, where the illegality raised in defense is cognizable by Section 7 and 8 of the National Labor Relations Act. A contract which on its face or in practice is contrary to the stated violative provisions of Section 8 cannot be enforced by the Board. To put it another way, an employer cannot be made to perform under a contract when the performance itself constitutes an unfair labor practice or protracts a prior error which tends to coerce, restrain, or interfere with employees' basic Section 7 rights.

I therefore conclude and find that the contractual group insurance benefits and pension accrual benefits for employees in the bargaining unit should have ceased for Meers, Moss, and Currie when each had amassed 4 years on their extended leaves of absence as such benefits would have ceased for any other employee not returning to the bargaining unit at the termination of any leave of absence. Only in this way can the rights of all employees in the bargaining unit be protected by the negotiated terms of the contract. No employee should be allowed to receive greater benefits under the contract simply because he or she chooses to request a leave of absence to serve the Union in an official capacity, particularly in view of the fact that employees serving the Union in an official capacity have access to union-sponsored group insurance plans and union-sponsored pension plans for those employed by the Union on a full-time basis. Bargaining unit employees on leaves of absence unrelated to union business have no such access to group insurance or group pension plans and must, by the contracts' terms, forgo further benefits if they choose not to return to employment upon the termination of their leaves of absence. In my view, Respondent has the right to correct the obvious wrongs relating to the leaves of absence of Meers, Moss, and Currie.

Accordingly, I conclude and find that Respondent Mead Packaging has not refused to bargain with the

[7] Contractual benefits for employees on leaves of absence are generally ceased at some point in time by practical considerations which are no less obvious than in the instant case.

Union nor has Respondent's conduct related to Meers, Moss, or Currie violated Section 8(a)(5) of the Act.

Respondent Mead Products' contract is silent with regard to any limitations on receipt of pension benefits for employees on leaves of absence. The parties did stipulate that the past practice for employees on leaves of absence for any reason other than union employment disallowed receipt of negotiated pension benefits for a period longer than 2 years. In effect this practice was an implementation of the contract terms relating to leaves of absence (not for union employment) and the pension plan. Union-related leaves of absence have a specified term of 4 years which exceeds the stipulated past practice for terms of other leaves of absence thereby creating a different period of time for cessation of the employment relationship. In my view, it is clear that the past practice of limiting receipt of negotiated pension benefits to 2 years for employees on leaves of absence unrelated to union employment does not apply to employees on a union-related leave of absence whether the employee is within the first 2-year term or in the extended 2-year term. The stipulated past practice obviously relates directly to the unspecified terms of personal and medical leaves of absence and is an attempt to coincide the receipt of benefits with the term of the leave of absence and the cessation of employment.

Since Turner's group insurance benefits and pension benefits were terminated by Respondent Mead Products on March 31, 1981, 2 months before his leave of absence would terminate under the contract, such termination was premature and violates Section 8(a)(1) and (5) of the Act. By contract, Turner was entitled to receive the benefits up to and including May 1, 1981. At that time Turner would have completed the allowable 4 years of his leave of absence. He would have at that time an election to continue in the employ of the Union or return to the bargaining unit with no loss of seniority or contractual privileges. Respondent must give Turner this prerogative as of May 1, 1981.

Additional Conclusions of Law

1. Respondent Mead Products, by terminating group insurance benefits and pension benefits of Albert Turner Jr. on March 31, 1981, has engaged in conduct violative of Section 8(a)(1) and (5) of the Act.

2. Respondents have not, other than found above, violated the Act.

3. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

Remedy

Having found that Respondent Mead Products has engaged in certain unfair labor practices, I find it necessary to order Mead Products to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. In view of the fact that payments have been made to the insurance carrier on behalf of Meers, Moss, and Currie for the past years and pension credits have been assessed to Meers, Moss, and Currie for this same period, which included several years of payments outside the contractual terms and the past practice under the contract, but at the same time the excess payments were inadvertent with no apparent intent to deceive the bargaining unit employees, I shall not order any restitution of those past payments.

Respondent Mead Products must, however, reinstate the group insurance benefits payments and pension benefits credits to Albert Turner Jr. to continue until the stated times and conditions found above.

[Recommended Order omitted from publication.]

District 1199E, National Union of Hospital and Health Care Employees, Retail, Wholesale and Department Store Union, AFL–CIO (Greater Pennsylvania Avenue Nursing Center, Inc.) *and* **Fred Punch.** Case 5–CB–2173

16 January 1985

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS HUNTER AND DENNIS

On 7 September 1978 the National Labor Relations Board issued its Decision and Order in this proceeding,[1] in which it adopted the administrative law judge's finding that Respondent District 1199E, National Union of Hospital and Health Care Employees, Retail, Wholesale and Department Store Union, AFL–CIO, violated Section 8(b)(3) of the Act by refusing to bargain with Olympic Management Services, Inc. Upon a petition for review and a cross-application for enforcement of the Board's Order, the United States Court of Appeals for the District of Columbia Circuit remanded the case to the Board for the purpose of determining the effect, if any, on the Board's original findings of fact and conclusions of law of both the collective-bargaining agreement between the Respondent and Greater Pennsylvania Avenue Nursing Center, Inc. and a 6 June 1977 arbitration award pursuant thereto.[2]

After receiving statements of position from the parties, the Board thereafter remanded the case to the administrative law judge to reopen the record to admit the collective-bargaining agreement and the arbitration award, and for further findings consistent with the court's remand.

On 15 February 1983 Administrative Law Judge Herzel H.E. Plaine issued the attached supplemental decision. The Respondent filed exceptions and a supporting brief.

The Board has considered the supplemental decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

The relevant facts are as follows:

Greater Pennsylvania Avenue Nursing Center, Inc. (Greater Pennsylvania) and the Respondent entered into a collective-bargaining agreement in September 1975 which expired 30 June 1978. In October 1976 Greater Pennsylvania notified the Respondent of its intention to subcontract its dietary, housekeeping, and laundry services to Olympic Management Services, Inc. (Olympic). When the Respondent failed to request bargaining, Greater Pennsylvania signed an agreement with Olympic.

Olympic retained all of Greater Pennsylvania's former employees. It also agreed to abide by the terms of the Respondent's collective-bargaining agreement, except for the health and welfare provisions. The Respondent, however, insisted that Olympic accept the entire agreement, including health and welfare provisions. When Olympic refused, the Respondent sought arbitration under its agreement with Greater Pennsylvania on whether Greater Pennsylvania's subcontracting had breached the collective-bargaining agreement.

Prior to the issuance of the arbitration award, Olympic filed the unfair labor practice charges which are the subject of this proceeding. On 6 June 1977, after the hearing before the judge but before a decision, the arbitrator issued an award in favor of the Respondent, in which he concluded that Greater Pennsylvania's subcontracting of the dietary, housekeeping, and laundry services during the term of an existing collective-bargaining agreement constituted a breach of contract.

The judge thereafter issued a decision on the unfair labor practice. He found that Greater Pennsylvania had given proper notice of its willingness to bargain, and the Union had not responded. He therefore concluded that the subcontracting was lawful under Board law, and that the Respondent's subsequent insistence that Olympic abide by all of the terms of the agreement with Greater Pennsylvania was an unlawful refusal to bargain under Section 8(b)(3) of the Act.

With respect to the arbitration award, the judge found deferral inappropriate because Olympic was not a party to the award; the award did not consider the unfair labor practice; and, in the opinion of the judge, the award was contrary to the United States Supreme Court's decision in *Fibreboard Corp. v. NLRB*, 379 U.S. 203 (1964). The Board adopted the judge's decision with a minor modification of the Order.

On review, the court found that the Board "did not give adequate consideration to the Union's defense based on the collective bargaining agreement and the Arbitrator's interpretation of it."[3] The court therefore remanded the case to the Board to determine if the collective-bargaining agreement applied to subcontracting and, if so, if the subcontracting violated the agreement. In remanding the case, the court disagreed with some of the administrative law judge's findings with regard to the inap-

[1] 238 NLRB 9.

[2] *Hospital Employees District 1199E v. NLRB*, 613 F.2d 1102 (1979).

[3] 613 F.2d at 1103.

propriateness of deferral. The court stated that it "would probably have approved NLRB deference to the award because Greater Pennsylvania and Olympic were completely in privity by operation of the November, 1976 contract. Greater Pennsylvania 'fully and adequately defended' Olympic's position in the arbitration."[4]

The court further found that the arbitrator was competent to decide the subcontracting question. Finally, the court concluded, contrary to the Board, that *Fibreboard* was distinguishable because in *Fibreboard*, "unlike the case before us . . . there was no suggestion . . . that the contracting out violated any collective bargaining agreement (613 F.2d at 1108)."

As noted before, we accepted the court's remand and thereafter remanded the case to the judge for further findings of fact and conclusions of law consistent with the court's decision. The judge recommended that the Board reaffirm its denial of deference to the arbitrator's award and readopt the finding of the violation. Contrary to the arbitrator, the judge found on the record before him that there was substantial evidence of a business justification for the subcontracting. Furthermore, he reiterated his finding that the Board should not defer to the award because Olympic was not a party to the arbitration.

The Respondent excepts to the judge's findings. It argues that the judge failed to resolve the contractual question, and that the reasons advanced by the judge for refusing to defer are not substantial. In particular, it asserts, in agreement with the court, that the absence of Olympic as a party does not render deferral inappropriate because Greater Pennsylvania and Olympic were in contractual privity, and nothing in the record suggests prejudice to Olympic because it was not a party. We find merit to the Respondent's exceptions.

In agreement with the court, but contrary to the judge, we conclude that we should defer to the arbitration award on the question of whether Greater Pennsylvania breached its collective-bargaining agreement by subcontracting certain work to Olympic during the term of the agreement. Thus, as found by the court, the proceedings were fair and regular, the parties agreed to be bound, and the result was not clearly repugnant to the purposes of the Act. Thus, deferral is appropriate under the standard established by the Board in *Spielberg Mfg. Co.*, 112 NLRB 1080 (1955), and in *Olin Corp.*, 268 NLRB 573 (1984). Accordingly, we shall dismiss the complaint in its entirety.

[4] 613 F.2d at 1107, citations omitted.

ORDER

The National Labor Relations Board orders that its previous Decision and Order in this case be revoked and the complaint dismissed in its entirety.

SUPPLEMENTAL DECISION

HERZEL H. E. PLAINE, Administrative Law Judge. This is on remand of the Board decision in the case, 238 NLRB 9 (1978), by the United States Court of Appeals for the District of Columbia Circuit, 613 F.2d 1102 (1979), requesting further explication of denial of deference to an arbitrator's award.

In an order dated June 6, 1980, the Board ordered the record to be reopened for the purpose of admitting into evidence copies of the collective-bargaining agreement between the Respondent Union and Greater Pennsylvania Avenue Nursing Center, Inc. (Greater Pennsylvania), and an arbitrator's award of June 6, 1977, on a subcontracting issue raised by the Union against Greater Pennsylvania. Neither the contract nor the award was a part of the record of this case when it was made on May 2 and 3, 1977, and when I issued my decision April 7, 1978.

The Board futher remanded the case to me to consider the effect, if any, of the collective-bargaining agreement and arbitrator's award on the findings of fact and conclusions of law in the case, and to prepare and serve on the parties a supplemental decision in light of the court's remand and consideration of the additional evidence.

The Additional Evidence

By stipulation of the parties, dated January 5, 1981, I have placed in the record of the case the following three exhibits, which will be identified as Exhibits A–1, A–2, and A–3:

Exhibit A–1, a letter of agreement, dated September 22, 1975, by which Greater Pennsylvania assumed all the terms and conditions of a prior existing agreement (Exh. A–2) between the Union and Community Health Corporation covering the employees of the nursing home, and extending its duration to June 30, 1978.

Exhibit A–2, the previous existing agreement assumed by Greater Pennsylvania[1]

Exhibit A–3, award of Arbitrator Herbert N. Bernhardt, dated June 6, 1977, in arbitration between the Union and Greater Pennsylvania.[2]

[1] In establishing the original record in this case, the Union failed to comply with my request that it produce and introduce the collective-bargaining contract which, as now appears, comprised Exhs. A–1 and A–2, see 238 NLRB at 13.

[2] The further delay in dealing with the remand was caused largely by efforts, at my suggestion, that counsel for the General Counsel explore and try to achieve settlement of the case among the Respondent Union, the subcontractor Olympic Management Service, Inc. (Olympic), and the General Counsel. Over a period of time an oral settlement was achieved, other matters concerning the same three parties was sought, but finally abandoned with a report to me that no settlement could be achieved.

Summary of Board Decision

In the decision affirmed by the Board, 238 NLRB 9 (1978), it was found that Respondent Union, which had represented 33 nursing and 17 dietary, housekeeping, and laundry employees of the Greater Pennsylvania nursing home, violated Section 8(b)(3) of the National Labor Relations Act by refusing to bargain in good faith with Olympic, the subcontractor of Greater Pennsylvania. The subcontractor had undertaken to provide dietary, housekeeping, and laundry services of the nursing home, and had hired the 17 dietary, housekeeping, and laundry employees formerly with Greater Pennsylvania to do these services under Olympic's management. To remedy the unfair labor practice the Board issued a bargaining order.

In connection with the subcontracting, Greater Pennsylvania had given advance notice to the Union of its intention to subcontract with Olympic in October 1976, and offered to meet and to discuss the matter with the Union. Receiving no answer from the Union, Greater Pennsylvania signed the subcontract with Olympic.

Olympic started its operations for the Greater Pennsylvania nursing home partially in November and fully in December 1976. Olympic hired the 17 former Greater Pennsylvania dietary, housekeeping, and laundry employees and their immediate supervisors, without interruption of their work, adding 2 employees later.

As successor employer to Greater Pennsylvania, Olympic recognized the Union as the representative of its employees and gave effect to the terms of the Greater Pennsylvania collective-bargaining agreement with the Union, including giving a wage increase on January 1, 1977. However, Olympic indicated that it would not accept the Union's benefit plan without a separate labor agreement, because the benefit fund was in difficulties, including litigation. Olympic requested bargaining of its own agreement with the Union, as successor employer, largely to deal with the subject of the benefit fund.

The Union refused to bargain with Olympic unless Olympic would accept all existing terms of the collective-bargaining agreement between Greater Pennsylvania and the Union, and unless all outstanding disputes involving a second nursing home, Lafayette Square (owned and operated by the owner of Greater Pennsylvania), whose auxiliary services had also been subcontracted to Olympic, were first resolved in resolution of the total issues.

After the Union refused to bargain, Olympic provided its employees with another form of benefit coverage. The Union's response was that it was taking Greater Pennsylvania to arbitration for violating its collective-bargaining agreement with the Union in subcontracting the housekeeping, dietary, and laundry operations to Olympic. Olympic notified the Union it was filing a refusal-to-bargain charge under Section 8(b)(3) of the Act.

Dealing with the unfair labor practice complaint, it was held that the Union had imposed unlawful conditions upon the bargaining of a collective-bargaining agreement with subcontractor Olympic, in violation of Section 8(b)(3) of the Act. And the Union was ordered to bargain in good faith with Olympic.

In the course of arriving at this result, the decision disposed of two claims of the Union, resulting in findings that the subcontract with Olympic was not a sham or subterfuge to circumvent the previous direct relationship between the Union and Greater Pennsylvania as employer of the dietary, housekeeping, and laundry employees; and that Charging Party Punch was not disqualified to represent Olympic as bargaining representative because of, or for any alleged misuse of, his former position as a union official.

The holding, to which the remand relates, was the determination that it was inappropriate for the Board to defer to the arbitration award which the Union obtained against Greater Pennsylvania declaring that the subcontract to Olympic was invalid under the collective-bargaining contract between the Union and Greater Pennsylvania.

The arbitration and award came after the Union had initially accepted Olympic as employer of the employees performing the auxiliary services at Greater Pennsylvania but balked at bargaining with Olympic, as successor employer, over the Union's benefit fund which was in trouble, and instead imposed illegal conditions on bargaining. The award itself was issued after the trial was held in this case and, as the arbitrator indicated, he was well aware of the Board proceeding, but declined to defer his decision on the ground he was capable of settling all the issues between the parties.[3]

Three reasons were given in the Board decision for not deferring to the arbitrator's award of June 6, 1977 (now Exh. A–3), 238 NLRB at 14.

First, an important party to the dispute, subcontractor Olympic was not party to the collective-bargaining agreement or to the arbitration, and the Board has held that deferral to arbitration is not warranted where all the parties who have important interest at stake in the unfair labor practice are not parties to the labor contract and therefore not represented in the arbitration.

Second, the alleged unfair labor practice of the Union involved in the case at bar was not considered by the arbitrator.

Third, the decision of the arbitrator on the subcontracting appeared to rest on grounds at variance with the holdings of the Board and of courts under the Act construing rights and duties of employers in subcontracting under labor agreements similar to the Greater Pennsylvania agreement.

The Court's Remand

The Court of Appeals for the District of Columbia Circuit remanded the case to the Board for further analysis of the collective-bargaining agreement, the arbitrator's award, and the administrative law judge's opinion "in light of the strong policy favoring deference to the Arbitrator's interpretations of collective bargaining agreements." 613 F.2d at 1109.

[3] Actually, the award was first made known to me, and to the parties to the Board case, as an attachment to Respondent Union's posttrial brief. I provided opportunity for all parties to file additional briefs concerning the question of giving deference to the award.

In particular the court requested that the Board explicitly discuss the implications of the collective-bargaining agreement as interpreted by the arbitrator. Ibid.

The Arbitrator's Award

The arbitrator's award identifies article 3, section 3-1, "Management Functions" of the labor contract between the Union and Greater Pennsylvania, as the contract provision governing subcontracting by Greater Pennsylvania (see Exh. A-2). It reads:

> ARTICLE 3—MANAGEMENT FUNCTIONS
>
> *Section 3.1*—All management functions and responsibilities which the Home has not expressly modified or restricted by a specific provision of this Agreement are retained and vested exclusively in the Home. More specifically, the Home reserves the right to establish and administer policies and procedures related to patient care, research, education, training, operations, services and maintenance of the Home; to reprimand, suspend, discharge or otherwise discipline employees for cause, including, but not limited to, excessive absenteeism and/or lateness, insubordination, mistreatment of patients, neglect of work, theft, being under the influence of liquor, leaving the job station without permission, and violation of medical confidence; to hire, promote, transfer, lay off and recall employees to work; to determine the number of employees and the duties to be performed; to maintain the efficiency of employees; to establish, expand, reduce, alter, combine, consolidate, or abolish any job classification, department, operation or service; to determine staffing patterns and areas worked; to control and regulate the use of facilities, supplies, equipment and other property of the Home; to determine the number, location and operation of divisions, departments and all other units of the Home, the assignment of work, the qualifications required and the size and composition of the work force; to make or change rules, regulations, policies and practices not inconsistent with the terms of this Agreement; and otherwise generally to manage the Home, attain and maintain full operating efficiency and optimum patient care, and direct the work force, except as expressly modified or restricted by a specific provision of this Agreement. None of the above-mentioned Management Functions shall be exercised in an unreasonable manner.

While the management functions article does not use the word subcontracting as such, the language is so broad as to embrace subcontracting within the authority reserved to the Employer (Greater Pennsylvania). Key Phrases are: The Home reserves the right to determine the number of employees and the duties performed; to maintain the efficiency of employees, to establish, expand, reduce, alter, combine, consolidate or abolish any job classification, department, operation, or service; to determine the number, location and operation of divisions, departments, and all other units of the Home, the assignment of work, and the size and composition of the work; to attain and maintain full operating efficiency and optimum patient care. As the arbitrator said, section 3.1 is indeed a broad management-rights clause.

The clause concludes with the words that none of the above-mentioned management functions shall be exercised in an unreasonable manner.

However, as the arbitrator points out, the limitation of reasonableness would exist under the interpretations of arbitrators, without specific statement of it in the labor contract. As he said, "The general position of arbitrators is that the right to subcontract depends upon reasonableness; and when a substantial portion of the regular work of employees is subcontracted, substantial business justification must be shown."

In this case, said the arbitrator, the Employer (Greater Pennsylvania) offered no evidence of substantial business justification, hence the Employer acted unreasonably, and violated the collective-bargaining contract by subcontracting the laundry, dietary, and housekeeping services to Olympic.

Comparison with Record Before the Board

Whereas the arbitrator's award alleged that Greater Pennsylvania gave the arbitrator 'no reasons" for the subcontract (Exh. A-3) and that there was "no advantage to the Employer" in making the subcontract apparent on the record, ibid, and therefore no substantial business justification, there was considerable testimony in the record of the case before me, provided largely by Owner Gershowitz of the nursing home and Charging Party Punch, giving the reasons for, and the advantages of, the subcontract, summarized in the decision at 238 NLRB 11 and 13.

There was, first, the preliminary discussion of reasons between Mrs. Gershowitz and Charing Party Punch, as labor relations consultant, on the view, demonstrated by the practice of other nursing homes, that nursing home administrators could provide better nursing care if they were relieved of responsibility for the chore of auxiliary operations, such as housekeeping, laundry, and preparation of food. Coordinately, Mrs. Gershowitz was interested in acquiring and operating still another nursing home (Lafayette Square) and because existing subcontractors of auxiliary operations elsewhere in the area were expensive, Punch came up with the idea of putting Mrs. Gershowitz in touch with people he knew with experience in food preparation and maintenance services for health care facilities, which turned out to be Olympic. 238 NLRB at 11.

Second, Mrs. Gershowitz testified (after operation under the subcontract had begun) that the advantage to Greater Pennsylvania in subcontracting was that the administrator of the nursing home did not have to deal with the routine of the kitchen, the laundry, and housekeeping, and could concentrate on nursing care. She further testified that since meals are part of patient care, she had on her staff a dietician, who prepared menus and special diets and saw to it that food came out properly prepared and served, and a purchasing agent responsible for purchase of food and other supplies. The dietician worked with the purchasing agent and with Olympic's

food supervisor, in making menus to keep costs in line. The food service supervisor was employed by Olympic and had the responsibility for seeing that the right menus were dispensed to the patients, for cleanliness of the kitchen, and for staffing patterns. Likewise, the housekeeping supervisor was employed by Olympic and had responsibility for seeing to the cleaning and maintenance of the nursing home rooms.

Mrs. Gershowitz further testified that while Greater Pennsylvania's cost for auxiliary services were increased by the $100-per-week management fee paid Olympic (this was a cost-plus-fixed fee contract as described elsewhere in the testimony) and by the net increase (by two) in employees, there was also a decrease in costs as a result of more efficient management. She added that Olympic was doing an excellent job at her facilities. In response to questioning by Respondent, she pointed out that she could not reverse the decisions or just step out of or terminate the subcontract without subjecting Greater Pennsylvania to the consequences of breach of contract.

Third, the subcontract with Olympic was not the only or first subcontract of Greater Pennsylvania. According to Mrs. Gershowitz, building maintenance and fire prevention were being done by a subcontractor; and special professional services, including those rendered by psychologists, dietician, and speech therapist, were being provided to Greater Pennsylvania by Chai Management, a company owned by Mrs. Gershowitz, that provided consulting services of this kind on a fee basis to other companies as well. 238 NLRB at 13.

This testimony, concerning the business reasons and advantages to Greater Pennsylvania, or the reasonableness of its practice of subcontracting necessary functions in this case and prior situations, was not contradicted by the Union. It was plausible testimony, it was credible testimony.

Also part of the record in the case before me, which was not part of the record before the arbitrator and not considered by him, was the evidence of the job security of the affected employees arranged for beforehand and carried out by the subcontractor Olympic. All of the affected employees were hired by Olympic without any break in employment or loss of pay; a pay raise, provided by the union contract with Greater Pennsylvania, was put into effect; and the Union was recognized by Olympic as the representative of the transferred employees. Additionally, because the Union's health-welfare-pension plan was in litigation and therefore a major reason for Olympic not acceding to existing contract terms and seeking collective bargaining of its own, Olympic provided for enrollment of its employees in another such plan. There was no evidence of any adverse effect on the job security of the transferred employees.

Under "arbitrator's law," while an adverse effect on job security could result in limitations on subcontracting, such limitations would be reduced or eliminated where the effect on job security was minimal or nonexistent. See, for example, *City of Hamtramck*, 71 LA 822 (1978). Again, the arbitrator's record was lacking in material facts that were present and useful to the decision. Indeed, the arbitrator declined to become acquainted with the job security situation of the affected employees, indicating that he could provide a decision without it.

It is not improbable that the deficient record upon which the arbitrator's decision rested, developed concurrently with the record before the Board, may be attributed at least in part to the absence of the Charging Party Punch and the subcontractor, Olympic, in the arbitration proceeding. The result suggests the wisdom of the Board rule in not deferring to arbitration where all the parties, who have important interest at stake in the unfair labor practice determination, are not parties to the labor contract and not represented in the arbitration, 238 NLRB at 14.

An earlier example of this wisdom is reflected in the Court of Appeals' opinion in *NLRB v. Horn & Hardart Co.*, 439 F.2d 674–679 (2d Cir. 1971), affirming the Board's decision to refuse to defer to arbitration. Quoting from the Board decision, the Court explained:

> In *Raley's* the Board based its decision, in part, on a finding that, although the Petitioner was not represented at the arbitration hearing, its position was identical with that of the Employer and the Employer "vigorously" asserted its position in the arbitration proceeding. As in *Raley's* the Petitioner herein did not participate in the arbitration proceeding and as in *Raley's* the Employer in the instant case asserted a position in the arbitration proceeding which is identical with the Petitioner's position herein, namely that the present contract does not cover cashiers. The record is unclear as to how vigorously the Employer asserted this position. [Citation omitted.] However, it is clear from the testimony at the hearing and from a reading of the arbitration award that *not all of the pertinent evidence was made available to the arbitrator*. The two primary deficiencies are the failure to provide the arbitrator with information concerning the long history of Intervenor's attempts to organize the Employer and the consistent exclusion of cashiers from these attempts, and the failure to provide him with a clear understanding of the duties of the employees in question. In these circumstances, we do not think it would effectuate statutory policy to defer to the arbitration award. [Remaining footnotes omitted.] [Emphasis added.]

In accord: *Retail Clerks Local 1100 (White Front San Francisco)*, 203 NLRB 548 fn. 2 (1973), and 206 NLRB 1431 fn. 3 (1973), holding that the Board will not defer to an arbitration award when the employer's licensee, a party affected by the arbitration award, was not party to the arbitration proceeding. Cf. *NLRB v. Plasterers Local 79 (Texas Tile & Terrazzo)*, 404 U.S. 116 (1971), where in context of a 10(k) proceeding, employers who were not parties to the private dispute resolution procedure, but who had substantial financial status in the outcome of the proceeding, were considered parties necessary to the dispute's resolution.

To suggest, as appears in the remand 613 F.2d at 1107, that Greater Pennsylvania represented Olympic in the arbitration and "fully and adequately defended" Olympic's

position is not sustained by the comparative records of the arbitration and the unfair labor practice trial, already analyzed. Moreover, in the cited cases, referred to as exemplifying that the party excluded from the arbitration was fully and adequately represented or its position defended, the excluded party stood on a different footing in relation to the arbitration from that of Olympic. In those cases, such as *Associated Press v. NLRB*, 492 F.2d 662, 664 (D.C. Cir. 1974), or *Haynes v. United States Pipe & Foundry Co.*, 362 F.2d 414, 416–417 (5th Cir. 1966), the excluded party was an employee and union member, who enjoyed the statutorily based assurance that his collective-bargaining representative would fairly represent his interest in the arbitration process. Subcontractor Olympic was not in any such protected category and had no such assurance respecting the arbitration.

I see no great or useful purpose served in denying to a bona fide subcontractor his Board remedy against a recalcitrant union, which has denied the subcontractor good-faith bargaining, by our giving credit in the proceeding before us to an arbitrator's decision that rests on a deficient record in light of the record established contemporaneously in the only forum open to the subcontractor.

Spielberg does not require it. Indeed *Spielberg*, as refined by the Board, forbids giving credit to such an arbitrator's award that did not encompass all the parties to the controversy before the Board, and that did not deal with the unfair labor practice.

[Recommendation for affirmation of Board's previous Order omitted from publication.]

Radisson Muehlebach Hotel *and* Hotel & Restaurant Employees and Bartenders International Union, AFL–CIO, Local 64. Cases 17–CA–10704, 17–CA–10782, 17–CA–11045, and 17–CA–11079

17 January 1985

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS HUNTER AND DENNIS

On 11 February 1983 Administrative Law Judge Burton Litvak issued the attached decision. The Respondent, the General Counsel, and the Charging Party[1] filed exceptions and supporting briefs.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions[3] as modified below and to adopt the recommended Order.

We agree with the judge's finding that the Respondent violated Section 8(a)(3) and (1) of the Act by discharging Edna Hayes. However, we do not pass on his finding that she was engaged in concerted activity, and we find the violation based solely on the following analysis.[4]

Hayes worked for the Respondent as a maid for 32 years. She had not openly indicated herself to be a union supporter prior to the events surrounding her discharge. On 4 June 1982 she entered the linen room and interrupted a conversation between Supervisors Grimes and Morrow in which both were criticizing the Union. Hayes indicated her disagreement with such criticism and asked them if they had seen "the article" in the previous night's newspaper which said that the Respondent had not remitted any money to the Union since February. Both Grimes and Morrow expressed disbelief. The Respondent suspended Hayes that afternoon and later discharged her for telling "numerous employees that the hotel had not paid dues or other money to the Union since January." The Respondent told Hayes this information was not true and that her conduct was violative of employee conduct rule 11. Rule 11 proscribes "making or publishing false, vicious, or malicious statements concerning any employee, supervisor, the Company, the Hotel or any other service establishment or individual directly or indirectly related to the conduct of Company or Hotel business."

A decertification election had been held about 10 months before Hayes' discharge and objections to the election were pending. The Respondent clearly demonstrated animus toward the Union by the unfair labor practices committed in the months after the election. In this context, Hayes, by her comments to the two supervisors, identified herself for the first time as a union supporter. We find that the Respondent discharged Hayes because of her support of the Union and that the discharge therefore violates Section 8(a)(3) and (1) of the Act.

We also agree with the judge's rejection of the Respondent's contention that Hayes was lawfully discharged because she violated employee rule 11. The judge correctly found that merely false utterances and writings constitute union or protected concerted activity within the meaning of Section 7 of the Act and the maintenance and enforcement of a rule prohibiting them is a violation of Section 8(a)(1).[5] While it is true that false statements that are knowingly false and therefore malicious are unprotected, the burden is on an employer who maintains such a rule to show that the employee in question intended to circulate knowingly false information. The Respondent has not satisfied that burden.

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[1] The Charging Party withdrew its exceptions on 6 July 1983.

[2] The Respondent asserts that the judge's credibility resolutions, findings of fact, and conclusions of law are the result of bias. After careful examination of the record, we are satisfied that this allegation is without merit. There is no basis for finding that bias and partiality existed merely because the judge resolved important factual conflicts in favor of the General Counsel's witness. As the Supreme Court stated in *NLRB v. Pittsburgh Steamship Co.*, 337 U.S. 656, 659 (1949), "[T]otal rejection of an opposed view cannot of itself impugn the integrity or competence of a trier of fact." Furthermore, the Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 363 (3d Cir. 1951). We find no basis for reversing his findings.

[3] The judge inadvertently referred to William C. Speidel as William E. Speidel. He also incorrectly found that Supervisor Reggie Williams was wearing a brass name tag instead of a red name tag. We hereby correct these errors.

We agree with the judge's refusal to order that discharged employee Grimes be reinstated and made whole because we provide only a cease-and-desist order in situations where an employer interviews an employee in violation of the requirements set forth in *NLRB v. J. Weingarten*, 420 U.S. 251 (1975), except in cases where an employee is discharged for asserting his *Weingarten* rights or where the reason for the discharge is itself an unfair labor practice. See our recent decision in *Taracorp Inc.*, 273 NLRB 221 (1984).

Chairman Dotson agrees with the judge that the Respondent's refusal to process grievances to arbitration is unlawful, but he does not rely on the judge's citation of *Dresser Industries*, 264 NLRB 1088 (1982). Member Dennis, who agrees with the judge that *Dresser* was prospective only and therefore would not apply to the instant case, finds it unnecessary to intimate any views regarding the issues *Dresser* presents.

In agreeing with the judge's conclusion that the discharge of union steward Grimes was not violative of Sec. 8(a)(1) and (3) we find it unnecessary to rely on fn. 44 of the judge's decision.

[4] Member Hunter finds that Hayes' conduct in telling two supervisors about a newspaper article which reported that the Respondent had not remitted dues to the Union for several months constituted protected concerted activity. See *Atlanta Newspapers*, 264 NLRB 878, 879 (1982).

[5] *Owens-Corning Fiberglas Corp. v. NLRB*, 407 F.2d 1357 (4th Cir. 1969), *American Cast Iron Pipe Co.*, 234 NLRB 1126, 1131 (1978); *Walls Mfg.*, 137 NLRB 1317, 1319 (1962).

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Radisson Muehlebach Hotel, Kansas City, Missouri, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

DECISION

STATEMENT OF THE CASE

BURTON LITVACK, Administrative Law Judge. These matters were tried before me on September 14, 15, and 16, 1982, in Kansas City, Kansas. On August 24, 1982, the Regional Director for Region 17 of the National Labor Relations Board (the Board), issued a consolidated complaint, based on unfair labor practice allegations in Case 17-CA-10704 filed by Hotel & Restaurant Employees and Bartenders International Union, AFL-CIO, Local 64 (the Charging Party) on November 5, 1981, and amended on December 11, 1981; in Case 17-CA-10782 filed by the Charging Party on January 11, 1982, in Case 17-CA-11045 filed by the Charging Party on June 17, 1982, and in Case 17-CA-11079 filed by the Charging Party on July 8, 1982, alleging that Radisson Muehlebach Hotel (Respondent) engaged in acts and conduct violative of Section 8(a)(1), (3), and (5) of the National Labor Relations Act. Respondent filed an answer, denying the commission of any unfair labor practices. At the hearing all parties were permitted to offer into the record any relevant evidence, to examine and cross-examine witnesses, to argue their positions orally, and to file posthearing briefs. Based on the entire record, including the posthearing briefs, which have been carefully considered, and my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent is an employer engaged in the operation of a hotel, restaurant, and lounge at 12th and Baltimore Streets, Kansas City, Missouri. The parties stipulated that Respondent, in the course and conduct of its business operations described above, annually derives gross revenues in excess of $500,000 and annually purchases goods ands services valued in excess of $50,000 directly from sources located outside of the State of Missouri. The parties further stipulated that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION

Edward L. Miller, who is employed by Hotel & Restaurant and Bartenders International Union as an International representative, testified that he is currently the International trustee of the Charging Party and in overall charge of its affairs. To this end, he further testified that he negotiates collective-bargaining agreements with various employers, files and processes employee grievances, and conducts membership meetings and that employee-members participate in collective bargaining, grievance processing, and membership meetings. Therefore, it appears that the Charging Party is an organization in which employee-members participate and which exists for the purpose, wholly or in part, of collective bargaining. Accordingly, I find that the Charging Party is a labor organization within the meaning of Section 2(5) of the Act. *Memphis Furniture Mfg. Co.*, 259 NLRB 401, 402 (1982).

III. ISSUES

1. At all times material herein, has Respondent maintained a rule concerning the publication of "false, vicious, or malicious statements" in violation of Section 8(a)(1) of the Act?

2. About December 16, 1981, did Respondent violate Section 8(a)(1) of the Act by threatening employees with discipline if they continued to engage in activity on behalf of the Charging Party?

3. About September 15, 1981, did Respondent violate Section 8(a)(1) and (3) of the Act by reprimanding employee James Grimes?

4. About September 25, 1981, did Respondent violate Section 8(a)(1) and (3) of the Act by reprimanding employee Beatrice Edwards?

5. About October 6, 1981, did Respondent violate Section 8(a)(1) of the Act by conducting an interview with employee James Grimes after denying his request for union representation and notwithstanding the fact that Grimes had reasonable cause to believe that interview would result in disciplinary action?

6. About October 6 and 9, 1981, did Respondent violate Section 8(a)(1) and (3 of the Act by initially suspending and subsequently terminating employee Grimes?

7. About June 4 and 8, 1982, did Respondent violate Section 8(a)(1) and (3) of the Act by initially suspending and subsequently terminating employee Edna Hayes?

8. Since about January 8, 1982, and continuing to date, has Respondent violated Section 8(a)(1) and (5) of the Act by refusing to process certain grievances, filed by the Charging Party, through the applicable arbitration procedures of an existing collective-bargaining agreement?

IV. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Facts*

1. Background

Respondent operates a hotel in Kansas City, Missouri; encompassed within it are various facilities including a coffee shop known as the Greenery. William E. Speidel is the managing director of the hotel and in charge of its entire operations, and Ronald C. Juneman is the director of personnel. Respondent has had a longstanding collective-bargaining relationshio with the Charging Party—until 1980 as an employer-member of the Kansas City Hotel Association and, since withdrawing from the aforementioned multiemployer bargaining association in 1980, on a single employer basis. Both as a member of

the association and as a single employer, Respondent's current collective-bargaining agreement with the Charging Party as the collective-bargaining representative of certain of its employees[1] is for a term of 5 years, effective from June 16, 1978, through June 16, 1983. Pursuant to the terms of article XXXI thereof, either Respondent or the Charging Party was permitted to request negotiations on changes in the wages and health and welfare provisions of the contract in the spring of 1981. By a letter dated April 7, 1981, the secretary-treasurer of the Charging Party, Clarence Owens, made such a request and, as a result, negotiations on such changes and other matters[2] between Respondent and the Charging Party occurred from May 18 through July 14, 1981. In the midst of these discussions, the event which is alleged to be the catalyst behind Respondent's conduct herein occurred—the filing of a decertification petition, in Case 17-RD-824, on June 18, 1981, by Beulah A. Bass, a waitress in the Greenery coffee shop. The preelection campaign continued throughout the summer of 1981[3] and culminated with the holding of a decertification election on September 11, 1981. The Charging Party prevailed, receiving a majority of the ballots cast.[4]

2. The Beatrice Edward reprimand

The record establishes that the Greenery coffee shop is open from 6 a.m. until 8 p.m. every day and that in September 1981 Douglas Brown was the manager. Beatrice Edwards, who worked as a waitress at Respondent's hotel for 25 years and who was an overt advocate for the Charging Party during the election campaign, testified that, at approximately 9 a.m. on September 25, 2 weeks after the election, while waiting on the tables in her assigned area,[5] she passed by a table in Beulah Bass' work station, and two gentlemen, whom she recognized as union officials Harold Hamilton and James Meyers, beckoned to her, asking for coffee. "I had a pot of coffee in my hand so I stopped and poured some. A few minutes later they asked me if I would give them some cream and I did." Thereupon, she went back to the kitchen in order to refill her coffeepots and observed Reggie Williams, who was the agri-business club manager for Respondent and acting as the Greenery manager that morning,[6] and Bass "standing by the timeclock smoking and talking." Noticing Edwards in the kitchen, Williams spoke and "told me not to work Beulah's station." When she attempted to explain what occurred, Williams said, "Shut up. I don't want to hear it." Approximately an hour later, Edwards received a reprimand from Williams for the incident in the form of a notice called "communication to employee."[7] The document accused Edwards of "working another waitress' station" without being instructed to do so and of "being insubordinate to manager."

Harold Hamilton, an official of the national AFL-CIO, testified that he was in Kansas City on September 25 in order to attend a Missouri manpower conference and that he had an appointment to meet James E. Meyers, an official of the Missouri AFL-CIO, in the Greenery that morning for breakfast. According to Hamilton, he arrived at the coffee shop a few minutes after 8 a.m. and observed Meyers already seated at a booth near the kitchen door. There was no waiting line, and Hamilton walked over to the booth and sat down.[8] Approximately 6 minutes passed until a black man who was wearing a suit and a brass name tag[9] approached their tables. Meyers said that they desired breakfast, and the individual gave each a menu. Another 4 or 5 minutes passed without any further service whereupon Meyers beckoned to a passing waitress, who was Beatrice Edwards, and requested coffee; the latter brought a coffeepot to the table and poured coffee for the two men. Edwards left the table; however, 5 minutes later Meyers stopped her and requested cream; Edwards placed cream

[1] The bargaining unit includes all employees employed by Respondent at its hotel; excluding executives, superintendents, department heads having the authority to hire and fire, supervisory employees having the authority to hire and fire and having an executive status, supervisory employees having an executive status with the right to effectively recommend hiring and firing, accounting or control employees, timekeepers, security officers, office employees, sales personnel, desk and mail clerks, checkers, cashiers, typists, stenographers, secretaries, supervisory stewards, storeroom and wineroom personnel, and all extra employees who have not worked at least an average of two functions (6 hours) per week for the period January 1, 1981, to July 24, 1981.

[2] Edward L. Miller, who attended the negotiations on behalf of the Charging Party, testified that the only matters discussed were wages and fringe benefits and denied that the contract provisions relating to individuals, known as extra banquet personnel, were discussed. As to the latter, Miller identified R. Exh. 18 as an unfair labor practice charge which he filed on behalf of the Charging Party on June 30, 1981, alleging that Respondent was bargaining in bad faith in violation of Sec. 8(a)(1) and (5) by attempting to force the Charging Party to bargain over matters other than wages and fringe benefits. The charge was dismissed and Miller identified R. Exh. 19 as the letter he received from the Board's General Counsel in which the latter's representative sustained the dismissal, writing that Respondent had made proposals as to extra banquet personnel and the Charging Party had engaged in "meaningful" bargaining on the subject. In addition, Respondent offered into evidence Juneman's notes, which he recorded at each bargaining session. These indicate substantial discussions regarding the matter of extra banquet waiters and waitresses. No rebuttal evidence was offered as to this.

[3] There is scant record evidence as to the conduct of the preelection campaign. However, the record does disclose that Speidel and Juneman held a series of meetings with employees on or about September 9 and that supporters of the Charging Party, including another waitress in the Greenery, Beatrice Edwards, formed a campaign committee known as the Save-Our-Contract committee.

[4] Respondent filed timely objections to the conduct of the election; these were heard by a hearing officer of the Board who found merit in two of the objections; on December 6, 1982, the Board reversed the decision of the hearing officer and certified the results of the election. This decision of the Board is reported at 265 NLRB 634 (1982).

[5] In September 1981, according to Edwards, the Greenery waitresses were assigned to permanent areas, or stations, whereby each was required to wait on specified tables and no others. Under this system, which was designed to ensure the waitresses their tips, they were not permitted to actually wait on customers in other work stations. However, Edwards testified, it was permissible for waitresses to pour coffee or water for such diners.

[6] Respondent admits that Williams was a supervisor within the meaning of Sec. 2(11) of the Act.

[7] These disciplinary notices are placed in employee personnel files and are utilized in assessing the necessity for harsher discipline if such is warranted in the future.

[8] Hamilton testified that his identity and affiliation was known to Respondent's employees as he had previously been in the hotel and at employee meetings in connection with the election campaign.

[9] There is no dispute that the black individual was Reggie Williams and that he, indeed, took the food orders of Hamilton and Meyers that morning. There is a dispute as to the type of name tag he wore but I deem this of little significance given the aforementioned.

on the table. Hamilton testified that another 4 or 5 minutes elapsed before the black individual returned and took their breakfast orders. Thereafter, Beulah Bass brought their meals from the kitchen. According to Hamilton, he was acquainted with Bass and, after asking how she was doing, introduced her to Meyers.

Beulah Bass, who filed the petition for the decertification petition and who, according to Douglas Brown, was constantly being harassed by other employees because of her actions, testified, "Mr. Hamilton and two more union [people] come in and sat down in my booth. And so I took them their coffee and was going to take their order and went ahead and asked the host to take the orders because I didn't know if they were going to ask me some questions or not." After the meals were prepared, she served them to the union officials. What upset Bass that morning and allegedly caused her to complain to Reggie Williams was that Beatrice Edwards "was at that table four different times. . . . she refilled their coffee or picked up their plates, and each time that she would go over there, they would have a little conversation. What they said, I don't know." The significance of Edwards' conduct, according to Bass, was that "you keep going over to somebody's table and doing things for them, it cuts down on your tips." As stated above, she ultimately complained to Acting Manager Williams; I told him they were in my station and [Edwards] was not suppose[d] to be. And he called her aside and talked to her. Usually we've suppose[d] to ask if we need help, we'll go to the host. . . . I hadn't gone to him. . . . She really did not have any business over there."[10] During cross-examination, Bass' testimony became contradictory. Thus, while initially testifying, "I took them their coffee and water and menus," she later stated that Williams poured coffee for the union officials and that when she first observed them in a booth, the men already had coffee, water, silverware, and menus on the table. Further, as to the number of times she observed Edwards at the union officials' table, Bass initially testified four or five times, with the former serving coffee and bringing cream to the table *prior* to Bass serving their food; later contradicting herself, Bass stated that Edwards was at the union officials' table four or five times *after* she served the food. Respondent offered no further evidence as to this incident.[11] Finally, Hamilton testified that during the approximately 25 minutes which elapsed until Bass served food to Meyers and him, he observed Bass on several occasions walking to and from the kitchen, never carrying anything.

3. James Grimes

The record reveals that James Grimes worked for Respondent from 1966 until about October 9, 1981, as a regular banquet waiter and that during this time period he served as a union steward for the Charging Party.[12] At all times material herein, he was supervised by Mary Moore, the banquet manager for Respondent.[13] With regard to the performance of his duties as a union steward, Grimes testified that he conferred with other employees concerning work-related problems "most times in the dressing rooms or at lunch time . . . in the lunch hall." Aware that the union stewards were prohibited from discussing union business with employees in public areas of the hotel or while working,[14] Grimes consistently maintained that his practice, whenever confronted by an employee with a problem in such an area or during work, was to refuse to discuss the matter.[15] According to Grimes' uncontroverted testimony, he was constantly "right on [Juneman's] back" about employee-related matters, and in early August 1981 as he passed by Juneman in a hotel hallway, the latter, with a smile, said "It seemed like you're running the place." At approximately the same time, Grimes was called to Juneman's office and informed by the latter that the two restaurants, the Greenery and La Carrousel, were "off limits" to him from that day on and that in order to report to his work station, he was required to utilize the rear stairway. Grimes testified that Juneman gave him no reason for this restriction and that prior to this conversation, Grimes had always taken a short cut (through the Greenery kitchen and up an elevator) to his reporting area. During his testimony, Juneman said nothing about, nor gave any justification for, Grimes' area restriction. Mary Moore testified that he never had any valid reason for being in the Greenery kitchen as the catering department possessed its own kitchen equipment and that the restriction was related to the sexual harassment of Beulah Bass by Grimes, a point not corroborated by Bass.[16]

[10] Bass admitted that it was common for another waitress to pour coffee or water if a customer so requests as that waitress passes by—"They're naturally going to pour it."

[11] There is no record evidence as to what, if anything, constituted Edwards' alleged insubordination to Williams that morning. The latter did not testify, and Respondent offered no reason for not calling him as a witness.

[12] As union steward, Grimes was responsible for representing the hotel's kitchen help, waiters, and waitresses. There was only one other steward, Thelma Glover, who was responsible for all other employees. Grimes testified that in Glover's absence he discussed work problems with employees within her jurisdiction.

[13] It was admitted that Moore is a supervisor within the meaning of Sec. 2(11) of the Act.

[14] Art. XIV of the current collective-bargaining agreement states that the Charging Party's business agents "shall not transact union business in public rooms, and shall not interfere with work being performed." While not specifically concerned with the Charging Party's shop stewards, Grimes testified that he understood that the same restrictions applied to his conduct of union business, and no contrary evidence was offered by the General Counsel or the Charging Party as to the conduct of union business by the stewards.

[15] During cross-examination, Grimes testified that he never violated the contractual provisions—"I was a busy man at all times and I could not stop my work to perform no business." While unable to recall being warned in March 1981 about conducting union business while working, Grimes admitted receiving and executing R. Exh. 6, a memorandum to Grimes from Ronald Juneman, dated March 13, 1981. This document, after quoting from the above-quoted art. XIV of the existing contract, reminds Grimes, "You are not to conduct union business while on duty. We have recently received several complaints from your membership regarding harassment from union officials. We request you follow the collective bargaining contract as written." There is no evidence that Grimes ever filed a grievance over receiving this document or that the Charging Party ever challenged its accuracy.

[16] Grimes admitted that the restriction did not inconvenience him and that it did not prevent him from having access to Greenery employees in either the employee locker room or cafeteria.

Two days before the decertification election, on September 9, 1981, Grimes was called into Mary Moore's office and met with the latter and Gordon Bell, Respondent's catering manager.[17] According to Grimes, Bell "asked me how I was going to vote and I told him for the union. And when I told him that he replied to me, 'I hope you do this in the future of your family and yourself.' I . . . said, 'I've been in this union for many—I worked in this hotel for many years and I've taken care of my own business for 40 years. I didn't need you to help me take care of my family.' That's all I said. And walked out." Gordon Bell testified that he was instructed to meet with employees prior to the election "to make sure they had all the facts" and to answer their questions and that he requested that Grimes speak to him in Moore's office with the latter being present. "What I said to James was that if he had any questions or anything that was on his mind or that he was not sure of, I was there to try and clarify the matters. And James didn't say anything, so I just said, 'well, just vote the way you really feel inside would be the best for you and your family.'" Moore said nothing about this meeting during her testimony. The election took place on September 11, and Grimes was the Charging Party's observer during it.

There is no dispute that, despite his aforementioned work restriction, Grimes was in the Greenery kitchen between 5:30 and 6:30 a.m. on September 15 and that, while there, he walked past past Beulah Bass, who was standing near the coffee shop timeclock, and greeted her. According to the testimony of Grimes during the General Counsel's case-in-chief, he was in the kitchen that morning, preparing for a buffet breakfast in the La Carrousel restaurant, which is located in close proximity to the Greenery. Mary Moore, who, as previously stated, testified that there was no need for Grimes ever to be in the Greenery kitchen as the banquet department possessed its own kitchen equipment, further testified that on September 15 just a few individuals were scheduled to work the buffet breakfast in La Carrousel and Grimes was not one of them and that he was assigned to other functions that day. As support, Moore identified a series of documents (R. Exh. 22) as Grimes' work vouchers[18] for September 15; these show him working five separate functions during that day—two in the Imperial Ballroom, two in the Grand Ballroom, and one in Room 1111. Further, Moore was certain that Grimes was not in the La Carrousel restaurant that morning for, as the supervisor in charge of that facility, she was in the area "off and on" that morning and did not see Grimes—"I know Mr. Grimes was not scheduled for that room and he was not in that area or come up and have anything to do with La Carrousel."[19] Moore also denied pulling Grimes off a function in La Carrousel that morning, asserting she would never do that. Testifying during rebuttal, Grimes contradicted Moore, stating that, as scheduled, he reported for work at 6 a.m. in the Imperial Ballroom but that the captain, Alex Naliviko, ordered him to report, instead, to the La Carrousel "because everybody was late" to help set up. Accordingly he accompanied Naliviko to the La Carrousel, which was open because a steward had previously opened the room,[20] and assisted in preparing the buffet table, rearranging and setting up the guest tables, and serving the food. Grimes testified that Moore arrived at 7:30 a.m., noticed him working that meal, and after stating that he had no business there, ordered Grimes to return to the Imperial Ballroom.[21]

With regard to his greeting to Bass, Grimes testified that "I said 'Good morning, Beulah baby" and that Bass returned his greeting, did not appear to be angry, upset, or irritated and did not complain about his manner of speaking. He further testified that he greeted "everybody" in that manner and that he used the same greeting to Bass prior to that morning and, also, subsequent to September 15. Beulah Bass, on the other hand, testified that Grimes "usually did not speak to me," that he said, sarcastically, "'Well, good morning, Beulah baby,'" and that she neither smiled nor responded in any way. According to Bass, Grimes, in the past, "might" have greeted her with a hello but never in such a manner or in the same tone of voice as that morning. Inasmuch as "it just upset me the way he talked to me is all," Bass immediately went to the Greenery manager, Douglas Brown, and requested permission to complain directly to the personnel office regarding Grimes' conduct.[22] Douglas Brown corroborated Bass in this regard—"Beulah approached me and stated James Grimes concerned her and said 'Hi Beulah, baby,' or words to that effect. She was very livid, she was very upset. She asked if she could go to personnel and talk to Ron Juneman. I said 'Of course.'"[23]

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[17] The parties stipulated that Bell is a supervisor within the meaning of Sec. 2(11) of the Act.

[18] According to Moore, a banquet waiter must receive a voucher in order to be paid for working a particular meal, and there would be no occasion when a waiter would not receive one after working a meal. Contrary to Moore, Grimes testified that it was not unusual for him not to receive a voucher after a meal because he was a leadman, was hourly paid, and did not expect a voucher for everything.

[19] Moore testified that she could recall the events of September 15 with particular clarity because of the Beulah Bass incident and because it was Grimes' first day back at work after being off for a while—"I know exactly where he worked on the 15th. . . . I kinda picture myself—picture things back in my mind, and I can kinda remember that"—while denying that her memory of Grimes' schedule for September 15 was based on his vouchers for that day, she had no recollection as to where Grimes worked on September 14 or 16 because she did not have Grimes' work vouchers for those dates.

[20] Moore asserted that only she was authorized to open the La Carrousel restaurant for banquet employees to work there; however, she admitted that a steward could open the room for employees of another department to work.

[21] Grimes acknowledged that he did not receive a voucher for working the buffet breakfast in La Carrousel.

[22] Asked why it was so important that she report the incident to the personnel office, Bass answered, "I don't know why I did." She asserted that she complained to personnel in the past about similar incidents but could give no examples and later admitted this was the first such occasion. Bass denied that Respondent Personnel Director Juneman asked her to report any incidents involving union supporters.

[23] Brown testified that although he normally accompanies employees to the personnel department, he did not do so on this occasion as Bass "was so upset and so livid, in fact incoherent to the point she was in tears almost . . . ." Brown further testified that he was not surprised how Grimes' greeting affected Bass "because she was taking a lot of verbal harassment from fellow employees around that hotel, before . . . and after the election." He continued, "It was probably a day where she just finally broke. . . ."

As a result of this incident, Grimes was given a "communication to employee" notice dated September 15, 1981. The disciplinary notice was authorized by Juneman and signed by Gordon Bell, and two reasons for the action are set forth therein: "You were observed in an unauthorized area of the hotel [Greenery kitchen]. You have been previously warned"[24] and "Sexual harrassment — Beulah Bass (called her Beulah Baby in a vulgar way)." The notice was given to Grimes by Gordon Bell; the former denied the contents of the document and refused to sign it. Ronald Juneman testified that Grimes' greeting to Bass was considered as constituting sexual harassment and, as such, violative of Respondent's persistent[25] campaign against such conduct.[26]

On Sunday evening, October 4, 1981, Grimes was scheduled and worked three dinners, two on the mezzanine level and the last, a group of Catholic priests, in a room on the Trianon level,[27] which is located one level above the hotel lobby. Grimes testified that he served the latter dinner and cleared the dishes from the tables onto carts between 7:30 and 8:30 p.m. and that he was resting in the employee hallway when William French, a houseman, came through the swinging doors and approached him. French began scooping uneaten food off the dinner dishes, which were stacked on the carts, and eating it.[28] French turned to Grimes and, according to the latter, said, "'When are you folks going to get—you people going to get our back time and raise?' And I looked at him and I said, 'As soon as we can get this back to the table, French.' And after that I replied to him, 'I'm sure the union ain't never did nothing for you.' And then this was the end of the conversation. He turned and went back into the Trianon area." Grimes further testified that he was not scheduled for work on October 5 (Monday) and that when he reported for work on Tuesday, October 6, he was ordered to report to Personnel Director Juneman's office where he found Mary Moore and Juneman waiting for him. According to Grimes, he had no idea why he was ordered to report to the personnel office.

William French[29] testified that he reported for work at approximately 7 p.m. on Sunday and that after cleaning the lobby and the public restrooms on that level, he moved up to the Trianon level. According to French, he had finished cleaning the ladies' restroom, which is located off the public hallway on said level, and was emerging from it when James Grimes, who was standing next to the swinging doors which lead to the employee hallway, beckoned for French to come over to where he was standing. French did so, and Grimes "said he wanted to see me because that was the only time he had to talk to me. . . . he said he wanted to know if I was one of the guys, the people who was against the union." French did not reply, and Grimes said that the "only thing I wanted to talk to you so I'd know who was against the union so I can put it in the union report." French further testified that another, unidentified waiter was standing nearby and that Grimes had been "sitting" by the double doors. As to the time of the incident, French placed it as occurring at approximately 8 p.m., shortly before his lunchbreak in the "middle" of his shift that night. The next day,[30] according to French, he bypassed his immediate supervisor and reported on what had occurred the night before directly to Ronald Juneman as "I figured he would need to know what happened." French added that Mary Moore was present and that neither Juneman nor Moore asked him any questions about his account.

Contradicting French, Juneman testified that Executive Housekeeper Kay Sullivan, French's supervisor, telephoned him during the morning of October 5 and said that French wished to speak to him. Having requested that Mary Moore be present, Juneman and the former thereupon listened to French's version of the incident of the previous night. According to Juneman, French said that he had been cleaning the men's bathroom in the public area of the Trianon level and that "he was cornered by Mr. Grimes and he was threatened to be put on a list with the union, and he was just basically intimidated by the whole thing."[31] Again contradicting French, Juneman testified that he thereupon questioned French regarding the incident and asked him to return to work. After French departed, Juneman asked Moore to have Grimes report to his office.

James Grimes testified that when he arrived in Juneman's office, the latter immediately handed him a two-page document dated October 5, 1981 (G.C. Exh. 18),

[24] With regard to the restriction from entering the Greenery kitchen, Mary Moore stated that it was based on Grimes doing union business there at unauthorized times and upon previous harassment of Beulah Bass. The latter, of course, stated that Grimes hardly spoke to her prior to September 15 and *not* as he did that day.

[25] Juneman testified that Respondent terminated two employees, one of whom was a managerial employee, for sexual harassment of female employees prior to the Bass incident.

[26] Lisa Helvey, the assistant personnel director, testified that Respondent's parent corporation, the Radisson Hotel Corporation, instructed Respondent to post notices throughout the hotel, informing employees of the corporation's policy against any form of sexual harassment. Upon receipt of these notices, R. Exh. 12, Juneman instructed her to post copies on employee bulletin boards, and Helvey did so in February 1981. Beulah Bass testified that copies of the notice were posted on the Greenery kitchen bulletin board and by the back door. James Grimes admitted that he was aware of said notices but asserted that he first observed one subsequent to receiving his reprimand for "greeting" Beulah Bass. As to Respondent's campaign against sexual harassment, Grimes admitted knowledge of the policy from the employee newspaper and from the holding of employee seminars regarding sexual discrimination.

[27] On this level, there is a public hallway, off which are some banquet rooms. An employee hallway is located to the rear of the banquet rooms and is reached from the public areas through two swinging doors.

[28] Such was a violation of Respondent's work rules; however, according to Grimes, he always "looked the other way" when employees did this.

[29] Grimes denied knowledge of French's attitude toward the Charging Party, while Juneman asserted that not only did he assume French was against the Charging Party but also French's sympathies were well known to other employees.

[30] French exhibited utter confusion as to when he reported the incident to Juneman. Initially, he testified that he spoke to Juneman on Monday at 8 a.m. Later, he testified that the time was 6:30 p.m.—just before he commenced work. Under intensive questioning on this point, French admitted, "I don't know what time it was." Finally, French placed the timing of his report to Juneman between 6 and 6:30 p.m. "I reported it the next day at the time when I came in."

[31] During cross-examination, Juneman asserted that the "conversation took place in two areas, outside the public restrooms where Mr. French was about to clean and then back in the service corridor."

and ordered Grimes to read it. It reads, inter alia, as follows:

> VIOLATION OF STANDARDS AND CONDUCT NUMBERS SEVEN (7) AND SEVENTEEN (17). VIOLATIONS OF THE UNION CONTRACT: ARTICLE XIV. VISITATION PRIVILEGES
>
> Ron Juneman
> James Grimes
>
> On Sunday, October 4, 1981, during the late afternoon you stopped William French as he was coming down the escalator to the Trianon bathrooms. You were standing in the hallway and you took him to the back corridor to discuss union business on company time.
>
> You asked Mr. French what the union has ever done for him. You told him that you realized that he (William French) was one of the people against the union. You also stated that you were going to place Mr. French on report (LIST) with the union because of his (Mr. French's) opinions about the union. You have been previously warned regarding your behavior as a union representative and your intimidation of fellow employees.
>
> Your activities of Sunday were in violation of the following rules:
>
> 1. ARTICLE XIV: VISITATION PRIVILEGES of the Local 64 Collective Bargaining Agreement, which reads in part:
>
> ". . . shall not transact union business in public rooms, and shall not interfere with work being performed . . . ."
>
> At the time you stopped Mr. French he was:
>
> a. In a public area.
>
> b. Trying to perform his duties, as assigned on company time.
>
> In addition, ARTICLE XIV reads:
>
> ". . . It is agreed that before contacting employees in any establishment, the union representative shall first report to the management of his intention to do so."
>
> You contacted Mr. French without first notifying management of your intent to do so.
>
> 2. You were in violation of the Hotel's Standards and Conduct rules, Number Seven (7), which reads, in part:
>
> "Disrespectful conduct . . . coercion, intimidation, or threats of any kind against . . . fellow employees . . . ."
>
> You told Mr. French that you were going to put him on "THE LIST" because of his opinions about the union.
>
> 3. Leaving your department or work area without permission from your supervisor is in violation of the Standards and Conduct rule Number Seventeen (17).
>
> As the result of your conduct you are hereby suspended pending investigation. You are to call your supervisor, Mary Moore, on Wednesday, October 7, 1981. We hope to have our investigation concluded by that date. If not, we will notify you of same.[22]

According to Grimes, after reading and returning the document to Juneman, he said that "it was just pure harassment." Thereupon, believing he needed a representative from the Charging Party present, Grimes said "that I would need a representative" and specified Edward Miller. Juneman responded that Grimes did not need the presence of a representative of the union as he was a union steward. Thereafter, Juneman "went on through to ask me my side of the story of this particular paper," and Grimes related his version of what occurred on the previous Sunday evening. During cross-examination, Grimes denied admitting to either Juneman or Moore that he accosted French in a public area of the hotel.

Ronald Juneman testified that after Grimes arrived at his office, "we asked [Grimes] about the different facts in the case as relayed to us, and James confirmed the fact that he did stop and talk with Mr. French the day before and he had talked to him about various union matters, and he did talk to him in the public area as was described by Mr. French." Next, according to Juneman, he told Grimes what hotel rules had been violated by the latter and he would be suspended while Juneman investigated the facts more thoroughly. Grimes responded, ". . . yeah, I did those things but I didn't think I was doing wrong." Juneman continued, "James said that Mr. French approached him and he didn't approach Mr. French. Everything else pretty well agreed verbatim." Juneman asserted that Grimes admitted threatening to place French's name on a union list but said, "I didn't mean any harm by it or anything like that." Juneman further testified that he and Moore discussed the suspension immediately after Grimes left his office; that as a result of the meeting with Grimes, Respondent's Exhibit 14, which is identical to General Counsel's Exhibit 18, was passed around for the signatures of the meeting participants, including Grimes; and that Grimes signed the document. Finally during cross-examination, Juneman averred that a major reason underlying his reaction to the incident of October 4 was that French appeared to be "honestly visibly shaken. He was scared. He feared for his physical well-being."

Mary Moore, whose recollection of the events of October 6 was hardly a model of clarity, testified that she had no idea why she was asked by Juneman to come to his office that day but that she met with Juneman, Grimes, and French. She said that the latter spoke first and said that "James Grimes approached him and kind of like on some threatening remarks about something that happened to the union. . . . Frenchy said he was clean-

[22] Beneath the last lines are spaces for the date of the conversation with Grimes and the signatures of Moore, Juneman, and Grimes. G.C. Exh. 18 contains no date for the conversation but does contain the purported signatures of Juneman and Moore in the spaces reserved for same. Grimes asserted that he refused to execute the document. Respondent offered into evidence as its Exh. 14 the identical document except that it contains the date "10/6/81" for the discussion with Grimes and purported signatures of Grimes, Juneman, and Moore. Grimes asserted that his signature on this document was forged; while Moore would not identify the signature on G.C. Exh. 18 as hers.

ing the halls. . . . And James Grimes was down there a little earlier, he was to work a function, but he was there earlier than he should have been. . . . And he said something about James, they were talking about the union. . . . They had some words about it. . . . And Frenchy said that Mr. Grimes said . . . somebody was going to get him . . . and they would get him one way or another." After French related his version of the October 4 incident, Grimes spoke, and, according to Moore, he admitted speaking to French that night: "Mr. Grimes said—well, something that they both had said something to that effect, that someone was out to get him.. . . And Mr. Grimes said that . . . both of them was talking about the incident, about the union." Moore further testified that, at this point in the interview, French left Juneman's office. Grimes remained and continued talking about the incident, "saying something, that he was a man and felt like a man had his opinion to say what he wanted to say. And, you know, he just went on and on." As to the document (marked as G.C. Exh. 18 or R. Exh. 14), Moore says it was given to Grimes "on a different occasion" most likely on October 7 and that at this meeting, which she, Grimes, and Juneman attended, Juneman asked if Grimes desired having a representative there; the latter "stated that he was a steward and he did not need anyone to represent him, he was his own representative because he was a steward at the hotel." Grimes was suspended after this meeting. Later, during direct examination, Moore recalled that the meeting during which Grimes and French spoke occurred on Monday, October 5, and that the meeting at which Grimes was suspended occurred the next day.[33]

There is no dispute that Grimes was terminated on October 9. According to Moore, "We kind of like investigated some other things in the past that had happened, including past write-ups against Grimes such as the Beulah Bass incident and being in unauthorized areas of the hotel, interfering with other employees doing their jobs. It was just a series of things. . . . I can't remember all of them, improper service . . . if you gave him one way of doing it, he had his own way he wanted to do it." Moore testified that she had observed Grimes' work, and "he had gotten very sloppy." Also, she mentioned two arguments which Grimes had with Respondent's supervisors: a fight with an individual named Bennie Barrera in 1968 and an incident involving Respondent's sous chef on August 4, 1981.[34] During cross-examination, Moore asserted having written up Grimes "several times" for sloppy work including the dropping of trays (she could recall neither the dates or dispositions) and the serving of food, wrapped in cellophane, during a dinner in June 1981.[35] Finally, Moore recalled an altercation between Grimes and an unidentified Greenery manager but could not recall when it occurred or what happened.

Ronald Juneman testified that he, Moore, and Helvey jointly made the decision to terminate Grimes during the period of his suspension. "We investigated . . . to determine all the facts regarding James Grimes' service record at that point and time . . . in an effort to determine whether or not he had been notified on previous occasions about various violations of company policy. We had to find out how we handled other individuals in like situations. . . . And based on gathering all our information . . . we made the determination to terminate." According to Juneman, who denied that Grimes' position as shop steward was a factor in his decision, the entire contents[36] of Grimes' personnel file, including

[33] Moore testified that the suspension was "based on being in unauthorized areas. There are a series of things, not just one."

[34] Grimes readily admitted almost having an altercation, during which he was prepared to utilize a knife in apparent self-defense, with the sous chef, Martin Dickey, involving Grimes eating food which the sous chef had prepared and which Grimes should not have eaten. A fight between the two was narrowly averted; however, both men received disciplinary notices giving each a 1-week suspension without pay. Also, both were warned that for any further violation of hotel policy, ". . . you will be immediately terminated."

[35] With regard to the cellophane incident, Grimes admitted its occurrence but asserted that a hotel steward brought the cellophane-wrapped dishes into the room and that the cellophane should have been removed in the kitchen. As a result, Grimes received from Moore a reminder notice that he was not to serve food in such a manner again. Grimes asserted that Moore was also disciplined for the incident. Moore denied this, saying her involvement concerned correcting his conduct.

[36] There is no dispute that 2 days before the decertification election, on September 9, William Speidel held a series of meetings with employees during which he made a show of ripping up documents which were to be expunged from employees' files. In this regard, Grimes quoted Speidel as saying "that all reprimands in your file, regardless . . . which way the voting went . . . he would discontinue. And he took one up and tore it up." Thelma Glover, who was the other shop steward and who also attended such a meeting, testified that Speidel discussed documents in the personnel files, "and he said that anybody had a clean record as of now, and he had a piece of paper in his hand and he just ripped it loose." Approximately 2 weeks later, in a letter to all employees dated September 25, Speidel wrote the following: "Have you checked your personnel file? Many employees have and were pleased to learn that WE KEEP OUR PROMISES. All of those old communications were removed. Let's make sure we keep our files clean." Two questions arise from the foregoing—to what documents did Speidel refer on September 9 and in the September 25 letter and should *all* disciplinary notices have been removed from Grimes' personnel file prior to October 1981. As to the first question, Speidel testified that during the week of September 9, he instructed Lisa Helvey to remove all existing employee communication notices from employees' files; that all these documents were placed in a box; and that in his speeches to employees it was to these that he referred. "I announced to the employees at each of those meetings [that] we were going to tear up, destroy the communications notices. . . . I took the forms and ripped a few of them up and we ultimately destroyed them all." Speidel further testified that he did not direct that anything else be removed from employees files and that G.C. Exh. 10 is the type of document which was removed. Corroborating Speidel, Helvey testified that in the first week of September 1981 she was instructed to remove all "communications to employees" from the personnel files. She did so, removing all pink, yellow, or white copies of such. With regard to the effective date of the removal of these notices, Speidel gave it as September 11, all communications after this date would remain in the files. Finally, as to the September 25 letter, Speidel says it was sent "to confirm that we live by our promises."

Regarding the pre-September 11, 1981 disciplinary documents in James Grimes' personnel file, Speidel testified that neither R. Exh. 6 (the March memo from Juneman to Grimes warning him about conducting union business during work hours) or R. Exh. 10 (the memo from Moore to Grimes concerning the cellophane-wrapped food) should have been expunged from Grimes' file as neither is on a "communication to employees" type form. However, Speidel conceded that the latter's content is such that it should have been removed.

communication notices, were considered in arriving at the aforementioned decision. Among the documents examined, as to Grimes' past behavior, were the March memorandum from Juneman (R. Exh. 6) concerning the unauthorized conduct of union business,[37] the July memo concerning the cellophane-wrapped food, and the August 1-week suspension letter over the sous chef incident. Helvey, whom Juneman identified as participating in the discharge decision, said nothing about this during her testimony.

4. The Thelma Glover letter

The record establishes that Thelma Glover works for Respondent as a "linen runner," is supervised by George Mills, and, as stated above, is a union steward for the Charging Party. She testified that on December 15, 1981, employee Jim Barber approached her and said that he was sick, that he had seen a doctor, and that he was required to go to a hospital. Glover produced a hospital card and showed it to Barber, saying that most of the older employees had them. Barber said that he did not have one, and Glover told him to go to the personnel office and inquire about the card during his break period. Later, Barber informed Glover that he had gone to the personnel office and had spoken to Ronald Juneman, who told Barber that Respondent had nothing to do with insurance matters and said that Barber should not ask the hotel about such problems. Shortly after this second conversation with Barber, Glover's supervisor Mills told her to report to Juneman's office at approximately 2:15 p.m.; Glover did so. ". . . Mr. Juneman . . . says, 'Thelma, I don't want you telling anybody else about this insurance because it's no good and you know it.' And so I say, 'Well, Mr. Juneman, I can't say it about the insurance because I went in the hospital . . . and was in there for six days. . . . It paid my hospital bill.' And he said, 'Well, we got a better insurance to offer, the insurance is no good.'" At this point, according to Glover, Juneman raised the subject of employee Katherine Relms and said the employees' health insurance did not cover her entire hospital bill, and she had trouble paying the difference. Glover responded that she had nothing to do with it and that the insurance company paid her bills. Juneman raised the matter of the hospitalization cards and said Respondent did not "give them anymore." He continued, saying he would write her up over the matter of the cards. Glover replied, "Well, I been doing it, I've been coming down her seeing if you all had the little hospital card.'" A day or two later, Glover received in the mail a copy of a letter, dated December 16, from Juneman to Clarence Owens, the Charging Party's secretary-treasurer. This letter concerns a meeting the previous day between Glover and Juneman during which, according to Juneman, they initially discussed a problem with an unpaid doctor's bill owed by Glover since December 17, 1980. The letter continues:

> In addition we informed Ms. Glover that we, the personnel office, is [sic] victim to the Union's faulty insurance handling practices. Further, Ms. Glover was under the impression that we are suppose [sic] to pass out hospitalization cards and other union materials.
>
> We do not have such cards and therefore we are not responsible for handling your administrative deficiencies.
>
> Lastly, we informed Ms. Glover in our meeting that she is misinforming our employees as to what the union benefits (or lack of) are.
>
> We respectfully request that the union, through its officers, officials, and agents *stop misinforming* our staff in the Health and Welfare benefits. Please meet with Thelma to inform her as to what your benefits include.
>
> Future information distribution by Thelma Glover either verbally or in writing which misrepresents our hotel or operating practices will be considered misconduct. Misconduct of this nature will be subject to our standard disciplinary procedures.[38]
>
> Glover testified during cross-examination that she received no disciplinary notices concerning this matter.

Director of Personnel Juneman testified that in December 1981 he learned from his assistant that Glover was encountering difficulties in processing health claims through the Charging Party's insurance carrier. According to Juneman, he spoke to Glover and informed her that Respondent handled only the preliminary paperwork and that, if the problems continued, she should have representatives of the Charging Party speak to its insurance agents. Thereafter, Glover appeared back in Juneman's office with similar questions, and, after speaking to her, Juneman wrote a letter (G.C. Exh. 13) to Clarence Owens, advising him to speak to Glover on the matter. He further testified that no discipline was given to Glover, and nothing was placed in her personnel folder.

5. The discharge of Edna Hayes

The record reveals that Edna Hays had been employed by Respondent as a maid for 32 years until her discharge on June 8, 1982. She worked in the housekeeping department wherein Kay Sullivan is the executive housekeeper, Lena Grimes, the wife of alleged discriminatee James Grimes, is the assistant to Sullivan, and John Monroe is the head houseman.[39] Hayes, who admitted that she was not an active supporter of the Charging Party during the 1981 election campaign, testified that she reported for work at 8:30 a.m. on Friday, June 4, that she commenced working on her assigned rooms on the 11th floor, and that at approximately 9:15 she went

[37] Juneman considered it highly significant as it involved Grimes' conduct as union steward.

[38] Juneman continued, writing that Glover's statements were violative of, among others, Rule 11 of Respondent's "Standards And Conduct." Said rule proscribes: "Making or publishing false, vicious, or malicious statements concerning any employee, supervisor, the Company, the Hotel or any other service establishment or individual directly or indirectly related to the conduct of Company or Hotel business."

[39] It was admitted that Grimes, Morrow, and Sullivan are supervisors within the meaning of the Act.

down to the "linen room," a combination office and supply area for the housekeeping staff, wherein she encountered Grimes and Morrow. The former was sitting on a desk near the edge and Morrow was seated behind it, and they were in the midst of a conversation. Grimes was relating to Morrow how the Charging Party had mistreated her husband, saying that she advised him to stay away from it as "they didn't do nothing for you when you needed help." Morrow said that he agreed with everything Grimes said. Closing the room door behind her, Hayes walked over to the desk and interrupted the conversation, asking Grimes why she would talk like that. After Grimes repeated that the Charging Party was no good, Hayes asked if Grimes had seen "the article" in the previous night's newspaper regarding relations between Respondent and the Charging Party. Grimes responded, "What articles?" and Hayes announced that Clarence Owens ("Squeaky" to Hayes) and another had been fired and that "a statement was there where they said they had not received tax money or the money for the taxes since February." Both Morrow and Grimes professed disbelief; Hayes said the story was in the newspaper and on television, gathered her supplies, and returned to work.[40]

Hayes reported back to the linen room after lunch and discovered that the newspaper article to which she had referred "was plastered up beside the timeclock. . . . It wasn't the original. It was a certified copy but it was out there." Morrow approached and asked Hayes to go into Sullivan's office. Hayes knocked on the door and entered. Sullivan said, "Why, Edna, I am just surprised at you. I am just shocked. I am just shocked." Hayes asked what was wrong, and Sullivan replied, "It was brought to me by four different people that you put it out on the hotel that we hadn't paid the union money." Hayes announced surprise, asked Sullivan to identify the four individuals, and said she should not speak for unidentified witnesses. Sullivan replied that she was "furious" at Hayes, that Speidel was "just spitting fire," and that Juneman was "so upset." Thereupon, Sullivan said that Hayes was suspended and should report to Juneman on the following Tuesday, her next scheduled day. Moments later, Grimes entered with a suspension notice for Hayes. The document stated "today you were making comments to numerous employees that the hotel had not paid dues or other money to the union since January. This is not true information" and alleged that such conduct was violative of, among others, Respondent's aforementioned employee conduct rule 11.

Lena Grimes testified that at 7:45 that morning she and John Morrow were working on the maids' schedules in the linen room when Hayes entered and asked if either had seen the morning paper. Both said no, "and she said they had an article that read in there, stating the hotel had not sent the union any money since February 5th. I said I don't believe that. So she went around and got her supplies and I started talking to her about a conversation that had happened at home over the telephone between my husband and the guy they work over to Local 64." Thereupon, Hayes left the room.[41] According to Grimes, she assumed,[42] without any proof, that other maids had overheard what Hayes reported inasmuch as maids normally congregate outside the linen room and as Hayes speaks in a loud voice. Thereafter, Grimes reported the incident to Sullivan and, approximately an hour and a half later, Grimes further testified, maid Elizabeth Santos entered Sullivan's office and said she wanted her union dues returned. Neither Grimes nor Sullivan replied, and Santos departed. Almost immediately, Sullivan telephoned Juneman who instructed Sullivan to prepare a communication to employee notice for Hayes because the latter seemed to be repeating the same story to other employees and had gotten Santos disturbed enough to demand the return of her dues money.

On Tuesday, June 8, 1982, Hayes reported to Ronald Juneman's office as directed and was informed by Lisa Helvey that because she had acted in violation of Respondent's rules she was terminated. Other than to Lena Grimes and John Morrow, Hayes denied discussing the contents of the newspaper article with any hotel employee on June 4. Finally, no evidence was offered as to whether Hayes' report of the contents of the newspaper article was false.

6. The refusal-to-arbitrate grievances

The record reveals that the existing collective-bargaining agreement between Respondent and the Charging Party contains a provision, article XXVII, entitled "Definition of Employees." Within this article, paragraph 28.4 states, "An extra employee is an individual who works at an Employer Hotel from time to time, who is not an employee of any particular hotel and who is not a full-time employee, part-time employee or a banquet extra employee." The agreement gives as examples of such individuals: extra bartenders, extra housemen, and cash bar cashiers. The record further reveals that, with regard to extra banquet personnel, paragraph 10 of Exhibit A to the collective-bargaining agreement provides that none shall be employed except as provided by the Charging Party—unless the latter is unable to furnish a sufficient number. The paragraph also provides that the Charging Party must submit the names of prospective banquet employees to employers regardless of their union membership or lack thereof; that the employer may accept or reject such applicants; and that the Charging Party must give 24 hours' notice to the employer of the names of said individuals if the employer's request is made 48 hours in advance. There is no dispute herein that Respondent utilized, at all times material herein, extra banquet waitresses in order to supplement its regular employees at the numerous functions held at the hotel.

The collective-bargaining agreement also contains a grievance and arbitration provision, article V. As set

[40] According to Hayes, at approximately 11:35 that morning, her floor supervisor, Lilly Ramey, passed by the room in which she was working, and said, "Hey, baby. What is all this about the union I'm hearing?" Hayes replied, asking if Ramey read the newspaper the previous night. Ramey said no, and Hayes told her to purchase a copy and read it herself.

[41] During cross-examination, Grimes admitted that the door was closed, that Hayes merely reported what was written in the newspaper article and was not giving her own opinion.

[42] "If she told me, she had told someone else."

forth therein, the grievance procedure consists of successive steps, the last being arbitration if grievances cannot be "satisfactorily" settled earlier. The article further provides that either party can request arbitration merely by giving the other notice of same within predetermined time restrictions. During the time period, November 12, 1981, through May 24, 1982, six individuals (Maurine Donnelly, Marguerite C. Stimac, Clara Walker, Tony Poke, Evelyn Anderson, and Rachael Dominquez), who work as extra banquet waitresses, filed individual grievances against Respondent, the underlying reasons and merits of which are not pertinent to this decision. Each grievance was filed on the Charging Party's standard grievance form and, in all respects, seems[43] to have complied with the contractual requirements. Moreover, it appears that Respondent processed each grievance through the various steps of the grievance procedure up to, but not including, arbitration. With regard to this last stage, the record establishes that the Charging Party's attorney requested arbitration of each grievance; that he notified Respondent of such; that the attorney sent letters to counsel for Respondent, requesting that he join taking steps to "strike" the arbitration panels and stating that, if the counsel did not respond, he (the Charging Party's attorney) would assume that Respondent would refuse to arbitrate; and that Respondent's counsel did not respond. The foregoing was uncontroverted.

B. *Analysis*

1. The Beatrice Edwards reprimand

The consolidated complaint alleges that the reprimand, in the form of a communication to employee notice, given to Beatrice Edwards by the acting manager of the Greenery restaurant, Reggie Williams, on September 25, 1981, was violative of Section 8(a)(1) and (3) of the Act. In support, counsel for the General Counsel argues that such was "nothing but a pretext to cover . . . Respondent's harassment of a known Union supporter." On the other hand, counsel for Respondent contends that the discipline was justified inasmuch as Edwards had violated restaurant policy by, on at least four occasions, serving customers at a table in Beulah Bass' service area and, thereby, depriving her of an opportunity to wait on said table.

At the outset, I note that Edwards had been an overt and known supporter of the Charging Party during the decertification election campaign, which had culminated in the NLRB-conducted election 2 weeks earlier; that the individuals who were seated at the table in Bass' station were union officials; that Bass was the employee who filed the decertification election petition and was aware of the identities of the two aforementioned individuals; that Bass admittedly refused to take their breakfast orders; that the two union officials waited in excess of 20 minutes for Bass to finally bring their meals; and that while it was contrary to established policy for a waitress to wait upon tables in another's station, it was a common practice, as Bass admitted, for a passing waitress to pour coffee or cream or water for a customer in another waitress' area. While there is no dispute that Edwards did wait upon the union officials that morning, Edwards and Harold Hamilton, both of whom testified candidly and forthrightly and are credited herein, insisted that the former did so only to the extent of pouring coffee on one occasion and cream on another. In contrast, Bass testified that she observed Edwards at the union officials' table at least four times; however, I found her account replete with inconsistencies and therefore not credible. In particular, I note that while initially asserting she took the officials their coffee, water, and menus, Bass later testified that when she first noticed them, they already had coffee, water, silverware, and menus in front of them and that after initially asserting that Edwards was at the union officials' table four or five times *before* she served them, Bass later testified that Edwards was at that table four or five times *after* she served the food.

While it seems obvious that Bass did, indeed, register with Williams, a complaint, regarding Edwards' conduct, I believe it likely that, based on the foregoing, such was greatly embellished to imbue the occurrence with more significance than it deserved. That Acting Manager Williams recognized the inherent triviality of the conduct is clear from the fact that he sought to justify the resulting discipline with what appears to be an entirely spurious allegation—that Edwards was "insubordinate" to him. Not a scintilla of evidence exists in the record in support thereof, and Respondent offered no explanation for the failure to utilize Williams as a witness in order to explain the basis for this allegation. In sum, the extent of whatever insubordination Edwards may have engaged—and I am not prepared, and do not, find that she engaged in any—appears to have been grossly and unjustifiably exaggerated to the point that such seems to be utterly pretextual. Thus, I believe Respondent, through Williams, acted to punish a known supporter of the Charging Party for said support and, perhaps, to protect Beulah Bass, an individual who was an antagonist of the Charging Party—in violation of Section 8(a)(1) and (3) of the Act.

2. James Grimes

The consolidated complaint alleges that both the reprimand, in the form of a communication to employee notice, given to Grimes on September 15, and his subsequent suspension and ultimate discharge on October 9, 1981, were violative of Section 8(a)(1) and (3) of the Act. In support, counsel for the General Counsel asserts that these actions were in retaliation for Grimes' activities as a union steward[44] and for his support for the

[43] Respondent's attorney argues in his posthearing brief that these grievances were not in compliance with art. V but is not specific as to how. I can find no facts to substantiate noncompliance.

[44] It is well established that an employer violates Sec. 8(a)(1) and (3) of the Act when he disciplines employees solely because of their status as shop stewards (*Precision Castings Co.*, 233 NLRB 183, 184 (1977); *United Aircraft Corp.*, 188 NLRB 633 (1971)), or as a result of their conduct as union stewards in processing grievances, policing collective-bargaining agreements, or engaging in other such activities. (*NLRB v. Clayton Construction Corp*, 652 F.2d 6 (8th Cir. 1981); *Boston Mutual Life Ins. Co.*, 259 NLRB 1270 (1982); *Postal Service*, 252 NLRB 624 (1980); *General*

Continued

Charging Party. Also, it is alleged that the interview which was conducted with Grimes by Juneman and Moore subsequent to the October 4, 1981 incident with William French was contrary to the rules set forth in *NLRB v. J. Weingarten*, 420 U.S. 251 (1975), and, thereby, violative of Section 8(a)(1) of the Act. With regard to his discharge, counsel for Respondent argues that Grimes had a long history of misconduct; therefore, his discharge was warranted and not motivated by unlawful concerns.

Initially, I note that resolution of the foregoing issues depends, to a great extent, upon a determination of the credibility of the various witnesses, most particularly Grimes, Moore, and Juneman. While finding that none of the three testified entirely candidly concerning the instant matters, I was least impressed with the demeanor and memory of Mary Moore. I found her recollection of the events of September and October 1981 to be clearly deficient and believe that, based on the aforementioned contradictions, both internally with other points in her testimony and externally with the testimony of other witnesses, she attempted to fill the gaps in her memory with fabrications. I credit Moore not at all herein. James Grimes also impressed me as being an inherently incredible witness and believe that, in most areas, he testified in a manner calculated to support his allegations. Except when in conflict with Mary Moore or where uncontroverted, I do not rely on Grimes' testimony. Evaluation of his testimony convinces me that Ronald Juneman engaged in the odious practice, which seemed to be endemic to several of Respondent's witnesses, of embellishing significant aspects of his testimony in order to bolster Respondent's case. Nevertheless, while testifying, he impressed me as being more candid than either Moore or Grimes. Accordingly, while I recognize the obvious problems with, and deficiencies in, his testimony, and do not rely on what I consider to be greatly exaggerated portions, Juneman will be credited herein.

The critical issue, of course, in determining the legality of the disciplinary actions taken against Grimes is whether the September 15 reprimand and the suspension and subsequent termination were motivated by his support for the Charging Party and by his activities as union steward. In cases such as herein, where motivation is the determining factor, the Board requires "that the General Counsel make a *prima facie* showing sufficient to support the inference that protected activity was a 'motivating factor' . . . . [then] the burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct." *Wright Line*, 251 NLRB 1083, 1089 (1980).[45] As to whether there exists evidence in the record of unlawful motivation, I initially note that the restriction prohibiting Grimes from being in the area of the Greenery kitchen was given to him in August 1981—in the midst of the decertification election campaign. In this regard, Grimes consistently denied speaking to employees about union business while passing through that area; Juneman, who issued the restriction, failed to offer any explanation for it during his testimony; and Mary Moore's assertion that one reason for the restriction was Grimes' harassment of Beulah Bass was not corroborated by the latter (Bass, in fact, said that Grimes rarely spoke to her and that such was one reason Grimes' September 15 "greeting" so upset her). These factors certainly support the inference that the area restriction was related to Grimes' status as a union steward and intended to somehow keep him away from, or at least inhibit his ability to meet, the Greenery employees during the decertification election campaign.[46] As further support for the existence of required unlawful motivation is the fact that Juneman failed to controvert Grimes' testimony regarding a meeting between the two in a hotel hallway also in early August during which Juneman accused the union steward of "running the place." The fact that Juneman smiled while he spoke does not detract from the impact of his words.[47]

Bearing in mind the foregoing, I turn to a consideration of whether the reprimand given to Grimes over his "greeting" to Beulah Bass on September 15 was violative of Section 8(a)(1) and (3) of the Act. What immediately strikes me with regard to this discipline is its similarity, in terms of cause and reaction, to that given Beatrice Edwards 10 days later. Thus, as with Edwards' conduct in serving the two union officials coffee and cream, Grimes' "Good morning, Beulah baby" comment appears to have been of a trivial nature and, notwithstanding his undoubtedly caustic tone of voice, not particularly menacing or abusive. That Respondent seems to have embellished the necessity for its reaction to Grimes' conduct is clear from Douglas Brown's characterization of Bass after the incident—incoherent to the point of tears. Bass herself did not corroborate this, describing herself merely as upset. Further illustrative of Respondent's effort to exaggerate the seriousness of Grimes' action is the rationale for the discipline, alleging him to have been in an unau-

Motors Corp., 233 NLRB 47 (1977)). However, a union steward may remove himself from the protection of the Act if his conduct as steward exceeds acceptable bounds of conduct such as forming a strike in violation of a contractual no-strike clause (*J. P. Wetherby Construction Corp.*, 182 NLRB 690 (1970)), instructing employees not to follow work orders (*Stop & Shop, Inc.*, 161 NLRB 75 (1966)), refusing to follow instructions and influencing other employees to so act (*Riviera Mfg. Co.*, 167 NLRB 772 (1967)), and deliberately violating established grievance-handling procedures (*Rickel Home Centers*, 262 NLRB 731 (1982)). Further, as any employee in a collective-bargaining or labor relations context, stewards may lose the protection of the Act if they engage in clearly opprobrious, disruptive behavior. *Container Corp.* 255 NLRB 1404 (1981); *Chrysler Corp.*, 249 NLRB 1102 (1980); *Consolidated Freightways Corp.* 242 NLRB 770 (1979).

[45] In concluding that a prima facie violation of the Act has been established, the Board will not "quantitatively analyze" the effect of the unlawful motive. The existence of such is sufficient to make a discharge a violation of the Act. *Wright Line*, supra at 1089, fn. 14.

[46] As such, of course, it failed, for Grimes did have access to the Greenery employees during nonwork hours.

[47] Counsel for the General Counsel contends that Gordon Bell's alleged comments to Grimes during their short conversation in Moore's office—2 days before the decertification election—likewise exhibited Respondent's animus towards Grimes. However, between the two, I credit Bell as to this conversation and find no evidence of animus. Bell's demeanor was that of a truthful witness, and I find it odd that apparently the only reported instance of such alleged remarks would be to a union steward, who would certainly be a union supporter and who would be more knowledgeable about employer-employee relations than the average employee.

thorized area that morning. Assuming arguendo the validity of the restriction, I do not believe Grimes was not supposed to be in the Greenery area at that time. Thus, crediting Grimes over Mary Moore as I have, I believe he had been instructed to work a buffet breakfast in the La Carrousel restaurant by the catering captain and it was not until after the incident, when Moore arrived at work, that Grimes was ordered away from the area. In short, I conclude that Respondent justified the communication to employee notice with a blatant fabrication and that the other asserted reason for the discipline (sexual harassment)[48] was merely a pretext to disguise Respondent's real motivation—Grimes' union activities as steward. The reprimand was, therefore, violative of Section 8(a)(1) and (3) of the Act.

With regard to the suspension and eventual discharge of Grimes on October 9, it is initially necessary to examine the precipitating cause—the William French incident on Sunday evening, October 4. Initially, counsel for the General Counsel does not dispute the fact that French did, in fact, complain to Ronald Juneman the next day about what had occurred the previous evening. Close scrutiny of the record[49] convinces me that not only did French truthfully testify as to his version of the incident but also he truthfully reported the event to Juneman. Thus, if one were to credit Grimes' account of his meeting with French, there simply would have been no reason for the latter to have complained to Juneman. Moreover, he would have admitted a violation of a strictly enforced work rule prohibiting the eating of banquet food by employees. Further, I did not believe Grimes' statement, disclaiming knowledge of French's union sympathies. To the contrary, illustrated by his sarcasm to the antiunion Beulah Bass, Grimes, I believe, was undoubtedly quite capable of intimidating another union foe, French, in the manner alleged. However, while I find, as French testified, that at approximately 8 p.m. on October 4 Grimes beckoned to French to speak to him in the public hallway near the swinging doors on the Trianon level and that Grimes, after inquiring if French was one of those against the Union, said he would place said information "in the union report" and that French accurately reported the facts to Juneman, the record justifies the inference, as with the previously discussed reprimands to Edwards and Grimes over the Beulah Bass incidents, that Respondent embellished the facts in order to inflate the seriousness of alleged misconduct toward an antiunion employee. Thus, while French testified that he reported the incident to Juneman merely because "I figured he would need to know what happened" the latter characterized French as being "honestly visibly shaken. He was scared. He feared for his physical well-being" and asserted that such was an important consideration in his decision to discipline Grimes. Further, Respondent's account of the facts in the suspension notice (G.C. Exh. 18), implies that Grimes accosted French clearly in a public area (on an escalator) and coerced and intimidated him during their conversation. In light of the foregoing, and of the evidence of unlawful animus in the record, counsel for the General Counsel contends that the suspension and discharge of Grimes for the French incident was pretextual and that the real reason was his status as union steward. I believe that a prima facie case has been established in this regard.

The burden of proof, thus, shifted to Respondent to demonstrate that it would have reached the same decision and taken the identical actions notwithstanding Grimes' activities and status as a union steward. In establishing its defense, Respondent relies on the testimony of Moore and Juneman. As discussed above, I place no reliance on that of the former; however, I do rely on and credit the testimony of Juneman concerning the reasons for the discharge of Grimes as, I believe, such is corroborated by the record as a whole. I do so cognizant of the fact that, while testifying and in documents, Juneman utterly exaggerated the seriousness of the French incident. Two factors are crucial to my conclusion. Initially, notwithstanding Respondent's embellishment, it does appear that Grimes, in fact, did engage in misconduct on the evening of October 4. Thus, Grimes violated a work rule by, without permission, speaking to French about ostensible union business during worktime in a public area. While counsel for the General Counsel argues that article XIV of the parties' collective-bargaining agreement applies only to outside business agents, Grimes admitted that he understood said rule or an identical rule applied to his conduct as a union steward. Further, while one may dispute the level of coercion, certainly the only logical purpose behind Grimes' conduct was to intimidate a fellow employee who had not supported the Charging Party during the recently concluded decertification election campaign. Next, Grimes' previous record of misconduct, which record, Juneman testified, was crucial to the decision to terminate the union steward, supports Juneman's credibility. In particular, I note the March 13 "reminder" to Grimes and his August 10 1-week suspension letter. As to the former, it was issued to Grimes as a result of complaints from employees regarding his penchant for discussing union business while on duty. Grimes admitted the factual basis for the document and his receipt of it. As to the latter, what is significant is Respondent's admonition that another violation of Respondent's employee rules and regulations would result in immediate termination. Further, there is no record evidence that either disciplinary action was unlawfully motivated or that Respondent's reliance on them was in bad

[48] I accept as accurate the seriousness of Respondent's policy prohibiting the sexual harassment of employees and do not mean to disparage it herein. However, I agree with counsel for the General Counsel that the surrounding circumstances support the conclusion that such was a pretext for the disciplining of Grimes, an act which was occasioned by Bass' convenient complaint about Grimes' rather innocuous comment to her. In this regard, it appears that his comment was not unlike that common in a restaurant environment and that previous incidents of punishment for sexual harassment were for far more serious conduct, such as propositioning a female employee.

Finally, that Respondent was not above harassing the Charging Party's stewards is further demonstrated by its conduct toward Thelma Glover, as described infra.

[49] I have previously discussed the lack of credibility exhibited by Grimes during his testimony. Likewise, French was not a particularly impressive witness, exhibiting inconsistencies and contradicting other witnesses.

faith.[50] In these circumstances, given the similarity between the French incident and the March and August 1981 conduct, it would appear that Respondent has established that Grimes would have been terminated notwithstanding Respondent's demonstrated unlawful animus.[51]

Taking the position that disciplining a steward for speaking to other employees concerning their union sympathies chills communications between stewards and employees and discourages employees from becoming stewards, counsel for the General Counsel asserts that "while an employer who has problems resulting from a steward's conversation with other employees may discuss this matter with the steward or the Union, the Employer may not lawfully suspend or discharge the steward for this reason." No case support is cited for this assertion of steward immunity and to suggest that a steward, who violates an employer's rules and regulations, may not be disciplined by suspension and/or termination is a misstatement of Board law. Thus, in *Rickel Home Centers*, 262 NLRB 731, a steward, in attempting to resolve a work problem, engaged in conduct violative of a collective-bargaining agreement and the employer's work rules. Concluding that the steward's discharge was for "legitimate cause" and not motivated by his status or other union animus, the Board noted that the steward was insubordinate and violated established procedures and stated such conduct was "unprotected by the Act and for which his status as union steward provided no immunity." Id. Likewise, in *Jos. Schlitz Brewing Co.*, 240 NLRB 710 (1978), a steward engaged in insubordinate conduct—refusing to work scheduled hours. The Board concluded that "[h]is status as shop steward should not furnish the basis for immunity from his acts of insubordination." Id. at 713. Herein, Grimes, who 2 months earlier had been warned that another act of insubordination would result in his discharge, violated both contractual and employee work rules when he spoke to William French on October 4, 1981. His status as union steward can offer no immunity for this misconduct. Finally, it makes no difference that Juneman may have been desirous of being rid "of a thorn in his side." For, "if an employee provides an employer with a sufficient cause for his dismissal by engaging in conduct for which he would have been terminated in any event, and the employer terminates him for that reason, the circumstances that the employer welcomed the opportunity to discharge does not make it discriminatory and therefore unlawful." *Klate Holt Co.*, 161 NLRB 1606, 1612 (1966). Based on the foregoing, I shall recommend that the consolidated complaint paragraphs pertaining to the discharge of James Grimes be dismissed. *Rickel Home Centers*, supra.

It is next alleged that the October 6 interview of James Grimes by Juneman and Moore was conducted in violation of the Supreme Court's *Weingarten* decision. As to this, Grimes testified that immediately upon entering Juneman's office that day, he was given a copy of his suspension letter and that, after reading it, he requested the presence of the Charging Party's official Edward Miller According to Grimes, Juneman denied the request because Grimes was a union steward. Grimes further testified that he was then asked for, and he related, his version of the meeting with French, never admitting the latter's version. Contrary to Grimes, Moore asserted that Juneman inquired as to whether Grimes desired the presence of a representative and the latter refused, saying he was a steward; that Grimes admitted that French's version of the Sunday night incident was correct; and that the suspension notice was given to Grimes on another occasion, after she and Juneman decided upon the discipline. During his testimony, Juneman said nothing about whether Grimes requested or he offered the presence of a union representative but did corroborate Moore that, while seeking to assuage the potential discipline, Grimes essentially corroborated French's version of the incident and that, afterward, he and Moore discussed the situation and decided to suspend Grimes, giving him, at that point, the suspension letter. With regard to the presence of a union representative, I credit the testimony of Grimes that he requested that Edward Miller be present during the interview but that Juneman denied the request. In this regard, while Moore testified that it was Juneman who made the offer of union representation to Grimes and that Grimes refused it, Juneman failed to corroborate the assertion. Essentially then, only a credibility resolution between Moore and Grimes remains and, as set forth above, I credit the latter in such instances. Further, while the suspension letter may have been drafted prior to the interview with Grimes (I credit him on this point), I credit the admissions of both Moore and Juneman that the final decision to suspend him was reached subsequent to his confirmation or corroboration of the facts, as previously related by French.[52]

In *Weingarten*, supra, the Supreme Court affirmed the determination of the Board that an employer violated Section 8(a)(1) of the Act by denying an employee's request that her union representative be present during an investigatory interview which, the employee reasonably believed, might result in disciplinary action. The Court noted that "the right arises only where the employee requests representation" and that the "employee may forgo his guaranteed right and, if he prefers and at his own instigation, participate in an interview unaccompanied by his union representative." Further, it makes no difference whether the employee interview be labeled investigatory or disciplinary. The *Weingarten* rules apply to both, save only those conducted for the exclusive purpose of notifying an employee of previously determined disciplinary action. *Baton Rouge Water Works*, 246 NLRB 995, 997–998 (1979). I have credited the testimony of Grimes that he requested the presence of Union Representative Miller upon reading of his suspension and that Juneman

[50] Counsel for the General Counsel does not contend that either should have been expunged subsequent to September 9, 1981, and I do not so find, bearing in mind that neither was the subject of a communication to employee notice.

[51] In this regard, I agree with Respondent's counsel that, given the fact that his wife was a managerial employee, it is highly unlikely that Respondent would have unlawfully terminated Grimes, thereby risking the potential loss of his wife.

[52] I do not credit Grimes' denial that he admitted the conduct as alleged by French.

denied his request and proceeded to interview Grimes as to the French incident. Further, as the meeting was not merely for the purpose of informing Grimes of his suspension,[53] I find Respondent's conduct violative of Section 8(a)(1) of the Act. *Houston Coca-Cola Bottling Co.*, 265 NLRB 1488 (1982).

3. The Thelma Glover letter

The consolidated amended complaint alleges that the letter from Juneman to Clarence Owens, dated December 16, 1981, wherein Juneman warned that future misrepresentation of Respondent's business practices by Glover would be considered "misconduct," was in violation of Section 8(a)(1) of the Act. In support, counsel for the General Counsel argues that even if Glover misrepresented Respondent's policies, the warning related directly to her performance as a steward; that such a warning would "chill" communications between stewards and employees; and that employees would be discouraged from acting in such a capacity for fear mistakes would adversely affect their status as employees. Finally, while no actual discipline attached, the warning is alleged as coercive inasmuch as Respondent offered no legitimate business purpose for issuing the warning. In defense. Respondent essentially argues that as no actual discipline was given to Glover, there was no violation of the Act.

I find merit in the position of counsel for the General Counsel. Initially, the law is settled that a shop steward, who, on behalf of fellow employees, makes assertions regarding matters pertaining to work, may not be lawfully disciplined for such by an employer notwithstanding the fact that said assertions are incorrect. *NLRB v. Clayton Construction Corp.*, supra. Moreover, the Board has long held that an individual engages in protected concerted activities when he, in good faith, complains pursuant to a collective-bargaining agreement, notwithstanding that the complaints are without merit or in error. *Delta Electric*, 236 NLRB 1108, 1112 (1978); *United Parcel Service*, 234 NLRB 483, 491 (1978). There is no record evidence to suggest that Glover acted in anything but good faith when she sent an employee to Juneman with regard to a hospitalization card, an act clearly within her duties as a union steward. That she may have been in error is, of course, no justification for Respondent's resulting conduct. Further, I find no merit in Respondent's defense that no actual discipline attached. There is no doubt that Juneman's statement in the December 16 letter would have a chilling effect on stewards' activities at the hotel, causing the spectre of discipline to haunt Glover should she ever be mistaken in her advice to employees in the future. No business justification for such was offered and, indeed, I cannot perceive the existence of such. In these circumstances, I must conclude that Juneman's threat of discipline to Glover was in violation of Section 8(a)(1) of the Act.

[53] Moore vaguely alluded to such a possibility; I discount it as not credible testimony.

4. The discharge of Edna Hayes

The consolidated complaint alleges that Edna Hayes was discharged by Respondent in violation of Section 8(a)(1) and (3) of the Act. In support, counsel for the General Counsel urges three separate theories: that Hayes engaged in protected concerted activities when she made her comments to Lena Grimes and John Morrow behind the closed door of the linen room on the morning of June 4, 1982, and that her resultant discharge was violative of the Act; that by maintaining and enforcing rule 11 of its employee rules, Respondent violated Section 8(a)(1) of the Act, causing any discharge for violation thereof likewise to be violative of the Act; and that if Respondent believed Hayes transmitted her comments to other employees and fired her for that reason, such is also violative of the Act. Taking a contrary position, counsel for Respondent asserts that Hayes engaged in no protected concerted activities and that rule 11 is not violative of the Act.

At the outset, the surrounding facts pertaining to Hayes' termination are not in dispute. Thus, in the morning of October 4, Hayes entered the linen room; closed the door; interrupted a conversation between Lena Grimes and John Morrow, both of whom were criticizing the Charging Party; and, calling their attention to an article in the previous afternoon newspaper, said that it was written therein that the hotel had not remitted any money to the Charging Party since February 5, 1982. Both Grimes and Morrow expressed their disbelief at Hayes' account of the newspaper article. There is no record evidence that any employee overheard Hayes' comments or that she repeated them to any other employee. Further, there is no evidence that she falsely or mistakenly reported the contents of the story. Finally, Hayes was suspended and subsequently terminated for telling "numerous" employees that Respondent had failed to remit dues moneys to the Charging Party—in violation of Respondent's aforementioned rule 11, among others.

I am convinced that, utilizing the asserted reason for her discharge, Hayes was terminated in violation of Section 8(a)(1) of the Act. As to the fact that Hayes allegedly related the contents of the newspaper article to numerous employees, if, as alleged, she engaged in such conduct, Hayes engaged in union and protected concerted activities within the meaning of Section 7 of the Act. Thus, as pointed out by counsel for the General Counsel and the Charging Party's attorney, in *Datapoint Corp.*, 246 NLRB 234, 235 (1979), the Board held that a conversation may constitute protected concerted activity, notwithstanding that only a speaker and a listener are involved, when such relates to "matters of mutual concern to the affected employees." Here, the alleged conversations clearly concerned employees' terms and conditions of employment as portions of their wages were being withheld by Respondent for the payment of dues to the Charging Party. The fact that the moneys may not have been remitted to the Charging Party was obviously a matter of vital and common concern. Further, there is no record evidence that Hayes' report of the contents of the newspaper report was false, and I am not prepared to

find such. However, even if actually false, her alleged comments about Respondent and the Charging Party would nevertheless remain protected concerted activity. *American Cast Iron Pipe Co.*, 234 NLRB 1126, 1131 (1978). Finally, whether or not Hayes actually engaged in the alleged conduct is an irrelevant consideration; rather, the only pertinent inquiry concerns whether Respondent *believed* that she did. *Riverfront Restaurant*, 235 NLRB 319, 320 (1978). In this regard, Sullivan's accusation that four unidentified employees said Hayes had been repeating her comments concerning the article and the contents of the suspension letter establish that Respondent did, in fact, believe Hayes had so acted. Inasmuch as this is an admitted reason for the discharge, I find the discharge to be violative of Section 8(a)(1) and (3) of the Act.

With regard to whether Hayes' discharge for violating rule 11 alone constitutes a violation of the Act, I must initially determine whether said rule is itself per se violative of the Act. This rule proscribes the making of false, vicious, or malicious statements regarding, among others, Respondent or its business operations. In *American Cast Iron Pipe Co.*, supra, the Board had occasion to consider the validity of virtually identical employer rules. Therein, two rules, respectively prohibiting the making of "false, vicious or malicious verbal statements" and the distribution of "false, vicious or malicious written statements," were posted on the employee bulletin board. Noting that merely false utterances and writings constitute protected concerted activity, within the meaning of Section 7 of the Act, so long as they are not malicious, the Board concluded that each rule was per se violative of Section 8(a)(1) of the Act as it prohibited and punished the merely false as opposed to the vicious and malicious. Id. at 1131. I perceive no material difference between the two employee rules therein and rule 11 herein. As the latter draws a clear distinction, by use of the disjunctive, between false and vicious and malicious statements, I find it to be per se violative of Section 8(a)(1) of the Act.[54] In analogous situations, such as when employees are terminated for violating an invalid no-solicitation or no-distribution rule, the Board finds such discharges to be violative of the Act. *Newport News Shipbuilding Co.*, 233 NLRB 1433, 1451 (1977); *Keystone Resources*, 230 NLRB 247 (1977). Inasmuch as Hayes was terminated for violating, among others, rule 11, I find such to be violative of Section 8(a)(1) of the Act.[55]

[54] Counsel for Respondent seeks to distinguish between the instant case and the facts of *American Cast Iron Pipe Co.*; however, although they may be factually distinguishable, the rules were found to be per se unlawful. Accordingly, factual differences are irrelevant to consideration of the facial validity of the rules.

[55] Respondent contends that Lena Grimes and Kay Sullivan considered Hayes' comments to be false, vicious, *and* malicious—quoting from the suspension letter. In this regard, counsel asserts that use of the conjunctive makes the rationale lawful as the Board considers false and malicious communications to be outside the protection of Sec. 7 of the Act. However, while it is true that the suspension letter reads as stated above, it is also true that reference was made to employee rule 11 and that the above words were obviously meant to track the rule's prohibition. In these circumstances, I believe the governing language is that of rule 11 itself and not what is set forth in the suspension letter. Accordingly, I reject the argument of Respondent's counsel.

5. The refusal to arbitrate

The consoldiated complaint alleges that by refusing to arbitrate the grievances which were filed by the extra banquet waitresses, Respondent violated Section 8(a)(1) and (5) of the Act. Respondent offers several defenses to this allegation: that no valid contract exists between the parties; that inasmuch as the question of the certification of the results of the decertification was pending before the Board at the time, there was no duty to arbitrate; and that the extra banquet employees are not employees of Respondent and, therefore, Respondent was under no duty to process their grievances.

There exists no factual dispute herein that the collective-bargaining agreement between Respondent and the Charging Party is effective from June 16, 1978, until June 16, 1983; that the contract contains a grievance and arbitration provision and, at least, two paragraphs which refer to individuals known as extra banquet personnel; that Respondent utilizes extra banquet waiters and waitresses to augment its staff at banquet functions in the hotel; that between November 12, 1981, and May 24, 1982, six extra banquet waitresses filed individual grievances against Respondent; that Respondent processed these up to, but not including, arbitration; that the Charging Party's attorney sent letters to Respondent's counsel, requesting that the latter comply with the grievance and arbitration procedure by joining in striking arbitration panels and stating that failure to respond would be taken as a refusal to arbitrate; and that Respondent failed to respond. In agreement with counsel for the General Counsel and the Charging Party's attorney, I believe that Respondent's conduct indicates a refusal to arbitrate these grievances. Further, the Board has held that an employer acts in violation of Section 8(a)(1) and (5) of the Act by refusing to comply with a contractual arbitration clause and by refusing to arbitrate grievances. *Paramount Potato Chip Co.*, 252 NLRB 794, 797 (1980); *Independent Stave Co.*, 248 NLRB 219, 227–228 (1980).

With regard to the defenses raised by Respondent, although not well articulated, its initial defense, that no current collective-bargaining agreement exists, appears to be based on the Board's contract-bar rule that "an existing collective bargaining agreement not exceeding three years will bar a petition for redetermination of representation in most instances." *NLRB v. Circle A & W Products Co.*, 647 F.2d 924, 926 (9th Cir. 1981); *Vanity Fair Mills*, 256 NLRB 1104, 1105 (1981). However, nothing in the rule invalidates collective-bargaining agreements whose terms are for periods longer than 3 years in duration, and the Board has, in fact, found violations of Section 8(a)(1) and (5) of the Act when employers make unilateral changes in the terms of such contracts. *Keystone Consolidated Industries*, 237 NLRB 763 (1978). Further, the fact that midterm bargaining occurs does not invalidate the provisions of an entire collective-bargaining agreement for the remainder of its term. Thus, if impasse results in said negotiations, the contract provisions remain in effect, and an employer is not free to make unilateral changes. *Keystone Consolidated Industries*, supra at 767.

Next, Respondent argues that the filing of the decertification petition in June 1981 and the fact that the matter of the certification of the results of the September 1981 decertification election was pending before the Board at the time of the refusal to process the six grievances through to arbitration relieve Respondent from its obligation to bargain, including the arbitration of grievances, with the Charging Party as the latter may no longer be the majority representative of its employees. Thus, in *Telautograph Corp.*, 199 NLRB 892 (1972), the Board ruled that whenever a decertification election petition was filed, such permitted an employer to no longer bargain with the incumbent union until the matter was settled by the Board. While the Board overruled that decision in *Dresser Industries*, 264 NLRB 1088 (1982), it declined to make its ruling retroactive to pending cases. Id. at 1089. *Houston Coca-Cola Bottling Co.*, 265 NLRB 766. However, notwithstanding the aforementioned general proposition of law, the Board, in *Telautograph*, supra, specifically held that "the incumbent union may still continue to administer its contract and process grievances." Thus, it appears, and I find, that, despite the pendency of the unresolved decertification petition proceedings, the Charging Party retained its right to administer the parties' existing collective-bargaining agreement, including enforcement of the arbitration provision, and Respondent remained obligated to honor said agreement.[56] Finally, as to Respondent's argument that the extra banquet waitresses are not its employees and, thus, may not file grievances against it, I agree with the Charging Party's attorney that said issue involves one of the proper interpretations of the contract and is best resolved before an arbitrator. In sum, I find no merit to Respondent's defenses and conclude that by failing to process the grievances herein to arbitration, it engaged in conduct violative of Section 8(a)(1) and (5) of the Act.

REMEDY

Having concluded that Respondent has violated the Act by its acts and conduct described above, it is recommended that Respondent be required to cease and desist therefrom and to take certain affirmative action designed to effectuate the purposes of the Act.

With regard to the respective communication to employee reprimands given to Beatrice Edwards about September 25, 1981, and James Grimes about September 15, 1981, having concluded that Respondent violated Section 8(a)(1) and (3) of the Act by such conduct, I shall recommend that Respondent be ordered to expunge these notices from the respective personnel files of Edwards and Grimes. Having concluded that rule 11 of Respondent's "Standards and Conduct" is per se violative of Section 8(a)(1) of the Act, I shall recommend that Respondent be ordered to cease and desist from maintaining and enforcing the rule. Having concluded that Respondent violated Section 8(a)(1) and (5) of the Act by failing to process through arbitration the grievances which were filed by Maurine Donnelly, Marguerite C. Stimac, Clara Waller, Tony Poke, Evelyn Anderson, and Rachael Dominquez, I shall recommend that Respondent be ordered to bargain in good faith with the Charging Party by complying with the terms of the arbitration provisions of the existing collective-bargaining agreement. Having concluded that Respondent terminated Edna Hayes in violation of Section 8(a)(1) and (3) of the Act, I shall recommend that Respondent be ordered to offer her reinstatement to her former position or to a substantially equivalent position if such no longer exists, without any prejudice to her seniority or any other rights or privileges previously enjoyed; to make her whole for any loss of earnings she may have suffered as a result of her discriminatory discharge on June 8, 1982, with backpay to be computed in the manner set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as described in *Isis Plumbing Co.*, 138 NLRB 716 (1962), and *Florida Steel Corp.*, 231 NLRB 651 (1977), and to expunge all references to her suspension and discharge from her personnel file.

Finally, I have concluded that Respondent violated Section 8(a)(1) of the Act by conducting its interview with James Grimes without granting him his rights as set forth in *NLRB v. Weingarten*, supra. Counsel for the General Counsel contends that the remedy for such, in addition to the standard cease-and-desist language, should include a reinstatement and make-whole provision. In *Kraft Foods*, 251 NLRB 598 (1980), the Board established such a remedy for *Weingarten* violations. Therein, the Board stated that the General Counsel makes a prima facie showing that this is warranted by proving that the respondent conducted an interview in violation of *Weingarten*, supra, and that the employee was disciplined for conduct which was the subject of the unlawful interview. In order to negate this prima facie showing and establish that a cease-and-desist order is a sufficient remedy, the respondent must "demonstrate that its decision to discipline the employee in question was not based on information obtained at the unlawful interview." Applying the *Kraft Foods* analysis to the instant case, the General Counsel has established that an unlawful interview occurred, that the subject matter of this interview was the William French incident on October 4, 1981, and that the decision to suspend and, ultimately, terminate James Grimes was based, in large part, on the incident. Moreover, the record establishes, based on the admissions of Respondent's witnesses, that during his interview Grimes corroborated French's version of what occurred but denied his intent was to coerce French. While the foregoing establishes that the General Counsel made a prima facie showing that a reinstatement and make-whole remedy could be appropriate herein, I do not believe such is warranted. Thus, "the mere fact that

[56] I note that in *Houston Coca-Cola*, supra, the respondent argued that while a decertification petition was pending, an employer is free to make unilateral changes in working conditions. The Board sought to distinguish unilateral changes affecting a union's dealings with employees, whom the union represents, from those relating to wages and benefits and concluded that the former would be unlawful while a decertification petition remained pending, as the union remains the employees' bargaining representative. Id. at 766 fn.2.

The Board's holding is not particularly clear, and it may well be argued that failures to adhere to arbitration procedures fall within the former rather than the latter type of unilateral change. Hence, while not free from doubt, I do not believe *Houston Coca-Cola*, supra, is adverse to my decision herein.

discipline is imposed for misconduct which was the subject of a *Weingarten* violative interview does not irrefutably establish the required causal link between the interview and the discipline." *Houston Coca-Cola Bottling Co.*, 265 NLRB 766. Herein, Respondent was aware of what occurred during the October 4 incident from the statement of French; Grimes, other than corroborating the facts and denying a bad intent, added nothing to Respondent's knowledge. In *Houston Coca-Cola Bottling Co.*, supra, the respondent had previously learned that the employee involved had been in a restricted area of a plant without permission, and, during his unlawful interview, the employee merely corroborated the facts but denied knowledge that the area was restricted. Concluding that "no additional damaging information was obtained" from the employee's corroboration or admission, the Board refused to issue a *Kraft Foods* remedy and, instead, issued only a cease-and-desist order as "the unlawful interview produced no information other than that which [the respondent] already possessed" Id. Likewise, Respondent learned nothing it did not already know from its unlawful interview of Grimes on October 6. Therefore, the appropriate and proper remedy is the standard cease-and-desist order, which I shall recommend.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Charging Party is a labor organization within the meaning of Section 2(5) of the Act.

3. All employees employed by Respondent at its hotel; excluding executives, superintendents, department heads having the authority to hire and fire, supervisory employees having the authority to hire and fire and having an executive status, supervisory employees having an executive status with the right to effectively recommend hiring and firing, accounting or control employees, timekeepers, security officers, office employees, sales personnel, desk and mail clerks, checkers, cashiers, typists, stenographers, secretaries, supervisory stewards, storeroom and wineroom personnel, and all extra employees who have not worked at least an average of two functions (6 hours) per week for the period January 1, 1981, to July 24, 1981, constitute an appropriate bargaining unit within the meaning of Section 9(b) of the Act.

4. The Charging Party, at all times material herein, has been, and is now, the exclusive representative of all employees in the aforesaid appropriate unit within the meaning of Section 9(a) of the Act.

5. By refusing to abide by the provisions of its existing collective-bargaining agreement with the Charging Party and process through arbitration the grievances of Maurine Donnelly, Marguerite C. Stimac, Clara Waller, Tony Poke, Evelyn Anderson, and Rachael Dominguez, Respondent engaged in conduct violative of Section 8(a)(1) and (5) of the Act.

6. By issuing communication-to-employee reprimand notices respectively to Beatrice Edwards on September 25, 1981, and to James Grimes on September 15, 1981, because of their activities on behalf of the Charging Party, Respondent engaged in conduct violative of Section 8(a)(1) and (3) of the Act.

7. By suspending and, ultimately, terminating employee Edna Hayes on June 8, 1982, because of her activities in support of the Charging Party, Respondent engaged in conduct violative of Section 8(a)(1) and (3) of the Act.

8. By maintaining and enforcing rule 11 of its "Standards and Conduct," Respondent interfered with, coerced, and restrained employees in the exercise of the rights guaranteed by Section 7 of the Act in violation of Section 8(a)(1) of the Act.

9. By threatening employee Thelma Glover with discipline because she engaged in protected concerted activities as union steward, Respondent engaged in conduct violative of Section 8(a)(1) of the Act.

10. By denying the request of James Grimes to have a union representative at an interview, which he reasonably believed might result in discipline, Respondent engaged in conduct violative of Section 8(a)(1) of the Act.

11. Respondent committed no unfair labor practices not specifically set forth above.

12. The unfair labor practices specifically found above are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[57]

ORDER

The Respondent, Radisson Muehlebach Hotel, Kansas City, Missouri, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain in good faith with the Charging Party, as the exclusive bargaining representative of the employees in the following appropriate unit:

> All employees employed by Respondent at its hotel; excluding executives, superintendents, department heads having the authority to hire and fire, supervisory employees having the authority to hire and fire and having an executive status, supervisory employees having an executive status with the right to effectively recommend hiring and firing, accounting or control employees, timekeepers, security officers, office employees, sales personnel, desk and mail clerks, checkers, cashiers, typists, stenographers, secretaries, supervisory stewards, storeroom and wineroom personnel, and all extra employees who have not worked at least an average of two functions (6 hours) per week for the period January 1, 1981, to July 24, 1981.

(b) Issuing communication to employee reprimands to employees because of their activities in support of the Charging Party.

[57] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(c) Suspending and, ultimately terminating employees because of their activities in support of the Charging Party.

(d) Maintaining and enforcing Standards and Conduct Rule 11, relating to the making of false, vicious, or malicious statements against Respondent.

(e) Threatening employees with discipline because they engage in protected concerted activities within their duties as union stewards.

(f) Refusing to permit employees to have union representatives present at interviews, which they reasonably believe might result in discipline against them.

(g) In any like or related matter interfering with, coercing, or restraining employees in the exercise of rights guaranteed by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the purposes of the Act.

(a) Offer to Edna Hayes immediate and full reinstatement to her former position or, if such no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights and privileges previously enjoyed, and make her whole for any loss of earnings as a result of Respondent's discrimination against her in the manner set forth in the "Remedy."

(b) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Expunge from its records and files any and all references to the unlawful suspension and discharge of employee Edna Hayes and notify the employee, in writing, that this has been done and that evidence of the unlawful discharge will not be used as a basis for future personnel actions against her.

(d) Expunge from its records and files any and all references to the communication to employee notices, and the notices themselves, issued respectively to employee James Grimes on September 15, 1981, and to employee Beatrice Edwards on September 25, 1981.

(e) Abide by the arbitration provisions of its current collective-bargaining agreement with the Charging Party and process through arbitration, on request, the grievances of employees Maurine Donnelly, Marguerite C. Stimac, Clara Waller, Tony Poke, Evelyn Anderson, and Rachael Dominquez.

(f) Post at its Kansas City, Missouri facility copies of the attached notice marked "Appendix."[58] Copies of the notice, on forms provided by the Regional Director for Region 17, after being signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(g) Notify the Regional Director in writing within 20 days from the date of this Order what steps Respondent has taken to comply.

IT IS FURTHER ORDERED that, insofar as the consolidated complaint alleges that Respondent violated Section 8(a)(1) and (3) of the Act by suspending and terminating James Grimes, it be dismissed.

[58] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT refuse to bargain in good faith with Hotel & Restaurant Employees and Bartenders International Union, AFL-CIO, Local 64, as the exclusive bargaining representative of our employees in the following appropriate unit:

> All employees employed by Respondent at its hotel; excluding executives, superintendents, department heads having the authority to hire and fire, supervisory employees having the authority to hire and fire and having an executive status, supervisory employees having an executive status with the right to effectively recommend hiring and firing, accounting or control employees, timekeepers, security officers, office employees, sales personnel, desk and mail clerks, checkers, cashiers, typists, stenographers, secretaries, supervisory stewards, storeroom and wineroom personnel, and all extra employees who have not worked at least an average of two functions (6 hours) per week for the period January 1, 1981, to July 24, 1981.

WE WILL NOT issue "communication to employee" reprimands to our employees because of their activities on behalf of the Union.

WE WILL NOT suspend and/or terminate employees because of their activities in support of the Union.

WE WILL NOT enforce any work rules against employees, relating to the making of false, vicious, or malicious statements against this company or our business practices.

WE WILL NOT threaten employees with discipline because they engage in protected concerted activities within their duties as union stewards.

WE WILL NOT refuse to permit employees to have union representatives present at interviews which, our employees reasonably believe, might result in discipline against them.

WE WILL NOT in any like or related manner interfere with, coerce, or restrain our employees in the exercise of rights guaranteed by Section 7 of the Act.

WE WILL offer to Edna Hayes immediate and full reinstatement to her former position or, if the position no longer exists, to a substantially equivalent one without prejudice to her seniority or any other rights and privi-

leges previously enjoyed, and make her whole for any loss of earnings she may have suffered as a result of our discrimination against her, with interest.

WE WILL expunge from our records any and all references to the unlawful suspension and discharge of Edna Hayes and notify her, in writing, that this has been done and that evidence of the unlawful discharge will not be used as a basis for future personnel actions against her.

WE WILL expunge from our records any and all references to the "communication to employee" notices, including copies of the notices, issued respectively to James Grimes on September 15, 1981, and to Beatrice Edwards on September 25, 1981.

WE WILL abide by the arbitration provisions of our current collective-bargaining agreement with the Union and arbitrate, on request, the grievances of extra banquet employees Maurine Donnelly, Marguerite C. Stimac, Clara Waller, Tony Poke, Evelyn Anderson, and Rachael Dominquez.

RADISSON MUEHLEBACH HOTEL

Kraft, Inc. Retail Food Group *and* Zennon N. Olow, Petitioners *and* Local 34, United Food & Commercial Workers of America, AFL–CIO. Case 3–RD–819

17 January 1985

DECISION AND DIRECTION OF SECOND ELECTION

BY CHAIRMAN DOTSON AND MEMBERS HUNTER AND DENNIS

The National Labor Relations Board has considered objections to an election held 23 March 1984 and the Acting Regional Director's report and addendum recommending disposition of them. The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 119 for and 112 against the Union, with no challenged ballots.

The Board has reviewed the record in light of the Employer's exceptions and brief and adopts the Acting Regional Director's findings and recommendations only to the extent consistent with this Decision and Direction of Second Election.

Both the Petitioner and the Employer filed timely objections to conduct affecting the results of the election. Following an investigation, the Acting Regional Director concluded, without a hearing, that all objections lacked merit and did not warrant setting aside the election. The Acting Regional Director recommended that all objections be overruled and a certification of representative issue.

Contrary to the Acting Regional Director, we sustain the Petitioner's Objection 1 and the Employer's Objection 1 which concern the Region's use of a multilanguage Board election ballot.[1] On examination, we find, for the reasons set forth below, that the multilanguage ballot furnished by the Region is so seriously defective on its face as to interfere with the employees' ability to exercise their election choice.[2]

We first observe that the instructions and the proposition on the ballot appear in four languages. The Spanish and English translations are set forth in what appears to be preprinted type with letters smaller than the handwritten characters of the Vietnamese and Laotian translations. Thus, at times the Spanish and English translations seem lost or overshadowed by the other two translations. The translations are generally line by line which tends to create artificial phrasing in several of the languages. In our view the layout of the ballot makes for difficult reading even for the English-reading voters.

We also note the critical flaws encountered with the Vietnamese and Laotian interpretations, as pointed out by the Employer. The Acting Regional Director in his report conceded these translation inaccuracies but downplayed the high potential for voter confusion created if the proposition on the ballot makes no sense in two of the languages. The Acting Regional Director found a cure for the ballot's defects. He was persuaded that the partisan preelection campaigning, the collective-bargaining agreements, and the dues-checkoff authorization cards—all in English—somehow justified the poorly translated Board ballot. We disagree. We attach no weight to the fact that non-English reading employees may be forced to deal with only English translations in the workplace. Rather, it is the Board's responsibility when a multilanguage ballot is deemed appropriate to supply a ballot that can be comprehended in all the languages appearing on the ballot. See *General Shoe Corp.*, 77 NLRB 124 (1948), and *Fibre Leather Mfg. Corp.*, 167 NLRB 393 (1967).

We also disagree with the Acting Regional Director's conclusion that the eligible voters were presented with sufficient information prior to the election to enable them to intelligently cast their ballots. The requisite laboratory conditions for free expression of voter preference were not present here. *Rattan Art Gallery, Ltd.*, 260 NLRB 255 (1982). Board notices of election and the parties' instructional election campaigning have been found insufficient to cure defective Board ballots. *Thermalloy Corp.*, 233 NLRB 428 (1977), and *Marriot In-Flite Services v. NLRB*, 417 F.2d 563 (5th Cir. 1969), denying enf. 171 NLRB 742 (1968).

Because we find the ballot itself to be seriously inadequate, we need not address the Acting Regional Director's findings that the translation issues involved only a small percentage of the voters constituting an insufficient number to affect the results of the election. However, we point out that, contrary to the Acting Regional Director's findings, there is no indication from the evidence before us as to the number of Hispanic, Vietnamese, and Laotian employees who are unable to read English. The Acting Regional Director incorrectly assumed that the number of employees was three since the Employer supplied specific evidence concerning three employees who claimed confusion by the ballot. Rather, the appearance of the ballot has a

[1] In view of our disposition of this case, we do not find it necessary to address the Petitioner's and the Employer's remaining objections. The Petitioner's Objection 2 dealt with statements appearing in a local newspaper article allegedly attributable to the Union. The Petitioner's Objection 3 involved alleged union promises made to certain maintenance department unit employees. The Employer's Objection 2 was withdrawn. The Employer's Objection 3 alleged impermissible electioneering by the Union in the vicinity of the polling area. The Employer's Objection 4 concerned alleged threats made by a prounion employee sympathizer.

[2] A copy of the ballot is attached [omitted from publication].

tendency to confuse even the English-reading voters, which comprise the majority of the unit. In these circumstances, where the ballot is facially defective, we view evidence of actual voter confusion which would alter the election count as irrelevant. Nor is it controlling that some voters may have understood the ballot as relied on by the Acting Regional Director.

Accordingly, we reverse the Acting Regional Director's recommendation to overrule the Petitioner's Objection 1 and the Employer's Objection 1, sustain these objections, and set aside the election. We conclude in these circumstances it will effectuate the policies of the Act to direct another election.

[Direction of Second Election omitted from publication.]

MEMBER DENNIS, dissenting.

Contrary to my colleagues, I would not set aside the election. I do not believe that the translation of each line of the ballot into three non-English lanaguges precluded employees from reading the English portion. I therefore would not find that the ballot's organization was so confusing as to interfere with employees' opportunity to make informed decisions. That the Region might have organized the ballot better is not the issue. Rather, the issue is whether employees voted under conditions that permitted them to cast votes intelligently.

Further, I agree with the Acting Regional Director's determination that, under the circumstances, mistranslation of the ballot's propositions does not warrant setting aside the election. The translations in question were for only 3 out of a 238-person unit.[1] It is clear from two employees' statements that they understood (from the election campaign and reading the ballot's English as well as the foreign language) what they were voting about; the third employee admitted not even reading the propositions. Moreover, even assuming the three employees were confused by the ballot and voted contrary to their intentions, their votes could not have affected the election results.

In sum, I believe the facts show that the employees had sufficient information to vote intelligently, and the ballot did not taint the election results.

[1] Neither the Employer nor the Petitioner excepted to this finding.

So-Cal Products, Inc. d/b/a Eagle Headers *and* International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, Local 509. Case 31–CA–13088

17 January 1985

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS HUNTER AND DENNIS

On 24 February 1984 Administrative Law Judge Earldean V.S. Robbins issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed an answering brief.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, So-Cal Products, Inc. d/b/a Eagle Headers, Canoga Park, California, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

[1] The General Counsel has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

No party excepted to the judge's 8(a)(1) findings.

Member Hunter, in the absence of exceptions, adopts pro forma the judge's findings of 8(a)(1) violations.

DECISION

STATEMENT OF THE CASE

EARLDEAN V.S. ROBBINS, Administrative Law Judge. This matter was heard before me in Los Angeles, California, on October 25 and 26, 1983. The charge was filed by International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, Local 509 (the Union), and served on So-Cal Products, Inc. d/b/a Eagle Headers (Respondent), on May 9, 1983. The complaint, which issued June 23, 1983, alleges that Respondent violated Section 8(a)(1) and (3) of the National Labor Relations Act (the Act). The basic issues herein are whether Respondent discharged employees Rafael Gutierrez and Salvador Guzman because of their union or other protected concerted activities and whether Respondent engaged in certain other conduct which constituted independent violations of Section 8(a)(1) of the Act.

On the entire record,[1] including my observation of the demeanor of the witnesses, and after due consideration of the briefs filed by the parties, I make the following

FINDINGS OF FACT

I. JURISDICTION

At all times material, Respondent, a California corporation with an office and principal place of business located in Canoga Park, California, has been engaged in the manufacture of automobile parts. Respondent, in the course and conduct of its business operations, annually purchases and receives goods or services valued in excess of $50,000 from sellers or suppliers located within the State of California, which sellers or suppliers receive such goods in substantially the same form directly from outside the State of California.

The complaint alleges, Respondent admits, and I find that Respondent is now, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. LABOR ORGANIZATION

The complaint alleges, the parties stipulate, and I find that the Union is now, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Facts*

1. The business justifications for the layoffs

Respondent manufactures accessories and exhaust products for automobiles. Its business is a seasonal one with March through May being the peak sales season and August through September the slowest sales season. The production seasons parallel the sales season except that the production cycles usually commence 30 to 60 days prior to the sales cycles. Its employee complement fluctuates generally in direct relation to the production cycle, expanding by as much as 30 percent during the peak season. As the peak production season ends, Respondent normally begins a series of layoffs to reduce the complement as required by the demands of the slower production season. However, Respondent normally endeavors to confine this reduction in employee complement to less skilled employees and to maintain a permanent complement of the higher producing, more skilled employees.

Prior to 1980, Respondent was owned by Steven Goldstein, vice president of operations, and his father, Charles Goldstein. In 1980, due to strong competition and a rapidly escalating interest rate, Respondent began experiencing severe financial difficulty so that it switched from a profit of $150,000 in 1979 to a loss of $85,000 for the fiscal year ending September 30, 1980. This downturn continued throughout 1981 and into 1982. In an effort to achieve sounder financial footing, Steven

[1] Respondent's unopposed motion to correct the transcript is granted.

Goldstein (Goldstein), and his father sold 25 percent of the business to Herbert Goldstein in February 1982. In June 1982, having failed to achieve financial stability, an additional 25 percent of the business was sold to Herbert Goldstein. Steven Goldstein remained as vice president of operations until August 1983 when he and his father sold the remainder of their interest in Respondent to Herbert Goldstein.

Herbert Goldstein immediately expressed the desire to cut overhead expenses as much as possible and increase efficiency. In July and August, he demanded that Goldstein cut the payroll by 25 or 30 employees, but Goldstein argued successfully that these layoffs could not be effected all at once without adverse effect on Respondent. However, he began a series of layoffs on August 13. Eight employees were laid off in August, 10 in November, and 10 in December. In January, Respondent had 100 to 115 employees, about 95 percent of whom were Spanish-speaking. Guzman and another employee were laid off on January 14 and Gutierrez was laid off on January 21. The General Counsel concedes, and I find, that Respondent had legitimate business justification to effect layoffs extending into January.

2. The layoff of Guzman and Gutierrez

Guzman was employed by Respondent on January 29, 1976. He worked primarily as a parts mover for the welders. However, he was classified as a fabrication employee,[2] and did other jobs. At the time of his layoff, he was the only employee who worked primarily as a parts mover. Gutierrez, who worked on a production line as a collector-welder,[3] was hired by Respondent in August 1976. At the time of his layoff, there were two collector-welders in Respondent's employ. A third collector-welder, with greater seniority than Gutierrez, had been laid off on December 31, 1982. The General Counsel contends that Guzman and Gutierrez were selected for layoff because they engaged in union activities.

In mid-November 1982, certain of Respondent's employees began discussing the desirability of union representation. At some point they selected Guzman to contact the Union, which he did on January 2 or 3, 1983.[4] The union representatives gave Guzman union authorization cards which he distributed to some fellow employees who lived near him with the instructions to mail them to the Union after they were signed. On January 8, union representatives met with 15 to 20 of Respondent's employees at a park in Santa Monica. Both Guzman and Gutierrez were present. During the following week another union meeting was held. About 20 to 30 employees attended. Some of the employees signed union authorization cards at these meetings. Both Goldstein and Ollie Adkins, Respondent's plant manager and general foreman, testified that they had no knowledge of any union activity prior to Respondent receiving notice of the filing of the representation petition on January 24 or 25.[5]

On January 14, at the end of Guzman's shift, Adkins told Guzman he had to lay him off because Respondent wanted to save money. On January 20, Adkins called Guiterrez to his office and started to speak to him in English.[6] Gutierrez said he did not understand, so lead-person Vicente Jimenez was called in to interpret. According to Gutierrez, Jimenez said, "Ollie [Adkins] says that he does not like your attitude, and he doesn't like you at all." Gutierrez replied, "I am not here to be liked by anybody. I come to just do my work and do it right. I see that there are two checks on the table, and there is nothing to be said." Gutierrez then asked about unemployment papers Adkins said, "You are not going to need them, because you are dead."

Adkins testified that he told Gutierrez that they had to cut the work force, that Goldstein had insisted he had to let Gutierrez go, and the reason Adkins had chosen Gutierrez was his poor work record, his poor production. Gutierrez asked something about whether Adkins could give him a second chance. Adkins said, no, the decision was not his. Adkins denies saying, "I don't like your attitude" or "I don't like you at all." He also denies that Guiterrez said, "I don't work here to be liked by anybody. I come just to do my work and do it right." Adkins testified that Gutierrez did ask about papers to get his unemployment and he did tell Guiterrez that he did not need papers. However, he denies saying, "You're dead."[7]

I credit Adkins and Jimenez as to this conversation. Their testimony is mutually corroborative. Further, even assuming, arguendo, that Adkins had knowledge of the union activities, I note that there was no expression of hostility toward Guzman when he was laid off. Yet insofar as the record reveals, it was Guzman who was an initiator of union activities and there is no evidence that Gutierrez engaged in any union activity any different in kind from that of a number of other employees. In this regard, I have fully considered, and reject, the General Counsel's contention that the sign in Spanish at Gutierrez' work station, "Let's support Brujo [the warlock]," conveyed his involvement in union activities. The record does not support such a conclusion.

Employee Tommy Torres testified that some time in January, prior to Guzman's layoff, Adkins asked him if he knew that Leonard Hicks, Salvador, and Delgadillo were involved in the Union. Torres said he did not know anything. Adkins said, okay, and walked away.[8]

Wayne Dodds, a maintenance mechanic in Respondent's employ, testified that in late January or early February he went into Adkins' office to obtain his job as-

[2] This is a catch-all classification covering various jobs.

[3] A welder who welds the exhaust pipes of an automobile header into a large pipe which is a collector for all of the smog pipes.

[4] Unless otherwise indicated, all dates hereinafter will be in 1983.

[5] On January 20, the Union filed a petition with the Board seeking to represent Respondent's employees. According to Goldstein, Respondent received the notice of the filing of the petition on January 24 or 25.

[6] Goldstein and Ollie Adkins, then Respondent's plant manager and general foreman, do not speak Spanish. However, several of the lead persons are bilingual.

[7] At the time of the hearing, Jimenez had been plant manger for 2 weeks and Adkins was no longer in Respondent's employ.

[8] Hicks and Delgadillo were both welders in Respondent's employ at the time.

signments. At that time, Adkins mentioned that there was a union meeting the previous evening. Dodds said, "That is nice." Adkins asked if Dodds would see if he could find out anything about it, find out who the people were who were involved. Dodds said, sure, I'll see what I can find out. According to Dodds, Adkins further stated that he knew the address where the union meeting was held. Dodds also testified that on February 14 he went into Adkins' office. Leo Trane, a maintenance employee, was there. Dodds asked Adkins if he had heard anything about the Union lately. Adkins said, no, he had not. Trane said, "I would fire them all." Adkins said, "Well, we got rid of two of them." Dodds asked if one of them was Huedo, a supervisor in welding. Adkins said, no, it was not, it was Rafael and Salvador. Dodds is not sure whether his first conversation with Adkins occurred before or after Guzman and Gutierrez were laid off.[9]

Juan Vasquez, a leadman, testified that in the second or third week of February he and Adkins were talking about work when he asked Adkins what was going on in the plant. Adkins said, "I don't know, but I think some of your co-workers, they will try to bring the union in. Early or later, I will know who they are and then I will know what I have to do."[10]

Adkins denies the alleged conversations with Dodds, Torres, and Vasquez. He also testified that, at the time he laid off Guzman and Gutierrez, he had no knowledge of their sentiments regarding the Union nor did he have any knowledge of any union activity prior to the receipt of the notification of the filing of the representation petition. According to him, Goldstein told him a petition had been filed and that they were not to question employees regarding their union activities or support, that they were to stay out of it. Goldstein said he had been through it before and that Adkins was not to discuss the Union with anyone.

Goldstein testified that Respondent has no written layoff policy, that he established the layoff policy and administered it as he developed and framed it. According to him, he used a combination of factors in selecting persons to be laid off—efficiency, performance, and seniority to some degree where it could be applied. In the normal layoff situation, his selection follows the production flow. However, he testified, in the layoffs which began in August he more or less had to cut the size of the work force and yet try to maintain the most efficient crew possible. Thus, the principal determinant was the employee's ability. Selections were made so as to achieve a basic plantwide reduction. To the extent that seniority was considered in classifications such as welders or benders, department seniority was used. In other areas, depending on the flexibility of the employee, plantwide seniority was considered to some extent.

Goldstein also testified that the principal factors he considered were efficiency and rate of pay. All things being equal, he tried to keep a senior person but could not do that in cases where there was a great disparity of either production or payroll. Being marginally profitable, Respondent just could not afford to carry someone whose daily output was definitely less than other people working at the same job.[11] For example, Adelaido Robles, who had worked since 1975 as a collector-welder and an assembler-welder, was laid off in December without regard to seniority because his work had started to slip.

According to Goldstein, he initially tried to lay off the last people hired, in May, June, and July at the tail end of the production season. He did not consult Adkins in this regard. He merely told him who was being laid off. Then, as the cuts got deeper, the analysis of the individual employee became a bit more critical because he was trying to compare very closely who was the most efficient employee since, with the smaller crew, Respondent could not afford anything other than maximum output per person. At this point, he did discuss the selections with Adkins. According to him, basically he just presented to Adkins the names of the persons that he felt should be laid off and asked if he had any overriding reason why any of them should not be let go. He did consult Adkins as to Gutierrez, stating that his analysis was that Gutierrez was welding fewer parts per day than the other collector-welders and asked if Adkins disagreed. Adkins said, no, that he had spoken to Gutierrez regarding his production and then proceeded to relate two conversations he had with Gutierrez relative to increasing his production.

Goldstein admits that he did not consult Adkins as to Guzman since he was eliminating that particular job. One of the considerations in eliminating the parts movers classification was a desire to keep the more skilled employees. One way of keeping the welders busy was to let them take up an hour of their time doing their own parts moving, and to have another employee, Enrique Guzman, who had previously assisted Salvador Guzman in parts moving work as a parts mover for about 4 hours a day.

Adkins corroborates that it was Goldstein's decision as to who would be laid off, but testified that he regularly made suggestions. According to him, usually if it was a nonproduction type job, the layoff was strictly by seniority, but if it was something where performance was involved, then they pulled the work records and went according to performance. According to him, a parts mover is not a production job.[12] Adkins testified that he seldom made suggestions as to whom was let go, rather he would try to make a choice as to who to keep; but if it had been determined that a certain number of persons were to be laid off, then that number was laid off. He could not influence that basic decision. In the gray zone,

[9] Dodds is chairman of the in-plant union committee and has been since May.

[10] Vasquez was a member of the Union's negotiating grievance committee from sometime in May until 2 or 3 weeks prior to the hearing. Torres has also been a member of that committee since its inception sometime in May.

[11] Goldstein testified that he is aware of the production of all employees because he collected the job tickets daily and has read them for 11 years on a daily basis. The job tickets do not directly indicate the quality of work. However, it has been his practice to make spot checks as to quality.

[12] Adkins testified that at Respondent a production job was one on which you kept records as to actual output. They kept no records on how many parts the parts mover moved.

where one employee may have merits over another employee, he could sometimes influence those decisions. Occasionally his recommendation was accepted but in many cases it was not.

Adkins testified that at the time Gutierrez was laid off there were three collector-welders, Benjamin Vasquez, Raymond Cisneros, and Gutierrez. Vasquez was the best of the three and Gutierrez was the worst as to production. Adkins also testified that he talked to Gutierrez twice regarding his production, the last time was about 2 weeks prior to his layoff and the other occasion was probably 2 months.

Goldstein testified that there has never been any automatic right of recall in Respondent's history, but they have rehired employees from time to time based on their past performance. It was his decision as to whether a laid-off employee would be rehired. Goldstein also testified that he hired former employee Mario Munoz to do collector-welding a couple of months after Gutierrez' layoff. Munoz was only hired for the heavy season, 2-1/2 to 3 months. After that, he was laid off. Goldstein further testified that when the need for collector-work picked up, he tried a couple of times to reach Gutierrez but was unsuccessful. So when Munoz came in, he simply rehired him since he was a good, experienced worker. He also hired him at a lower wage rate than Gutierrez had been earning. Adkins testified that Munoz did not work full time as a collector-welder but did a number of other jobs also.

Another welder was hired between January 21 and August 18, during the peak season. However, he did no collector-welding and was laid off shortly after his hire date as the season ended.

When asked why he decided to let a welder go on January 21, just before the beginning of the peak season, Goldstein testified that he had three people to do the work of two and Gutierrez was the slowest one. According to him, he had no indication that very shortly he would need an additional collector-welder inasmuch as they were not meeting the sales projections forecast for the year;[13] so there was no point in continuing to stockpile headers inasmuch as they are the easiest things Respondent makes and are the easiest to stockpile.

There were no layoffs after January. February basically begins the selling season, so towards the end of February Respondent started to build production back up in anticipation of the 3- or 4-month peak season[14]

The General Counsel contends that if Goldstein had really wanted to contact Gutierrez when he needed to hire another collector-welder, he could have contacted him through his brother who was also in Respondent's employ. Goldstein testified that he does not recall that he was aware at that time that Gutierrez had a brother in Respondent's employ.

When Gutierrez was questioned as to whether, in the 2-month period before he was laid off, Adkins talked to him about his production, he testified that Adkins called in the welders in groups of three and told them if they did not increase production, what happened to Adelaido Robles was going to happen to them. He denies that Adkins ever had a private conversation with him regarding his production; and testified that at the time Adkins spoke to him, two port welders were present. Although Gutierrez testified as to the amount of his daily production, he did not dispute the testimony that he was the least productive of the three collector-welders. Since job tickets are retained for only about 6 weeks, no documentation of the relative production of these employees was available. Goldstein testified that, primarily for costing purposes, he maintained a production record on a spot-check basis whereby he would chart a different group of operations. Those records are also no longer in existence.

B. *Conclusion*

1. The alleged unlawful statements

I credit Dodds as to his conversations with Adkins. I found him to be an honest, reliable witness who was endeavoring to tell the truth. In this regard, I note that despite the questioning designed to determine if he could be more precise as to timing, and despite the obvious advantage to the General Counsel's case if he had firmly placed the first conversation with Adkins prior to the layoffs, he refrained from doing so. This is not consistent with a fabrication of testimony designed to support the position of the General Counsel and the Charging Party. I also credit Vasquez as to the statement made to him by Adkins. This occurred around the time of the Dodds-Trane-Adkins conversation—a time when Adkins did not seem adverse to expressing opinions to employees regarding union activities if they brought up the subject. Contrary to Respondent's urgings, I do not find that, during the course of a preelection campaign, an assumption by Adkins that Vasquez' question as to what was going on in the plant referred to the campaign was so unreasonable as to require a conclusion that Vasquez' testimony regarding his response lacked credence.

However, I do not credit Torres that prior to the layoffs, Adkins asked him if he knew that Leonard Hicks, Salvador, and Delgadillo[15] were involved in the Union. I find unreliable Torres' testimony as to the timing of this alleged conversation. Thus, he testified that he learned of the union activity from Dodds. Yet Dodds testified that he learned of the union activity through a conversation with Adkins. Dodds first testified that the conversation was in February. Then he testified that it was in late January or early February. In view of this testimony, I find it unlikely that the conversation occurred prior to January 14. I also note that Torres first

[13] According to Goldstein, these projections were based on the expection that Herbert Goldstein, one of the top salesmen in the industry, would obtain substantial increases in sales. However, he was hit in the eye with a tennis ball sometime in late October or early November, an accident which detached his retina and required several surgeries between then and the end of December.

[14] January and February are considered relatively slow months; March, April, and May are considered the best months; and June and July are considered good months. August tends to be slower and there is a definite decline in October and September. November and December may be good months depending upon the weather and the condition of the economy. The best months are March through May. The worst months are August and September and maybe February.

[15] Hicks and Delgadillo are welders in Respondent's employ.

testified that the conversation occurred "in the beginning and middle of January." In clarification, he then testified that, at the time, Gutierrez and Guzman were still employed by Respondent, that the conversation occurred during the first half of January. Yet he could not recall whether the first union meeting he attended was before or after they were laid off. Further, I note that, according to Torres, Adkins asked if he knew that Leonard Hicks, Salvador, and Delgadillo were involved in the Union. Yet, according to Vasquez' testimony, in February, Adkins made a statement to him which indicated that he did not yet know who was trying to bring the Union into the plant.

In view of my credibility findings, I find that Respondent violated Section 8(a)(1) of the Act by soliciting Dodds to inform him regarding the union activities of other employees and by creating the impression of surveillance of employees' union activities when he told Dodds he knew the address where the union meeting was held. I also find that, in context, Trane's statement, that he would fire them all, could only be interpreted as referring to union supporters. Therefore, Adkins' response that Respondent had gotten rid of two of them—Rafael and Salvador—was coercive in that it conveyed the impression that they had been laid off because of their union activities. Accordingly, I find that by this statement Respondent violated Section 8(a)(1) of the Act.

As to the statement made to Vasquez, contrary to Respondent's argument, I find that such a statement would reasonably be construed by an employee as constituting a threat of reprisals against union activists in Respondent's employ, and that Adkins intended to, and did, convey that impression. Accordingly, I find that Respondent thereby violated Section 8(a)(1) of the Act. Contrary to Respondent's contention, it is immaterial that the union discussions were initiated by Vasquez and by Dodds on one occasion. *Cardio Data System*, 264 NLRB 37 (1982). I also reject Respondent's argument that these statements were isolated or de minimis and require no remedy, inasmuch as Respondent and the Union subsequently negotiated a collective-bargaining agreement. *Holladay Park Hospital*, 262 NLRB 278 (1982).

2. The layoffs

The General Counsel contends that Guzman and Gutierrez were selected for layoff because of their union activities. Respondent contends it had no knowledge of the union activity prior to receiving notification of the filing of the representation petition. Thus, the initial issue is whether the evidence is sufficient to establish that Respondent had knowledge of the union activity in general and of the activity of Guzman and Gutierrez in particular prior thereto. The testimony of Goldstein and Adkins denying knowledge is supported by the evidence that the activity took place away from Respondent's premises and was so selective and secretive that employees who had become leaders in the Union by May had no knowledge, at that time, of the union activities.

Hence, the critical question is whether Adkins' statement to Dodds and Trane establishes knowledge, and unlawful motivation as well. I find that the statement does not establish knowledge at the time of the layoffs. Adkins' statement is equally as susceptible to a conclusion that he was expressing delight that the Respondent had laid off two employees who were subsequently found to have been union activists as it is to be the conclusion that they had been laid off unlawfully. Accordingly, I find that the General Counsel has failed to establish that, at the time of the layoffs, Respondent had knowledge of the union activities. Further, in this circumstance and in view of Respondent's legitimate reasons for a layoff, the General Counsel's failure to establish that Respondent had definitive policies or practices which it violated regarding the selection of employees to be laid off and the recall of laid-off employees; the absence of any evidence that Gutierrez engaged in any activities different in kind from that of a number of other employees; the prior layoff of senior employees; the limited nature of the unfair labor practices found herein; the fact that Goldstein, not Adkins, made the selections; the absence of unlawful conduct by Goldstein; and the absence of evidence to indicate that, but for Gutierrez' union activities, Adkins would have argued for his retention; I find that the General Counsel has failed to establish a prima facie case that the layoffs of Guzman and Gutierrez were unlawfully motivated. Accordingly, I find that these layoffs were not violative of Section 8(a)(1) and (3) of the Act.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By soliciting employees to inform regarding the union activities of fellow employees, by telling employees that fellow employees had been laid off because of their union activities, by creating the impression that the union activities of employees were under surveillance by Respondent, and by threatening employees with reprisals because of their union activities, Respondent has committed unfair labor practices in violation of Section 8(a)(1) of the Act.

4. The above-described unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

5. Respondent has not violated Section 8(a)(1) and (3) of the Act by laying off Salvador Guzman and Rafael Gutierrez, nor has Respondent violated Section 8(a)(1) of the Act except as found herein.

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I shall recommend that Respondent cease and desist therefrom and take certain affirmative action in order to effectuate the purposes of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[16]

[16] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended

Continued

ORDER

The Respondent, So-Cal Products, Inc. d/b/a Eagle Headers, Canoga Park, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Soliciting employees to inform Respondent regarding the union activities of fellow employees.

(b) Telling employees that fellow employees were laid off because of their union activities.

(c) Creating the impression of surveillance of employees' union activities.

(d) Threatening employees with reprisals because they engaged in union activity.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Post at its facility in Canoga Park, California, copies of the attached notice marked "Appendix."[17] Copies of the notice, on forms provided by the Regional Director for Region 31, after being signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director in writing within 20 days from the date of this Order what steps Respondent has taken to comply.

IT IS ALSO ORDERED that the complaint is dismissed insofar as it alleges that the layoff of Salvador Guzman and Rafael Gutierrez was violative of Section 8(a)(1) and (3) of the Act and insofar as it alleges that Respondent has violated Section 8(a)(1) of the Act in any respect other than found herein.

Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[17] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
>
> To form, join, or assist any union
>
> To bargain collectively through representatives of their own choice
>
> To act together for other mutual aid or protection
>
> To choose not to engage in any of these protected concerted activities.

In recognition of these rights, we notify our employees that:

WE WILL NOT solicit employees to inform us regarding the union activities of fellow employees.

WE WILL NOT tell our employees that fellow employees were laid off because they had engaged in union activities.

WE WILL NOT create the impression of surveillance of the union activities of our employees.

WE WILL NOT threaten employees with reprisals because they engaged in union activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

SO-CAL PRODUCTS, INC. D/B/A EAGLE HEADERS

Ace Cab Company, d/b/a Checker Cab Company, Marcella Cab Company and Manchester Cab Company *and* Chauffeurs and Industrial Workers, Local No. 5, affiliated with Seafarers International Union of North America, AFL–CIO. Case 14–CA–15712

18 January 1985

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS HUNTER AND DENNIS

On 18 March 1982 Administrative Law Judge Frank H. Itkin issued the attached decision. The Respondent filed exceptions and a supporting brief.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

Based on an essentially undisputed record, the judge found that the Respondent, a taxi service company, violated Section 8(a)(5), (3), and (1) of the Act by: (1) unilaterally announcing and implementing changes in the terms and conditions of the taxi drivers' employment; (2) dealing directly with the drivers rather than with their union representative; and (3) terminating the employment of those drivers who refused to abide by the unilateral changes in working conditions. Underlying these conclusions is the judge's determination that the taxi drivers are employees of the Respondent and not independent contractors as the Respondent argues. We disagree with the judge's resolution of the employee versus independent contractor issue and therefore reverse his findings of violations.

The National Labor Relations Act protects individuals who fall within the classification of "employee" and specifically excludes individuals who have the status of "independent contractor."[1] The judge reasoned that the determination as to whether an individual is appropriately classified as an employee or an independent contractor is based on general principles of agency law rather than on the application of any shorthand formula. As fully explicated in the attached decision the judge relied on the parties' long-established relationship (in which they apparently regarded themselves as employer-employee) as well as a number of company restrictions over the drivers' activities (as enumerated in the body of the collective-bargaining agreement and in an appended set of "Company's Working Rules") in concluding that the drivers are employees of the Respondent.[2] While we agree that certain of the characteristics on which the judge relied are suggestive of an employer-employee relationship, we find it significant that many of these factors are imposed not by the Respondent but by city and Federal regulations and insurance requirements. Moreover, we find that whatever factors may point toward an employer-employee relationship are overridden by the basic entrepreneurial nature of the drivers' arrangement with the Respondent which clearly establishes them as independent contractors.

In the recent decision in *Air Transit*,[3] the Board determined that taxicab drivers operating from Dulles Airport are independent contractors and not employees. Air Transit provided taxi service under a contract with the Federal Aviation Administration (FAA). The FAA imposed an extensive array of regulations on Air Transit which it, in turn, required the drivers to obey. The FAA contract required, for example, that taxi drivers accept all passenger assignments, that they obey all lawful directions from the dispatch, that certain vehicles be equipped with two-way radios, and that a particular fare schedule be followed. In exchange for a weekly stand fee to the company, drivers obtained the right to operate from its Dulles taxistand. Air Transit paid the drivers no wages; the drivers' income was determined solely by the receipts from the passengers they transported.

Adopting the reasoning of the District of Columbia Circuit Court of Appeals in *Seafarers Local 777 (Yellow Cab) v. NLRB*,[4] the Board determined that two elements were significant in determining that no employer-employee relationship exists: first, the company's lack of control over the drivers' means and manner of operation after leaving the garage and, second, the absence of any correlation between the company's income and the amount of fares collected by its drivers. The Board agreed with the court's statement that "Government regulations constitute supervision not by the employer but by the state";[5] therefore, the greater the control exerted by the governmental entity, the less opportunity for control by the putative employer. In such a situation the company has very little to

[1] Sec. 2(3) of the Labor Management Relations Act.

[2] Among the factors the judge found persuasive in his determination are: (1) the parties' collective-bargaining relationship dating back to 1966; (2) the parties' use of the terms "employer" and "employee" in referring to one another; (3) company restrictions over the right of owner-drivers to sell their vehicles; (4) restrictions over the right of owner-drivers to keep their vehicles out of service while retaining company identification; (5) widespread use by the drivers of the company dispatch service to obtain fares; (6) company requirements for appropriate driver attire; and (7) a variety of dischargeable offenses.

[3] 271 NLRB 1108 (1984).

[4] 603 F.2d 862 (1978).

[5] Id. at 875.

do with directing the manner and means by which the drivers conduct their normal daily business. Second, the arrangement between the drivers and the company entitled drivers to operate under the company's authority in exchange for payment of a fixed periodic fee. The company did not compensate the drivers for their efforts, but rather the drivers themselves determined their income by virtue of the number of fares they carried. Likewise, the company's revenues were unaffected by the drivers' efforts, but rather remained constant by virtue of the fixed fee arrangement. In a situation exhibiting both these elements—lack of control or actual supervision over the performance of the drivers' functions and lack of correlation between the drivers' efforts and the employees' profits—a finding of independent contractor status is warranted.

The facts of the instant case lend themselves to the same analysis. Most of the rules under which the drivers operate are dictated by either insurance or city requirements. Among the insurance-related rules are accident reporting procedures, restrictions on usage of alcohol or drugs while on duty, remaining within the authorized mileage radius, requesting passengers to ride in the back seat of the vehicle, and compliance with safe driving procedures. The city-imposed regulations address the operating condition of the vehicles, drivers' wearing apparel, procedures for obtaining weekly work authorization permits, overcharging of passengers, providing assistance to passengers, and prohibition of use of the vehicles for unauthorized purposes. Federal regulations govern drivers' use of two-way radios. The remaining rules of conduct which the company devised relate primarily to the orderly dispatching of jobs, i.e., trip stealing sanctions, obligations to service a fare once it is accepted, and banning the transfer of one driver's charge tickets to another driver. There is no requirement that drivers use the company-provided dispatch service, but rather they are free either to use it or to obtain fares on their own. The company pays drivers no wages, withholds no taxes, keeps no records regarding hours, and does not assign areas in which the drivers must operate. The drivers provide the Respondent with a monthly fee in exchange for the right to display the company emblem on their cabs and for permission to use the dispatch service. This is the only revenue the Respondent receives from the drivers, who are then free to carry as many or as few fares as they are able. In this way the drivers are responsible for generating their own income and the Respondent's profits are unaffected by the drivers' efforts. This type of arrangement is characteristic of an entrepreneutrial endeavor by the drivers rather than an employment relationship.[6] Accordingly we conclude that the drivers in this case are not employees but are independent contractors. Inasmuch as independent contractors are not covered by the Act, we reverse the judge's findings of violations against the Respondent and dismiss the complaint.

ORDER

The complaint is dismissed.

[6] We find that the parties' historic reference to themselves as "employer" and "employee" is not determinative of their relationship, but rather is merely reflective of common, albeit legally inappropriate, terminology.

DECISION

STATEMENT OF THE CASE

FRANK H. ITKIN, Administrative Law Judge. An unfair labor practice charge was filed in this case by the Union on February 5, and a complaint was issued on February 26, 1982. A hearing was conducted in St. Louis, Missouri, on October 25, 1982. Briefly, the General Counsel contends that Respondent violated Section 8(a)(1), (3), and (5) of the National Labor Relations Act by unilaterally implementing changes in terms and conditions of employment of its taxicab drivers, without first negotiating such changes with the Union, the exclusive bargaining agent of an appropriate unit of drivers; by dealing directly with unit drivers in the negotiation of certain changes in their terms and conditions of employment; and by, in effect, terminating the employment of unit drivers who refused to accept the changes in terms and conditions of employment thus demanded by Respondent. Respondent denies that it has violated the Act as alleged. The fundamental question presented here is whether the unit taxicab drivers are "employees," instead of "independent contractors," and thus covered by the protective provisions of the Act.

On the entire record in this case, including my observation of the demeanor of the witnesses and, after due consideration of the briefs filed by counsel, I make the following

FINDINGS OF FACT

I. PRELIMINARY STATEMENT

The evidence adduced in this case is essentially undisputed, and is contained in a 10-page typewritten stipulation, with exhibits A, B, C, and D annexed (Jt. Exh. 1); two letters of counsel (G.C. Exhs. 2 and 3); and the supplemental testimony of Allcorn Williams, Fleming Hearn, Charles Mueller, James Matthews, Robert Wolf, and James Cooper. The pertinent evidence is summarized below.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *The Status of the Taxicab Drivers*

Respondent is engaged in the operation of a taxicab business in the St. Louis area. It is admittedly an "employer engaged in commerce" and meets the Board's jurisdictional standards. The Union is admittedly a labor organization under the Act. And, as stipulated, if the taxicab drivers in question are found to be employees instead of independent contractors, the following constitutes an appropriate bargaining unit:

> All owner and non-owner taxicab drivers employed by Respondent, excluding dispatchers, service station employees, guards, office clerical, professional and managerial employees, and supervisors as defined in the Act.

In fact, over 16 years ago, on November 30, 1966, the Union was certified by the Board as exclusive bargaining agent for "all drivers and owner-drivers operating under the franchise of" Checker Cab Company. Respondent is admittedly now the successor to Checker Cab Company. (See app. A to Jt. Exh. 1.)

The Union has represented the above taxicab drivers during the past years, and there have been agreements between Respondent and the Union on behalf of these drivers. Thus, during the summer of 1981, Respondent and the Union negotiated the current agreement between the parties, which by its terms runs from August 1, 1981, through May 31, 1983. (See app. B to Jt. Exh. 1.) Although the 1981–1983 agreement was not signed by the parties, the terms of the agreement, as stipulated, were implemented.

The 1981–1983 agreement contains the following language and provisions. In article I, the Company "recognizes the Union as the sole and exclusive representative for purposes of collective bargaining with respect to wages, hours and other terms and conditions of employment for all owner and non-owner taxicab drivers, but excluding office clericals, dispatchers, service station employees, guards, supervisors, professional and managerial personnel." The Company "agrees not to discriminate against any employees for legitimate Union activities," and

> During the term of this Agreement, the Company shall not negotiate or enter into agreements . . . with individual employees in the bargaining unit . . . and . . . shall not by any means, directly or indirectly, circumvent or impair the exclusive representative status of the Union which the Union has achieved in consequence of certification by the National Labor Relations Board.

Article II contains union-security provisions, thus requiring union membership as a condition of continued employment. Article III sets forth the rights of employees, stating, inter alia, that no employees shall be deprived of employment in the absence of good and sufficient cause; no employee or union steward shall be similarly deprived of his employment with the Company because of his membership in or activity on behalf of the Union; a non-owner driver prevented from operating a cab during his regular working hours by reason of mechanical breakdown for more than 2 hours on any one occasion shall receive a pro rata refund of his daily operating fee and any attempt to collect such a refund for other than a bona fide mechanical breakdown will subject the driver to immediate discharge; the Company shall pay $5 per day to each employee covered by this agreement who serves on jury duty; the Company will enforce all rules and regulations equally to all drivers and without discrimination; and

> An owner may remove his cab once a year for a period not to exceed 30 days to take a vacation without being required to paint his cab out provided the cab is parked on the Company lot while the owner is on vacation. The owner shall notify the Company at least 30 days prior to the date of intended removal.[1]

Article IV provides, inter alia, that "service seniority shall be Company wide," with an attached "list of drivers rated according to seniority," and

> When an owner desires to sell his equipment, notice shall be posted . . . . First priority for purchase of said equipment shall go to the non-owner driver with the greatest amount of seniority with the Company, provided the applicant can provide evidence of financial responsibility.

Article V provides that no employee shall be required to serve as a supervisor and no supervisor may drive cabs. Article VI pertains to referral of employees in order that the Company shall have a competent working force. Under this section, the Company shall consider for employment drivers referred to it by the Union. The Company, however, is not prevented from hiring any other drivers that are qualified. The Company has the right to accept or reject, to employ or not to employee, any applicant referred by the Union.

Article VII contains grievance and arbitration procedures, including the right of union visitation during working hours for the purpose of adjusting disputes and investigating working conditions. Article XI, in turn, provides that "during the life of this Agreement there shall be no strikes including sympathy strikes, cessation of work or lockout." Appendix D to Joint Exhibit 1 is a copy of a verified complaint by the Company against, inter alia, the Union, filed in the United States District Court for the Eastern District of Missouri during early 1982, alleging, inter alia:

> Plaintiff [Company] has informed Defendant Local 5 that it stands ready to arbitrate any and all matters pursuant to article VII . . . .

[1] As stipulated, all taxicabs operated pursuant to permits issued to Respondent are painted with the Company's colors, and display its name, telephone number, and identification number. The Company paints the taxicabs and bills the taxicab owners for this service. Radios, as discussed below, are owned by the Company.

> Despite the availability of the grievance procedure, the Defendants have violated the collective bargaining agreements by striking the Plaintiff and picketing its premises.

The Company sought, inter alia, injunctive relief against the Union and striking and picketing drivers under Section 301 of the Labor Management Relations Act.[2]

Article VIII provides for working conditions, including sanitary toilet facilities for its employees, "adequate radio service, and uniform dispatching. The "Company's Working Rules" are attached to and made a part of the 1981–1983 agreement as appendix A. The Company expressly agreed:

> In the event that the Company changes any of the aforementioned rules or promulgates additional rules during the life of this Agreement, the Company shall notify in writing the Union office of its intention to do so at least five days before the effective date of changes or addition in order that the Union may have an opportunity to bargain with the Company.

Appendix A to the 1981–1983 agreement enumerates, inter alia, the following "working rules":

> All accidents must be reported immediately. Drivers must not leave the scene of accident and must wait for the Company supervisor.
>
> . . . .
>
> Any driver having an accident which is his fault may be subject to disciplinary action including discharge.
>
> . . . .
>
> Drivers should endeavor to take one percent of total daily orders.
>
> . . . .
>
> Wearing apparel will be a white shirt, black tie, black pants and black dress shoes. All drivers are to wear a chauffeurs cap or badge. All drivers are to be neat (hair cut and combed; beards and mustaches neatly trimmed) and the automobile to be in good working order and to be clean inside out. Ties will not be required May 1 to October 1.
>
> . . . .
>
> Work tickets are to be picked up each Monday. Turn in your old work ticket when obtaining a new one. Any driver failing to pick up a work authorization will be subject to disciplinary action.

The above working rules also enumerate some 16 violations "subject to immediate dismissal," including: driving under the influence of alcohol or drugs "or with the odor of alcohol"; overcharging passengers; using profanity; permitting an unauthorized person to operate cab; taking cab beyond 150-mile limit without proper authorization; failing to assist passengers failing to comply with safe driving regulations; trip stealing; using the cab for gambling or gambling on Checker Cab premises; not coming to the office when called; servicing an order with a person unauthorized by the Company in cab; not requesting that passengers will ride in back seat; not following a supervisor's orders so long as they do not endanger health or safety of driver; failing to report an accident; failing to take job assignment after responding to dispatcher's call regarding same; and transferring charges from one driver to another. In addition, the 1981–1983 agreement also states, inter alia: "Citizen band radios and other such two-way radios shall not be installed in any taxicab."[3] It was stipulated that the above rules, attached as appendix A to the agreement, have at all times been enforced as to all drivers, without regard to the ownership of the taxicab operated by the driver.

Article IX of the agreement provides, inter alia:

> The Company shall continue to provide during the term of this Agreement liability coverage as heretofore maintained to protect drivers and owners of every cab operating under the franchise of the Company against claims of persons involved in accidents inside or outside the cabs in the amount specified and in accordance with the provisions of [St. Louis and State law] . . . and will defend and hold its drivers . . . harmless against all liability.

Further, no driver shall be required to make any payment for or in connection with such liability coverage, and any driver not cooperating with the defense of an investigation of any accident claim will be subject to immediate discharge. (Also see the parties' stipulation, Jt. Exh. 1, par. 17, p. 4.) And, article X requires the Company to contribute $51 per month for each cab permit obtained by it from St. Louis during the next preceding calendar month to the Union's health and welfare fund. This fund is jointly administered, and any difference between the trustees shall be resolved in accordance with the provisions of Section 302(c)(5)(B) of the Labor Management Relations Act. The fund shall provide for payment of sickness and hospital benefits for employees in

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[2] The parties, in their stipulation, explained that during January 1982, the Union authorized a strike against Respondent for slow payment of charge business reimbursements; this strike lasted about 2 weeks; and ended on January 26 "upon agreement between the parties after suit had been filed."

I note also that sec. 7.5 of art. VII also provides:

> [T]he Union may designate a five member Committee . . . . The jurisdiction of this special panel shall be limited only to grievances involving dispatching and payment of charges affecting *all* employees. All other grievances shall be handled pursuant to sections 7.1–7.4 above. This Committee shall have the authority to take such action as it deems necessary to insure compliance with the provisions of this Agreement involving dispatching and payment of charges, including the right to reduce the monthly operating fee to $362 upon proven violations, all subject to the grievance and arbitration provisions . . . above.

[3] The Company's working rules and related provisions of the 1981–1983 agreement, as summarized above, were discussed and in part modified by the parties during their 1981 bargaining sessions. See generally G.C. Exhs. 2 and 3. Note, for example, the Company's unwillingness to accept a dress code of "dark blue pants, as apparently there are many variations of blue." Similarly, the Company would not agree to the insertion of the word "reasonably" with respect to the work requirement that drivers assist passengers, "as it provides a larger loophole for drivers not to assist passengers." (Ibid.)

the unit and for lost time of drivers due to sickness and injury.

Article XII contains a management-rights clause. The Union "recognizes that all management functions not specifically limited by this Agreement are vested and reserved exclusively in the Company," including, but not limited to, "the direction of the working force; the utilization of employees on any work assignment; the right to hire, transfer, layoff, discipline, and discharge employees for just cause."

Article IX generally provides for service and operating fees. The monthly operating fees payable by driver-owners to the Company total $450. This fee covers insurance premiums, radio and telephone service, general service fees, and monthly operating sticker. This fee may be paid in two specified monthly installments, and if payment is not paid as asforesaid the driver is not permitted to drive for the company. However, the agreement provides alternatively for a daily operating fee payable by non-owner drivers to driver-owners and/or the Company in the amount of $24 for a "daily one shift" or in the amount of $35 for a "daily 24 hour shift."[4] The stipulation executed by the parties explained:

> There are three categories of drivers driving taxicabs under an arrangement with the Respondent. (a) Drivers that own taxicabs and drive same. Said drivers pay to Respondent a monthly service or operating fee also known as the "proration" or "pro"; (b) Drivers that drive taxicabs owned by a corporation in which Barbara Wolf and Robert Wolf are principal shareholders.[5] Said drivers pay a daily operating fee to Respondent; (c) Drivers that drive taxicabs owned by other drivers, or by third persons whose only connection with the Respondent is the payment of the monthly proration. Said drivers pay a daily operating fee to these other owners or third persons who in turn pay the monthly proration fee to Respondent. Driver owners or third persons may own or operate any number of taxicabs under the permits of Respondent.

And, as further stipulated, the Company does not withhold taxes for any of the drivers, keeps no records pertaining to minimum wage or overtime pay for any driver, and "pays no wage of any kind for any driver."

In addition, the parties stipulated with respect to rates charged by drivers as follows:

> Rates charged by drivers are established through negotiation between Respondent and the Union. Such rates are currently $.90 per mile except as otherwise modified by the parties' Agreement. Drivers are not permitted to overchange. Nor may drivers request payment of charge fares directly from Respondent's charge customers. Respondent reimburses drivers for charge fares. In about January 1982, driver Zachary Druckerman, who at that time drove a taxicab owned by one Charles Mueller, attempted to collect on certain charge fares directly from Respondent's charge customers, which charge fares he had been unable to collect from Respondent. Respondent's representative Robert Wolf informed Druckerman that he could not continue to drive under Respondent's name if he continued to solict charge payments directly.[6]

It was also stipulated that drivers are not assigned areas in which to drive, they are not assigned particular times in which to drive, and no records are kept of driver movements. The stipulation explains:

> Drivers decide whether to use the Company dispatcher as a method of customer solicitation. Respondent makes available to drivers a dispatch service. If a driver wishes to use the dispatch service, the driver either waits at one of several designated stands for radio dispatch call, in which case the first driver in line at that stand is normally dispatched; or the driver may respond to "open" radio dispatches when no taxicabs are available at nearby stands, in which case the nearest driver responding is dispatched. While operating under Respondent's permits, drivers may not be dispatched by other taxicab companies.[7]

The supplemental testimony of the six witnesses appearing herein is essentially consistent with the above-summarized provisions of the 1981–1983 agreement of the parties, the working rules attached to the agreement, the 10-page stipulation, and related documentary evidence. Thus, Robert Wolf, an officer and agent of Respondent, credibly testified that during February 1982 there were about 101 taxicabs operating under Respondent's name. Respondent owned about 3 of the taxicabs and a corporate entity known as Robar owned an additional 27 of these taxicabs. Robert Wolf and Barbara Wolf, officers and agents of Respondent, are also the principal stockholders of Robar. The remaining some 71 taxicabs were owned by other individuals. There were, according to Robert Wolf, about 37 persons who drove taxicabs owned by other people—however, approximately 27 of the 37 apparently drove for Robar and approximately 10 drove for other individuals.[8] All 101 taxicabs were equipped with Company-supplied two-way radios, and 85 to 90 percent of the drivers used these radios to obtain business.

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[4] As noted supra, the agreement provides that the union committee may reduce the monthly operating fee under specified circumstances. See sec. 7.5 of art. VII.

[5] The Wolfs, as discussed below, are admitted officers and agents of Respondent.

[6] Respondent was permitted by an additional agreement, dated October 26, 1981, to discount by 5 percent "charge business reimbursement to drivers." See Jt. Exh. 1, par. 22, p. 6, and app. C.

[7] It was also stipulated that:

> Drivers may sublease their cabs to other individuals. Sublessees must complete a written application provided by and submitted to Respondent. If said applicant passes a police check concerning his driving record conducted by Respondent, he may be permitted to drive.

[8] Wolf's testimony is not entirely clear in this respect; in any event, whether or not he intended to include the three taxicabs owned by Respondent Ace with his Robar figures is not critical here.

Wolf also explained that the Company could discipline drivers in a couple of different ways. It could put a driver on hold, it could lay a driver off, and it could terminate a driver. Moreover, the working rules, as summarized above, were enforced evenhandedly without regard to who owned the car. Thus, Wolf recalled that Michael Van drove a vehicle owned by his father; he was given a reprimand and disciplined for, inter alia, careless and reckless driving. Wolf recalled that Jesse Jones, a driver of his mother's car, had two chargeable accidents in a 2-week period, and Respondent's supervisor Todd told his mother to remove him from the cab, which she did. Wolf recalled that the Company laid George Emswiller off for overcharging a passenger, and the Union obtained his reinstatement. According to Wolf, the Company, in disciplining a driver as a result of an accident or rule violation, would, in effect, have to determine whether the driver was responsible. Finally, although the stipulation states that no records are kept of driver movements Wolf acknowledged that the Company does maintain a record of dispatches.[9]

Allcorn Williams, formerly a driver for Respondent, credibly testified that he drove his own taxicab for Respondent; that his normal procedure when he started in the morning was to call the Company on the radio to let them know he was in operation; and that he would then proceed to the stand and wait for a call from the Company's dispatcher. Williams explained that, during the course of a normal day, some 80 percent of his business was the result of this dispatch service. Williams noted that:

> . . . the 80 percent was charges, charge business [slips], which you are able to return to the Company for cash . . . I [Williams] would pick up the passenger or package and [the passenger] would give me a charge [slip] . . . [I] write in the fare . . . turn it in later to the Company . . . for cash.

Williams paid the Company a total fee of $450 each month, as a proration. He was required to obtain a permit to drive. He obtained such a permit every week from the Company. The permit or workcard gave the date of the drive and the time.[10]

Williams recalled that he had, for certain periods, two taxicabs in operation with the Company. He owned both vehicles. He would sublease the second taxicab to another driver. Williams explained:

> I had two on the stand. I paid the Company $450 per month and they set the daily run charge, which was $35 a day.

A person named John Thomas drove his second vehicle. Williams paid the Company $450 per month for the second vehicle and Thomas paid Williams $35 per day. Thomas, as Williams explained, was already employed by the Company, so he just got to switch over to Williams' vehicle without obtaining any special application or permission from the Company. Williams added:

> If you found a man [driver] for your car and he was not employed by the Company, you would take him to the Company and try to get him hired before you could put him on your car. . . . If he was already working for the Company, that was different.

Fleming Hearn, formerly a driver for Respondent, credibly testified that he drove his own taxicab for the Company; that he paid the $450 per month proration; that he got a workcard from the Company at its office every week; and that "any official of the Company could sign it and give it to you." The work card named the Company and the work hours that a driver was permitted to work. According to Hearn, 90 percent of his business during a normal day was a result of the Company's dispatch service, and 85 percent of his daily business would be charge business with the Company.

Charles Mueller, formerly a driver for Respondent, credibly testified that he drove his own taxicab and also subleased about three or four vehicles to other drivers. Mueller recalled:

> Most of the time I got drivers that were already cleared by the Company. I never put anybody in from scratch myself. You had to make out an application and get the police report and a "C" taxicab driver's license, and then the driver was available. . . . On a new driver, the Company would take and send him out with either a supervisor, if there was a supervisor available, or with another experienced driver, to teach him how to operate the radio and taking in the orders and servicing the orders and things like that.

Mueller claimed that none of the people driving his vehicles could sublease them.[11]

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[9] Wolf noted that some of the working rules (annexed to the 1981–1983 agreement) are the result of city, municipal, or Federal regulations; some are the result of insurance company provisions or requirements; and others were adopted without reference to or not because of law or insurance. Thus, for example, Wolf explained that "rule number three is by city ordinance, you are required to keep your car neat," and the "city does require . . . a neat driver." However, as Wolf also acknowledged, the city did not at the time require black dress shoes—there was no specific dress code.

[10] Williams explained that the only time restrictions on the permit were daytime or nighttime.

Also see the related credible testimony of former driver-owner James Cooper.

[11] In addition, Mueller recalled that one of his drivers, Zachery Druckerman, called him and told him that he had been fired by the company for trying to collect charges directly from charge customers. Mueller told Druckerman that his recourse was not with Mueller; it was with the Union.

James Matthews, president and business representative for the Union, credibly recalled how he spoke with officials of Respondent about Druckerman, and Company Officer Robert Wolf told Matthews that Druckerman could go to work so long as he did not bother the customers anymore. He would be reinstated. Matthews similarly recalled that Company Officer Barbara Wolf apprised him that driver Leroy Moore was fired because he continually answered trips, and was not in the vicinity of the trips. He was lying about his location. Moore was then driving a vehicle owned by another individual.

B. *The Sequence of Events Culminating in the Filing of Unfair Labor Practice Charges by the Union*

The pertinent sequence of events culminating in the Union's filing unfair labor practice charges with the Board in this case was also stipulated by the parties. (See Jt. Exh. 1, pp. 6–10.) Thus, during January 1982, as noted above, the Union authorized a strike against Respondent "for slow payment of charge business reimbursements." This strike, the subject of an injunction proceeding instituted by the Company, lasted about 2 weeks, ending on January 26, 1982. (Ibid.)

Also, during early January 1982, the Board of Public Service of the City of St. Louis (the governmental unit responsible for issuing taxicab permits for operation in the city of St. Louis), informed Respondent that the Company would be required to take out insurance policies on all taxicabs operating under city permits. Previously, the Company had operated on a surety bond in the approximate amounts of $30,000 to $40,000 for all of the city permits. In addition, during early December and January, the St. Louis County Department of Public Works notified the Company that it would require insurance on each taxicab operating in St. Louis County. (St. Louis City is independent of and is not located in St. Louis County.) (Ibid.)

Respondent, as further stipulated, attempted to secure insurance, and was notified by its insurance agent that the cost of insuring a taxicab in the city of St. Louis was approximately $143 per month per cab and the cost of insuring a taxicab in the county of St. Louis was approximately $83 per month per cab. The Company, however, was in dire financial straits and, rather than close down, determined to pass along the cost of the insurance to the drivers. (Ibid.)

A meeting was held at the Union's hall on January 26, 1982. There, Respondent, through its attorney, informed the union representatives and others that the Company was forced to pass along the cost of the insurance to the drivers. The union representatives informed the Company that the Union would not agree to the insurance cost passthrough. In addition, at this same meeting, union representatives informed company representatives that, due to nonpayment of substantial charge reimbursements, the 5-percent discount of charge reimbursements to the drivers would be discontinued and, further, the monthly operating fee (proration) would be reduced for the month of February to $363 from $450. Respondent's attorney, in turn, informed the union representatives that the Company would not agree to the reduction of the proration or the discontinuance of the 5-percent discount. (Ibid.)

About January 27 or 28, 1982, Company Vice President Robert Wolf spoke by telephone to the Union's president, and gave him the approximate cost of the insurance, which he quoted at $143 for the city of St. Louis. The Union's president then informed Robert Wolf that he would submit the proposal calling for the drivers to pay the insurance cost to the union membership. Later, about January 29, the Union's president telephoned Wolf to inform Wolf that the drivers had rejected the proposed insurance passthrough. The Union's president also informed Wolf that the proration would be reduced from $450 per month to $362 per month. (Ibid.)[12]

About this same time, Robert Wolf met with various drivers to discuss operating problems and, in response to a question as to whether the Company would be operating after February 2, 1982, Wolf informed the drivers that the city of St. Louis and St. Louis County were requiring insurance; that the Company could not afford to pay the insuance; and that drivers would have to pay the insurance amount in addition to their monthly proration. The amount discussed with the drivers was $113, an average of the city and county insurance costs. Wolf further stated that, in lieu of paying $113 per month for insurance, drivers could pay Respondent $5000 for a medallion (i.e., city permit or buy shares in the Respondent's business in that amount, and pay a monthly operating fee equal to approximately one-half the monthly proration fee. (Ibid.)

Thereafter, commencing on January 31, 1982, all drivers paying a monthly proration were told by Respondent that an amount for insurance of $113 would be required in addition to the $450 monthly proration. These drivers were told that the $113 had to be paid prior to February 5, 1982. After that date, Respondent did not give dispatches to any driver that had not paid both amounts. (Ibid.)[13]

C. *Discussion*

The protective provisions of the National Labor Relations Act extend only to employees, and not to any individual having the status of an independent contractor. The question, whether an individual is an employee or an independent contractor, is to be resolved by application of general principles of agency law. See *NLRB v. United Insurance Co.*, 390 U.S. 254 (1968). And, as the Supreme Court explained in *NLRB v. United Insurance Co.*, supra at 258:

> [T]here is no shorthand formula or magic phrase that can be applied to find the answer, but all of the incidents of the relationship must be assessed and weighed with no one factor being decisive.

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[12] Also on January 29, as further stipulated, there was a meeting at the Respondent's offices attended by the Union's president, the Union's attorney, the Respondent's president Robert Wolf, and the Respondent's attorney. There, the Union suggested that the drivers collect their charges directly from customers. This was rejected by Respondent. (Ibid.)

[13] It was stipulated that earlier, commencing on January 8, 1982, Respondent had also increased the daily shift fee charged to non-owner drivers from $35 per day to $39 per day (for 24-hour shifts). (Ibid.)

Further, Kenilworth Insurance Company, the proposed insurer of the taxicabs in St. Louis, had notified the St. Louis Board of Public Service on February 2, 1982, that it would not accept insurance coverage for Respondent's taxicabs in the city of St. Louis. On February 16, the Board of Public Service voted to revoke all permits for Respondent for various reasons, including the failure to provide insurance on the amount of taxicabs operating. By its order, all taxicabs were to be off the streets of the city of St. Louis and out of operation by noon, February 17, 1982. Thereafter, about March 1, Respondent eliminated all insurance payment requirements to the drivers. Subsequently, the monthly proration required by Respondent did not exceed $450 per month. The daily operating fee was reduced at the same time to $35 per day. (Ibid.)

Restatement 2d, *Agency* § 220 (2), lists the following indicia, among others, to be considered in assessing this relationship: the extent of control which may be exercised over the details of the work; whether or not the individual is engaged in a distinct business; the skills required; the supplier of the instrumentalities, tools, and place of work; the term of employment; the method of payments; whether the work is part of the regular business of the alleged employer; and whether the parties believe they are creating the relationship of master and servant.

In the instant case, the record makes clear that the parties, for some 16 or more years, regarded the relationship created here to be that of employer-employee. In November 1966, the National Labor Relations Board, following an election by "consent agreement," certified the Union as the exclusive bargaining agent for all drivers and owner-drivers operating under the franchise of Checker Cab Company, the predecessor of Respondent. The Union thereupon represented the unit personnel, entering into a series of collective-bargaining contracts with Respondent. The current contract, summarized at length, supra, runs from August 1, 1981, through May 31, 1983. Although counsel for Respondent generally asserts that "the agreement itself was a business arrangement rather than a collective-bargaining agreement," a review of the contract clauses and attached working rules makes it plain that the document purports to be and is in fact a collective-bargaining contract. Indeed, in early 1982, Respondent filed a suit in the Eastern District of Missouri, seeking, inter alia, to enjoin the Union and its striking and picketing drivers from violating the no-strike provisions of their "collective bargaining agreements" under Section 301 of the Labor Management Relations Act. The current contract, in addition, provides that any differences between the trustees with respect to the jointly administered health and welfare fund shall be resolved in accordance with the provisions of Section 302(c)(5)(B) of the Labor Management Relations Act. And, earlier, during this ongoing employer-employee relationship, the National Labor Relations Board determined that Respondent had violated Section 8(a)(1) and (3) of the National Labor Relations Act by terminating one of its driver employees. See *Checker Cab Co.*, 175 NLRB 20 (1969).

In sum, the parties have regarded and treated the unit personnel here as employees, the parties have called the unit personnel employees, and the parties have resorted to, relied on, and complied with the protective provisions of the Labor Management Relations Act, in controlling this employer-employee relationship. Significantly, counsel for Respondent, in his brief, makes no attempt to cite here some new facts or recently discovered evidence which would change this 16-year-old relationship. Instead, as demonstrated below, Respondent, for economic reasons, has attempted to unilaterally abrogate, ignore, and modify the terms and conditions of employment expressly provided in the 1981–1983 collective-bargaining agreement of the parties, as implemented by them.

On the significant issue of Respondent's right and exercise of control over its taxicab drivers in the performance of their daily work, this record also demonstrates that the Company possesses such power and in fact exercises close supervision over the drivers. Thus, for example, although some 71 of the 101 taxicabs involved here are owned by individuals, all 101 taxicabs are painted with the Company's name, telephone number, identification number, and colors. An individual owner may remove his cab once a year for a period not to exceed 30 days to take a vacation without being required to paint his cab out *provided* the cab is parked on the company parking lot. An individual who wants to sell his taxicab must post a notice giving first priority for purchase to the non-owner driver with the greatest amount of seniority with the Company. An individual may sublease his taxicab; however, sublessees must complete a written application provided by and submitted to Respondent. Such an applicant, if not already employed by the Company, must fill out an application, get a police report or check, and be instructed by a company supervisor, if available, or experienced driver. In addition, some 80 to 90 percent of these individual drivers utilize and rely on the Company-supplied two-way radios and dispatch system. Further, about 80 to 85 percent of their business is so-called charge business, for which drivers are subsequently reimbursed by the Company. As noted, drivers are not permitted by the Company to request payment of charge fares directly from Respondent's charge customers. And, drivers must obtain from the Company weekly permits, which generally provide, inter alia, whether the driver may work during the day or night period. Drivers, while operating under such permits, may not be dispatched by other taxicab companies.

The Company also has a detailed set of working rules which further enables it to closely supervise and control its drivers' daily activities. These rules are admittedly applied evenhandedly to both owner and non-owner drivers. And, as illustrated herein, violation of these working rules has resulted in reprimands, discipline, and the firing of unit drivers. Thus, for example, owner and non-owner drivers must report all accidents to the Company immediately; must not leave the scene of accidents and must wait for the company supervisor; are subject to disciplinary action by the Company if the Company determines that an accident is his fault; are required to comply with a strict dress code; are required to keep their vehicles in good working order and clean inside and out; are required to pick up work tickets from the Company each Monday; and are subject to discharge for violating 1 of some 16 enumerated violations pertaining to, inter alia, their conduct and behavior at work. Owner and non-owner drivers are required to endeavor to respond to a certain percent of total daily orders from the Company. Further, not coming to the office when called, failing to take a job assignment after responding to a dispatcher's call, and not following a supervisor's orders make such an owner or non-owner driver subject to immediate dismissal. Likewise, owner and non-owner drivers may not take their vehicles beyond a 150-mile limit without proper authorization from the Company.

Respondent, in its collective-bargaining agreement, as implemented, agreed to provide liability coverage to protect drivers and owners of every cab and driver was re-

quired to make any payment for, or in connection with, such liability coverage. Respondent also agreed to contribute to the Union's health and welfare fund, thus providing sickness and hospital benefits for employees in the unit. And, while it is true that some 71 of the 101 vehicles involved here are owned by individuals, and drivers do not receive compensation or wages in the form of a paycheck like a factory worker, it is also true that the use of all such vehicles is substantially controlled by the Company; over 80 percent of the moneys received by the owner and non-owner drivers is from company dispatches; and an equally significant percent is charge business for which the owner and non-owner drivers cannot be paid directly, but must get their money from the Company.

In sum, I find here that this record shows an employer-employee relationship between the unit personnel and the Company. It is true, as counsel for Respondent contends, there are present here some criteria which, if viewed separately, suggest an independent contractor status. However, on balance, and assessed in the context of this full record, the scale, in my view, substantially tips toward the employer-employee relationship.[14]

The record establishes here, and the parties do not seriously dispute, that the Company unilaterally determined to pass along to its unit drivers the insurance costs, and related operating fees, contrary to the express terms and conditions of employment contained in the 1981–1983 agreement of the parties, as implemented. The Union would not agree to the Company's proposed changes. Representatives of the Company later met privately with unit drivers, advised them that they would have to pay the insurance costs and related operating charges, and offered them, inter alia, an opportunity to purchase an interest in the Employer's business. Under the circumstances, Respondent unilaterally modified terms and conditions of employment of the unit drivers, as contained in the 1981–1983 agreement, in violation of Section 8(a)(5) and (1) of the Act. Further, Respondent, at the same time, attempted to circumvent the Union as bargaining agent for the unit employees, also in derogation of its statutory bargaining obligation. And, it is settled, economic needs of an employer will not, as here, privilege such attempts to unilaterally modify or abrogate the terms and conditions of employment set forth in the parties' collective-bargaining agreement. See generally *Inland Cities, Inc.*, 241 NLRB 374 (1979), enfd. mem. 618 F.2d 117 (9th Cir. 1980); *Oak Cliff-Golman Baking Co.*, 207 NLRB 1063 (1973), enfd. 505 F.2d 1302 (5th Cir. 1974). Cf. *Fibreboard Corp v. NLRB*, 379 U.S. 203 (1964); and *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981).

Respondent unilaterally implemented these changes in unit employees' insurance costs and operating fees. Unit drivers, who did not comply with these midterm changes in the terms and conditions of their 1981–1983 collective-bargaining agreement, were summarily denied dispatch services from the Employer. In short, they were, in effect, terminated because of their insistence that the terms of their collective-bargaining agreement be followed, in clear violation of Section 8(a)(1) and (3) of the Act.

In sum, I find and conclude that Respondent, by the foregoing conduct, has violated Section 8(a)(1), (3), and (5) of the Act, as alleged.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce as alleged.

2. The Union is a labor organization as alleged.

3. The following employees of Respondent constitute an appropriate collective-bargaining unit, as alleged:

> All owner and non-owner taxicab drivers employed by Respondent, excluding dispatchers, service station employees, guards, office clerical, professional and managerial employees, and supervisors as defined in the Act.

4. At all times material, the Union has been and is the duly designated collective-bargaining agent of the unit employees, as alleged.

5. Respondent violated Section 8(a)(5) and (1) of the Act by announcing, contrary to the terms of its 1981–1983 collective-bargaining agreement, an increase in, and subsequently increasing, the amount of operating fees which must be paid by certain of the unit taxicab drivers as a condition of their employment; by advising unit employees that, contrary to the terms of its 1981–1983 collective-bargaining agreement, they would have to pay certain costs for insurance; and by bypassing the Union and dealing directly with the unit employees.

6. Respondent violated Section 8(a)(1) and (3) of the Act by failing and refusing to issue dispatches to unit employees because they have engaged in union activities, or other concerted activities for their mutual aid and protection, including their insistence that the terms of their 1981–1983 collective-bargaining agreement be followed.

7. The violations found above affect commerce as alleged.

REMEDY

Respondent will be directed to cease and desist from engaging in the unfair labor practices found above, or like or related conduct, and to post the attached notice. It has been found that Respondent violated Section 8(a)(5) and (1) by, contrary to the terms of its 1981–1983 agreement, unilaterally modifying certain terms and conditions of employment, as provided therein. Respondent will therefore be directed to, on request, bargain in good faith with the Union as the duly designated bargaining agent of the unit employees; to abide by the terms and conditions as contained in the 1981–1983 agreement; and to make whole the unit employees for all monetary losses sustained as a result of its unlawful unilateral

[14] The General Counsel and counsel for Respondent cite, inter alia, *City Cab Co. of Orlando v. NLRB*, 628 F.2d 261 (D.C. Cir. 1980), and *Air Transit v. NLRB*, 679 F.2d 1095 (14th Cir. 1982), seeking to derive support from the treatment of the various indicia found present or lacking in those and related cases. Again, each of these cases rests on its own special facts and no one fact is decisive in striking the required balance.

action, with interest, to be determined and computed as provided below.

In addition, it has been determined that Respondent violated Section 8(a)(1) and (3) of the Act by, in effect, terminating the unit employees because they insisted that the terms and conditions of the 1981–1983 agreement be followed. Respondent will therefore be directed to offer such unit employees immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority and other rights and privileges previously enjoyed, and to make them whole for any loss of earnings sustained as a result of this unlawful conduct, by paying them a sum of money equal to that which they normally would have earned from the date of this discrimination to the date of Respondent's offer of reinstatement, less net earnings during such period, with backpay computed as provided in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and with interest computed as provided in *Florida Steel Corp.*, 231 NLRB 651 (1977).[15]

[Recommended Order omitted from publication.]

[15] See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962). Respondent will preserve and make available to the Board, on request, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary and useful to determine compliance with and the amount of backpay due under the terms of this decision.

Reading Anthracite Company *and* United Mine Workers of America. Case 4–CA–13877

18 January 1985

DECISION AND ORDER REMANDING

BY CHAIRMAN DOTSON AND MEMBERS HUNTER AND DENNIS

On 3 April 1984 Administrative Law Judge Joel A. Harmatz issued the attached decision. The Respondent filed exceptions and a supporting brief; the Charging Party filed cross-exceptions and a brief in support of its cross-exceptions and in opposition to the Respondent's exceptions; the General Counsel filed a brief in support of the judge's decision and in answer to the Respondent's exceptions; and the Respondent filed an answer to the Charging Party's cross-exceptions.

The Board has considered the decision and the record in light of the exceptions and briefs and makes the following findings.

Following the hearing, but before the issuance of the judge's decision, the Respondent moved that the judge disqualify himself from the instant proceeding on the grounds that the record reflects statements by him which demonstrate hostility, bias, and prejudice towards the Respondent and prejudgment of the merits of the case. In his decision the judge denied the Respondent's motion as "plainly lacking in merit" based on his findings, contained in a separate report which he included as an exhibit in the record, of "misconduct" by the Respondent's attorney in filing the motion to disqualify.[1] The judge further found, on the merits, that the Respondent violated Section 8(a)(5) and (1) of the Act by refusing to furnish relevant information requested by the Union concerning the Respondent's leasing out of coal lands.

After carefully reviewing the entire record, we find merit in the Respondent's contentions that the judge appeared to prejudge the merits of the case and exhibited hostility, bias, and prejudice towards the Respondent. As the Board stated in *Indianapolis Glove Co.*,[2] and recently reaffirmed in *Dayton Power & Light Co.*:[3]

> [I]t is essential not only to avoid actual partiality and prejudgment . . . in the conduct of Board proceedings, but also to avoid even the *appearance* of a partisan tribunal.[4]

Here it appears that the judge made statements throughout the hearing—from as early as during the direct examination of the first witness—to the effect that the Union had a statutory right to the requested information, thereby giving the impression that he had prejudged the ultimate issue in the case.[5] Moreover, when the Respondent's counsel was attempting to elicit evidence as to the nature of the operations of the Respondent's lessees, the judge stated to counsel for the General Counsel, "I would appreciate it if counsel would maintain a reasonably militant posture with respect to the relevance of this material." Further, the judge made several comments to the Respondent's attorney that are particularly troublesome because of their serious accusations and hostile tone, such as when the judge told the Respondent's attorney that he would be "suborning perjury" if he attempted to ask certain questions of his witness, whereupon counsel was impelled to make an offer of proof with respect to that inquiry.

With regard to the judge's report recommending that the Board take disciplinary action against the Respondent's attorney for his "contemptuous and unethical conduct" in filing the motion to disqualify and the judge's supplemental report reaffirming his charges of misconduct, we firmly reject any

[1] The attorney who filed the motion to disqualify did not represent the Respondent at the hearing. The Respondent subsequently filed with the Board a response to the charges of misconduct and a motion to strike the judge's report from the record. The General Counsel filed a position letter stating that the Board should reject the judge's recommendation of disciplinary action against the Respondent's counsel. The judge thereafter filed a supplemental report in response to the Respondent's motion to strike. For the reasons set forth in this decision, we grant the Respondent's motion to strike, and, sua sponte, further strike the judge's supplemental report.

[2] 88 NLRB 986 (1950).

[3] 267 NLRB 202 (1983).

[4] 88 NLRB at 987; 267 NLRB 202. See also *Center for United Labor Action*, 209 NLRB 814 (1974); *Better Monkey Grip Co.*, 113 NLRB 938 (1955).

[5] For example, during the judge's examination of the General Counsel's witness, Union President Semko, after Semko stated, "We have the right to it [the leasing information] under the agreement, right," the judge responded, "Not only do you have the right, you have the responsibility."

Later, during the Respondent's cross-examination of Semko, the judge interrupted to state:

> [W]hat they are attempting to do in this proceeding is to verify that information and they have a perfect right under the law to do so . . . . The obligation of a signatory contractor under this agreement couldn't be expressed more clearly than is set forth in subparagraph (g) of Article 2.

In a further dialogue with the Respondent's counsel, the judge stated, "All they have to do is suspect that their contract is being violated and they have a right to request information to protect the interests of the working people who are the beneficiaries of this agreement." A short while later he asked, presumably rhetorically, "What is wrong in giving a little information if it doesn't hurt to give it?"

Finally, during the Respondent's examination of its own witness, Employer Vice President Ulmer, the judge stated:

> As far as I'm concerned, the unions have a right to see the leases, to examine what they cover, and to all the other information to assure themselves that there is no violation of the collective-bargaining agreement.

and

> They don't have to take your word for it. They are entitled to see the business records. They are entitled to see what is beyond dispute; i.e., the identity of your shareholders, the identity of your managers, the identity of your directors.

such recommendation and express our disapproval of the judge's reports. Particularly where, as here, the attorney's motion to disqualify and the supporting brief are based entirely on the contents of the official record, even the suggestion of discipline for filing such a motion necessarily would have an inhibiting effect on the attorney's duty to represent the best interests of his client in this or any future Board proceeding. Further, we find no basis for the judge's characterization of the Respondent's motion to disqualify the judge as "contemptuous" or "unethical" or, as the judge viewed it, as a personal attack on the judge which was designed ultimately to obstruct Board processes. Accordingly, we find that the judge's reports recommending disciplinary action against the Respondent's attorney were without justification and in the circumstances here were improper, and we strike them from the record.

When the judge's conduct is considered as a whole, both his on-the-record conduct and his issuing reports on misconduct, there are sufficient grounds for finding that the judge, at the very least, gave the appearance of partiality and prejudgment sufficient to warrant his disqualification from the case. Accordingly, in fairness to the parties, and in order to effectuate the purposes of the Act, we shall set aside the judge's decision and remand this proceeding to the Chief Administrative Law Judge for a hearing de novo before a different administrative law judge duly designated by him, who shall prepare and serve on the parties a decision containing findings of fact, conclusions of law, and recommendations with respect to the unfair labor practices alleged in the complaint herein.

ORDER

It is ordered that the administrative law judge's decision of 3 April 1984 is set aside.

IT IS FURTHER ORDERED that a hearing de novo be held before a different administrative law judge for the purpose of receiving evidence on the issues raised by the allegations of the complaint.

IT IS FURTHER ORDERED that, upon conclusion of the hearing, the administrative law judge shall prepare and serve on the parties a decision containing findings of fact, conclusions of law, and recommendations based on the evidence received and that, following service of such decision on the parties, the provisions of Section 102.46 of the Board's Rules and Regulations shall be applicable.

DECISION

STATEMENT OF THE CASE

JOEL A. HARMATZ, Administrative Law Judge. This matter was heard in Pottsville, Pennsylvania, on January 9, 1984, upon an unfair labor practice charge filed on July 29, 1983, and a complaint issued on September 14, 1983, alleging that Respondent violated Section 8(a)(5) and (1) of the Act by refusing to furnish requested information necessary and relevant to the Union's performance of its function as exclusive bargaining representative of employees in the appropriate collective-bargaining unit. In its duly filed answer, Respondent denies that any unfair labor practices were committed. Following close of the hearing, briefs were filed on behalf of the General Counsel, the Charging Party,[1] and Respondent.[2]

On the entire record in this proceeding, and after careful consideration of the posthearing briefs, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent is a Pennsylvania corporation with a main office located in Pottsville, Pennsylvania, from which it is engaged in the strip-mining, processing, and sale of anthracite coal. Respondent is a member of the Anthracite Operators, an employer association which represents employer-members in negotiating and administering collective-bargaining agreements with the Charging Party. Members or a member of the Anthracite Operators has sold and shipped products valued in excess of $50,000 directly to points outside the Commonwealth of Pennsylvania.

The complaint alleges, the answer admits, and it is found that Respondent is, and has been at all times mate-

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[1] A posthearing brief filed on behalf of the Charging Party was over the signature of Attorney Randall Vehar, whose appearance was verified by mail and subsequently entered. For reasons set forth below, the Charging Party's "Opposition to Respondent's Motion to Disqualify Administrative Law Judge" is stricken.

[2] The brief of the Respondent was over the signature of Richard S. Meyer, an attorney, who did not attend the hearing. Pursuant to formal correspondence with Meyer, his appearance is noted. At his request, the record is reopened to receive a letter from me, dated February 27, 1984, and marked ALJ Exh. 1 and Meyer's response of March 2, 1984, marked ALJ Exh. 2. Meyer also filed a "Motion to Disqualify Administrative Law Judge," alleging that I "demonstrated hostility, bias and prejudice toward Reading Anthracite Company and prejudged the case" and on that basis requesting "the proceeding to be heard *de novo* before a new administrative law judge." These latter charges raise fundamental issues concerning the competence, fitness, and integrity of an administrative law judge. The relief sought is plainly calculated to prolong resolution of the instant controversy. Despite their gravity, said allegations are so baseless as to suggest possible malice as well as an intent deliberately to impede Board processes. The motion has been analyzed fully in an independent report issued simultaneously herewith and filed by me with the Executive Secretary of the National Labor Relations Board for further investigation and appropriate action pursuant to Sec. 102.44(b) of the National Labor Relations Board Rules and Regulations. Findings therein are deemed a part of this record and it is received in evidence as ALJ Exh. 3. Upon request of Meyer it shall be attached to this decision as an "Appendix" and published [omitted from publication]. Needless to say, the motion to disqualify is denied as plainly lacking in merit.

Respondent on March 12, 1984, outside the due date, filed a "Reply Brief." The General Counsel and the Charging Party urge that said document be stricken. They correctly observe that such filings are not authorized by the Board's Rules and Regulations. For this reason, reply briefs customarily are rejected at this level. Accordingly, neither the belatedly filed "Reply Brief" nor the Charging Party's "Opposition" referred to above has been considered herein.

rial herein, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The complaint alleges, the answer admits, and it is found that United Mine Workers of America is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Facts*

The material facts in this case are simple and beyond dispute. Respondent, as a member of the Anthracite Operators, is bound to a multiemployer collective-bargaining agreement, executed on June 1, 1981, and scheduled to expire on June 1, 1984.[3] On the face of that agreement, Respondent, as a signatory, is obligated to apply the terms and standards thereof to employees engaged in "the production, preparation, processing and cleaning of coal from deep mining operations, strip operations, and refuse banks."[4]

In addition, Respondent has agreed, as a member of the employer association and party to the contract, that it "will not lease out any coal lands for the purpose of avoiding the application of this agreement."[5]

On May 2, 1983, the Union wrote Respondent requesting information bearing upon the latter's practice of leasing lands for the mining of coal, stating as follows:

> In order to insure compliance with certain portions of our collective bargaining agreement, we are requesting that you provide the following information:
>
> (1) A description of all anthracite coal lands located within District 25 that Reading Anthracite Company has leased out or during the terms [sic] of this Agreement intends to lease out.
>
> (2) Specifically identify the leases, the date the leases were let, and whether or not the United Mine Workers of America was previously notified of this lease.
>
> (3) Please provide copies of all the leases described in paragraph one (1) to the United Mine Workers of America, Region 1 Office, R.D. #1, Box 172, Belle Vernon, Pennsylvania 15002.
>
> (4) Please provide any agreements and descriptions of any arrangements whereby the leases [sic] provide coal (produced from lands leased from Reading Anthracite Company) to Reading Anthracite Company or provides such coal for Reading Anthracite Company customers. Please provide any agreements and descriptions of arrangements whereby Reading Anthracite Company has obtained coal produced by such leases or whereby Reading Anthracite Company has assisted the lessee in obtaining customers for such coal. Identify whether any of these agreements or arrangements for providing or purchasing back coal or [sic] exclusive agreements or arrangements.
>
> (5) Please provide the following additional information:
>
> A. Specifically identify any share holders, directors, officers, managers, supervisors, and/or agents of Reading Anthracite Company. The lessor [sic] who are also share holders in the lessee, and/or who otherwise have connections with the lessee as a director, officer, manager, supervisor, agent employee, etc. with the lessee. Specifically identify any subsidiary and/or affiliates of Reading Anthracite Company that are lessees.
>
> B. Specifically identify whether or not Reading Anthracite Company and the lessee share any fringe benefit coverage programs, mining or other governmental permits, financial accounts, etc., and identify such connections. Specifically identify any situations in which Reading Anthracite Company has paid or is paying taxes, black lung benefits, royalties, etc. for the lessee.
>
> C. Identify the nature of any financial assistance provided by Reading Antracite Company to the lessees identified in paragraph one (1).
>
> (6) Specifically identify any type of control legally or contractually retained (whether or not exercised) and/or as a practical matter actually exercised by Reading Anthracite Company over the production, mining, processing, etc. of coal by lessees from such leased coal lands, including, but not limited to the manner in which the coal is to be mined, the amount and the extent to which the coal is to be mined, the type of reclamation that is to be accomplished, etc.
>
> (7) For the past four (4) years, please identify on a monthly or quarterly basis the tonnage of coal produced by Reading Anthracite Company under the agreement, produced by Reading Anthracite Company by not under the agreement [sic], and the tonnage of coal produced by Reading Anthracite Company lessees (from lands leased from Reading Anthracite Company).
>
> To the extent that the above information can be provided in a package or if necessary in installments, please provide it as soon as possible to the Region I Office. If you have any questions regarding this request, including clarification of request or suggestions as to any conditions under which you will provide this information, please contact the Region I office.[6]

Thereafter, on July 29, 1983, the Union filed unfair labor practice charges with the Board, reciting in material part, as follows:

> Since on or about May 2, 1983, the above-named employer has been violating Section 8(a)(5) of the Act by refusing to provide the United Mine Work-

[3] See Jt. Exh. 1.
[4] Ibid., art. 2, sec. (a), p. 1.
[5] Ibid., art. 2, sec. (g)(1), p. 3–4.
[6] See Jt. Exh. 2.

ers of America, the collective bargaining representative, with the information the Union needs to effectively administer its labor contract with the employer.[7]

On September 23, 1983, the Union, through its "legal coordinator" informed Respondent that its letter of May 2 included a typographical error, attempted to correct same, and indicated that the Union remained available to clarify any questions held by Respondent concerning the request.[8]

Prior to the instant hearing on January 9, 1983, Respondent simply ignored the request, neglecting to inquire in any fashion as to the nature, purpose, or scope of the Union's interest in the subject matter.

B. *The Controlling Precedent; Relevance of the Requested Information*

Pursuant to settled authority, employers, as a corollary of the duty to bargain in good faith, are required, on request, to provide the exclusive collective-bargaining agent with certain information within its possession. This duty exists where the data sought is relevant to the Union's duties in connection with the negotiation, enforcement, or administration of a collective-bargaining agreement. See, e.g., *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149, 152 (1956); *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 435–436 (1967); *Detroit-Edison Co. v. NLRB*, 440 U.S. 301, 303 (1979).

Apart from issues addressed to the relevance of information sought, precedent leaves little room for controversy in this area of the law. Once relevance is established, the failure of the employer to respond is tantamount to a per se violation of Section 8(a)(5) and (1) of the Act. See *Curtiss-Wright Corp. v. NLRB*, 347 F.2d 61, 68 (3d Cir. 1965); *C-B Buick Inc. v. NLRB*, 506 F.2d 1086, 1091 (3d Cir. 1974).[9] In the interest of facilitating a free exchange of facts, labor organizations have been favored with wide latitude in perfecting a legally enforceable claim. Thus, certain requests, such as those related to "wages" fall into a category so "intrinsic" to the core of the employer-employee relationship as to be "presumptively relevant." See, e.g., *San Diego Newspaper Guild Local 95 v. NLRB*, 548 F.2d 863, 867 (9th Cir. 1977). In such cases, "the employer bears the burden of showing a lack of relevance." *Prudential Insurance Co. of America v. NLRB*, 412 F.2d 77, 84 (2d Cir. 1969), cert. denied 396 U.S. 928 (1969). On the other hand, in connection with certain other types of information, "the courts have required a showing of relevance by the Union before holding that the employer must comply with the request." *San Diego Newspaper Guild Local 95 v. NLRB*, 548 F.2d at 867, and cases cited therein. However, even under this more stringent standard, the initial burden of proof imposed upon labor organizations is readily satisfied, on the theory that "a broad range of potentially useful information should be allowed to the Union for the purpose of effectuating the bargaining process, unless it is clearly irrelevant." *Procter & Gamble Mfg. Co. v. NLRB*, 603 F.2d at 1315. Consistent therewith, the Supreme Court, has admonished that the Board need only find a "probability" as to relevance, and that the information sought "would be of use to the union in carrying out statutory duties and responsibilities." *NLRB v. Acme Industrial Co.*, 385 U.S. at 437; *NLRB v. Rockwell Standard Corp.*, 410 F.2d 953 (6th Cir. 1969); *Procter & Gamble Mfg. Co. v. NLRB*, 603 F.2d at 1315.

With these principles in mind, on the undisputed facts in this proceeding, the prima facie entitlement of the Union is beyond realistic challenge. The request, on its face, relates to possible violations of separate obligations willingly assumed by Respondent through the bargaining process. . The first derives from a "resolution" adopted in 1939 by the Union and the Anthracite Operators which in material part provided as follows: "When any operator proposes to lease a . . . mine or parcels of coal land, and before such lease is executed, he shall notify the President of the District of the United Mine Workers of America in which the property is located."[10] According to testimony adduced on behalf of the complaint it was the Union's position that the aforesaid notification obligation was carried forward through article 1 of the subsisting collective-bargaining agreement which in material part states:

> THIS AGREEMENT . . . carries forward the provisions of the precedessor Agreements except to the extent inconsistent with this Agreement. Prior practice, custom, local agreements and rulings and decisions of the Anthracite Board of Conciliation and umpire not in conflict with this Agreement shall be continued.

Consistent with this interpretation, there was no showing in the instant case that the 1939 resolution had ever been modified, abrogated, or otherwise limited. Against this background, the May 2 letter urges Respondent to "specifically identify the leases, the dates the leases were let, and whether or not the United Mine Workers of America was previously notified of this lease." Such a request was plainly relevant to the Union's assessment of whether or not Respondent had breached an enforceable commitment to the Union.

Beyond the notification issue, the letter of May 2 sought disclosure of factors bearing upon the possibility that Respondent might have embarked upon an improper intrusion upon work awarded by contract to represented employees. On its face, that letter seeks documentation and other evidence pertaining to the degree of common control, common ownership, and other elements of interrelationship of operations relevant to assessment of whether lessees were utilized as a "disguised continuance" in furtherance of a design by Respondent to evade its negotiated contractual duties. See, e.g., *Southport Pe-*

[7] See G.C. Exh. 1(a).

[8] See Jt. Exh. 2(b).

[9] "To refuse to furnish such relevant information violates the Act, irrespective of the employer's good or bad faith, because it conflicts with the statutory policy to facilitate effective collective bargaining." *Procter & Gamble Mfg. Co. v. NLRB*, 603 F.2d 1310, 1315 (8th Cir. 1979).

[10] See G.C. Exh. 4, pp. 179–180. Respondent in its posthearing brief erroneously refers to the resolution as the "Anthracite Coal Strike Commission award."

troleum Co. v. NLRB, 315 U.S. 100, 106 (1942). In this connection, it will be recalled that article 2, section (g)(1), of the governing agreement embodies an injunction that "[t]he Operators agree that they will not lease out any coal lands for the purpose of avoiding the application of this Agreement."[11] Michael Semko, president of District 5 of the United Mine Workers, testified that the request for comprehensive data concerning Respondent's leasing arrangements also was effected pursuant to article 2, section (g), of the subsisting collective-bargaining agreement and that this request was based on "concern by the coal operators and . . . the Union prior to the time . . . that Reading Anthracite was leasing coal lands out to other people without notifying the Union," and the fact that operators were "expressing concern about nonunion operations in District 25," and "these nonunion operators . . . does affect our membership."[12]

It is also clear that, as a matter of law, the theory on which a grievance or other cause of action might be maintained was implicit in the May 2 letter. That document sought a return which closely tracked factors relevant to the Board's alter ego policy, a concept designed to assure that an employer not avoid its statutory obligations "merely by forming a new business entity." *NLRB v. Scott Printing Co.*, 612 F.2d 783, 786 (3d Cir. 1979). In that same vein, as a matter of settled principle, "one entity is responsible as the *alter ego* for another's unfair labor practices if an apparent transfer of operations is not an 'arms length' transaction between distinct entities . . . but merely a sham, creating a disguised continuance of the precedessor's operations." *Fugazy Continental Corp. v. NLRB*, 725 F.2d 1416 (D.C. Cir. 1984); *South Prairie Construction Co. v. Operating Engineers*, 425 U.S. 800 (1976). By the same token, a contracting employer's use of a closely related firm to operate on a nonunion basis has been held to violate Section 8(a)(5) and Section 8(d) of the Act as an abrogation of the terms of a subsisting contract. *NLRB v. Al Bryant Inc.*, 711 F.2d 543 (3d Cir. 1983). And beyond the authority of the Board, in *Carpenters Local 1846 v. Pratt-Farnsworth*, 690 F.2d 489, 511 (5th Cir. 1982), the court recognized the legal substantiality of a union's cause of action to enforce a contract as against a related, nominally independent nonsignatory under Section 301 of the Act, stating as follows:

> It was Congress' stated goal in adopting section 301 to treat collective bargaining agreements as contracts fully enforceable in federal courts, in order to encourage the making of such agreements and to promote industrial peace through faithful performance of such agreements. . . . The NLRA similarly has as one of its goals the promotion of industrial peace through faithful performance of collective bargaining agreements. . . . We have seen that the Board has developed the single employer and alter ego theories in the context of unfair labor practice proceedings in which it is alleged that related employers have violated sections 8(a)(5) and (1) of the NLRA by failing to abide by the terms of a collective bargaining agreement entered into by one of them. Both of those theories are clearly designed to promote the faithful performance of a collective bargaining agreement not only by the signatory employer but also by a nonsignatory employer with the requisite high degree of consanguinity to the signatory employer. . . . [We] see no reason why the law developed by the Board and by federal appellate courts in that context should not be the substantive law applied in a suit under section 301 against related employers for breach of a collective bargaining agreement entered into by one of them.

In the instant case, the governing contract on its face purports to assure represented employees in the multiemployer bargaining unit work entailed in "the production, preparation, processing and cleaning of coal from deep mining operations, strip operations, and refuse banks."[13] It need not be gainsaid that: "The preservation or diversion of [such] . . . work is a subject of mandatory bargaining under the Act. *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203, 209 . . . (1964)." *NLRB v. Rockwell-Standard Corp.*, 410 F.2d 953, 957 (6th Cir. 1969). Here, the leasing operations of Respondent were extensive. Most of the lessees were performing work akin to that described in the "Work Jurisdiction" clause of the contract. In these circumstances, the Union's right to information enabling determination as to whether any employee interests were compromised by operations financed, owned, controlled, or supervised by Respondent is not only confirmed by Board precedent, but also by specific views expressed in at least two circuit courts of appeals. See *NLRB v. Leonard B. Herbert Jr. & Co.*, 696 F.2d 1120 (5th Cir. 1983); *NLRB v. Associated General Contractors*, 633 F.2d 766, 772 (9th Cir. 1980); see also *Doubarn Sheet Metal, Inc.*, 243 NLRB 821 (1979).

[11] Attorney Kopko, on behalf of Respondent, after close of the evidentiary portion of the hearing, represented that "[t]hrough a reading of the complaint, the Reading Anthracite Company was not alerted to the contractual provision . . . which they [the Union] were relying upon for their entitlement to the information that they had requested." In view of Kopko's limited experience under this Act, his representation might well have been accurate. I would note, however, that the governing collective-bargaining agreement itself has but one article dealing with the leasing of coal lands. Furthermore, leasing practices unmistakably were the focal point of the Union's letter. In any event, the Union both on May 2 and September 23 invited the Employer to address any questions or need for clarification to the Union concerning the request. Respondent obviously failed to show any interest in this offer, electing instead on its own assumption, blindly, to assert that "the information requested . . . is beyond the scope of any collective bargaining obligations imposed . . . by the Act." See G.C. Exh. 1(e).

[12] In its posthearing brief, Respondent characterizes the General Counsel's testimony as failing to provide "clear or consistent reason for the broad request for information." To exemplify the so-called shifts in this evidence Respondent fails to rest entirely upon testimony. Indeed, at the core of this contention is a representation uttered by the General Counsel in support of an offer of evidence which later was excluded by me pursuant to Respondent's own objection. Surely, learned counsel could be expected to grasp the difference, in terms of probative weight, between proof and argumentation by an attorney. Contrary to Respondent, the testimony of Semko concerning the Union's suspicion as to the possibility that Respondent was engaging in evasive tactics through its leases, the fact that any such practice would offend interests of represented employees as well as other signatory operators, and the fact the Union sought to protect those concerns by the May 2 effort was perfectly plausible and did in fact portray "a clear and consistent reason for the broad request for information that it made to Reading Anthracite."

[13] Jt. Exh. 1, art. 2(a)(1), p. 1.

Indeed, in the most recent pronouncement affecting the instant issue, the Ninth Circuit Court of Appeals stated as follows:

> We think the union needed the requested information to perform an essential collective bargaining function. The union had reason to suspect that the employer was attempting to circumvent the collective bargaining contract by secretly cutting wages and directing work to other, possibly related, firms. Without further data, however, it could not successfully act on these suspicions. [*NLRB v. National Cleaning Co.*, 723 F.2d 746, 748 (9th Cir. 1983).]

C. *The Defense*

Respondent's posture in this matter is inexplicable under the law and the facts. Despite prodding by me not a shred of competent proof was offered which would tend to controvert the relevance of the requested information. The clear message from an overwhelming body of judicial authority has been ignored, rather than challenged or distinguished. At least one defense collides directly with the teachings of the Supreme Court. Thus, it is asserted on behalf of Respondent that the instant complaint can have no merit "absent some indication that the purpose for the leases was to avoid the Anthracite Wage Agreement." Under this contention the Charging Party would have to substantiate, and the Board and courts affirm, a violation of the contract as a prerequisite to disclosure. Respondent cites neither authority nor line of reasoning which would tend to support such a requirement. Indeed, this is a view which has been discredited by empirical authority. In *NLRB v. Acme Industrial Co.*, 385 U.S. 435, 437–438 (1967), the Supreme Court made it clear that the duty to furnish requested information was an obligation which stood "in aid of the arbitral process." As such, it was enforced "to enable [a] union to evaluate intelligently grievances," in order that it might make an "intelligent appraisal of its right to grieve" and, thus, to "sift out unmeritorious claims." Hence, an employer is precluded from withholding relevant information so as to require a union to proceed with a grievance under conditions amounting to no more than "a game of blind man's bluff." 385 U.S. at 438 fn. 8. See also *J. I. Case Co. v. NLRB*, 253 F.2d 159, 155 (7th Cir. 1958). Accordingly, "it is not the Board's function in this type case to pass on the merits of the Union's claim that Respondent breached the collective bargaining agreement or has committed an unfair labor practice." *NLRB v. Rockwell-Standard Corp.*, 410 F.2d 953, 957 (6th Cir. 1969).

Equally untenable is Respondent's contention that the Charging Party's entitlement is influenced adversely by distinction between the work performed by Respondent and its lessees. Even if one were to accept Respondent's representation that the lessees are engaged in deep mining, while it participates exclusively in stripping, this would merely establish that Respondent has made a business judgment that it would not acquire the needed equipment, technology, and personnel to itself develope the capacity to engage in work performed by its lessees. Though Respondent was forewarned at the hearing by my ruling that any such operational difference was irrelevant, the issue was again raised in the posthearing brief without articulation as to just how, under the law, this would make a difference. On the other hand, unmistakable evidence reveals that Respondent was signatory to a multiemployer collective-bargaining agreement which "covers the wages and conditions of employment in the Anthracite coal fields of Pennsylvania,"[14] and which also provided that "the production, preparation, processing and cleaning of coal from deep mine operations, strip operations . . . shall be performed by classified Employees of the Employer covered by and in accordance with the terms of this agreement."[15] In addition, Respondent, by virtue of article 2, section (g), affirmed that its "Agreement covers the operation of all the coal lands owned or held under lease by [it] . . . or by any subsidiary or affiliate." At a minimum, it is the work that Respondent guaranteed the Union through contract, rather than the nature of its own operations, that is determinative. Here again, Respondent's position is in defiance of clear holdings that employers may not subvert contractually defined work jurisdiction by channeling even part thereof to a nominally separate entity which, as a matter of substance, constitutes no more than a "disguised continuance." *NLRB v. Scott Printing Co.*, supra; *Fugazy Continental Corp. v. NLRB*, supra; *South Prairie Construction Co. v. Operating Engineers*, supra; *NLRB v. Al Bryant Inc.*, supra.

The final defense offered by Respondent is founded upon Section 8(e) of the Act. That issue was first raised at the hearing after all evidence had been submitted, when then counsel for Respondent represented that from a "reading of the complaint, the Reading Anthracite Company was not alerted to the contractual provision in which [the Union] . . . were [sic] relying . . . for their entitlement to the information that they had requested." On that basis, the answer to the complaint was amended to include as an affirmative defense that article 2, subsection (g), embodied "a secondary purpose . . . and that it served no legitimate union function so far as the preservation of work is concerned because it only deals . . . [with] benefits that go to employees of independent miners and to the lessees; no benefit to the Union whatsoever." A motion to dismiss the complaint on that ground was denied. That ruling is hereby reaffirmed.

In this regard, the information requested herein was based upon separate contractual obligations and possible grievable violations, the first pertaining to the 1939 resolution and relating exclusively to the proviso thereof that "when any operator proposes to lease a . . . mine or parcels of coal land . . . before such lease is executed, he shall notify the president of the District of the United Mine Workers of America in which the property is located." Unlike article 2, section (g), Respondent, at no time during the course of the hearing, asserted that this resolution was within its 8(e) contention. Furthermore, in now raising that issue, Respondent seeks to side step the literal terms of the Union's letter of May 2, and belatedly

[14] Jt. Exh. 1, art. 1, p. 1.

[15] See Jt. Exh. art. 2, sec. (a), p. 1.

to substitute a version of the facts more to its suiting. For there is no indication in the testimony which directly or indirectly would tend to support the notion that the Union's request was addressed to any other obligation incurred by Respondent under that resolution. Nonetheless, Respondent imputes an 8(e) objective to language in the resolution which requires a lessor's cooperation with the president of the Union in establishing contact with the proposed lessee and to "render reasonable assistance to the Mine Workers and lessee to have operations under such leases carried on in accordance with the terms and provisions of the wage agreement." As indicated, here, the Union is not shown to have ever requested or to have charged Respondent with a failure to provide any such assistance, or to have requested information in connection therewith. Thus, on the facts, the claim of secondary objective is without foundation. See *National Cleaning Co.*, 265 NLRB 1352 fn. 14 (1982), enfd. 723 F.2d 746 (9th Cir. 1983). Moreover, were it necessary to reach the issue, I would find Respondent guilty of absolute error in representing that "the award of the Anthracite coal Strike Commission . . . states that coal lands may be leased *only where the lessees agree to abide by the UMWA agreement.*" See Respondent's posthearing brief, page 6. This is a misstatement of the contract terms. The "assistance" arrangement does not state nor embody, directly or indirectly, a "cease doing business objective" within the ambit of Section 8(e). See, e.g., *Harris Truck & Trailer Sales*, 224 NLRB 100 (1976); *Lone Star Steel Co. v. NLRB*, 639 F.2d 545 (10th Cir. 1980). It fails to include the language of "boycott" and neither imposes "onerous conditions," nor limits the signatory employer's right to contract with unorganized operators or those who fail to abide by the terms and conditions of employment enjoyed by those working under union contract. See, e.g., *Masters, Mates, & Pilots (Seatrain Lines)*, 220 NLRB 164 fn. 2 (1975). Moreover, the statement on behalf of Respondent that the assistance provision "is in substance precisely the same as the language struck down by the Board in *Amax Coal*, "is a materially false portrayal of what was involved in that case and fails to grasp the important distinction between the "assistance clause" and that in *Amax* and other cases involving 8(e) violations. Thus, the cases cited by Respondent including *Mine Workers Local 1854 (Amax Coal)*, 238 NLRB 153 (1978), enfd. 614 F.2d 872 (3d Cir. 1980), revd. on other grounds 354 U.S. 322 (1981); *Teamsters Local 94 (California Dump Truck Owners)*, 227 NLRB 269 (1976), and *Electrical Workers IBEW Local 437 (Dimeo Construction)*, 180 NLRB 420 (1969), all involved clauses which on their face denied the employer discretion as to whom it would do business with, precluding business relationships with those who "do not have union contracts or employ union members" (238 NLRB at 626), or who do not pay the precise wages and benefits enjoyed by members of the bargaining unit (227 NLRB at 273).

Beyond the "resolution" and the obligation to notify embodied therein, article (2), section (g), of the current agreement and language thereof precluding signatory employers from leasing coal lands "for the purpose of avoiding the application of this agreement" is the only other clause directly involved in the Union's request. As was true of its attack upon the 1939 resolution, Respondent also attempts to set up a "strawman" in order to perfect its 8(e) claim with respect to article 2(g). Thus, in addition to the segment invoked herein by the Union, article 2, section (g), also includes the following:

> Where coal lands of a signatory operator or a signatory company are leased, the signatory operator or signatory company shall be responsible for defaulted wages or earnings of miners of the lessee and independent coal operators.

Here again, Respondent fails to point to any evidence, having the remotest tendency to suggest that the Union's May or September requests, or the surrounding circumstances, are indicative of an interest held by the Union in obtaining information in support of a charge that Respondent had violated the default language or in exploring any such possibility.[16] Nor does it appear that Respondent would be possessed of data bearing upon the "wages and earnings" paid by lessees. On the other hand, clear evidence discloses that under article 2, section (g), the information sought in the instant case, on its face, was addressed to the possible diversion of unit work to an alter ego which might perform under standards undercutting those in the primary work unit. The default clause is collateral to and has no bearing upon the Union's right to enforce another, legally separable obligation regulating the use of a lease as a means of avoiding the collective-bargaining agreement. Not a scintilla of evidence has been offered to suggest that this latter restriction constitutes anything other than a legitimate effort to preserve the work of employees of signatory employers as that work is defined in article 2, section (a), of the agreement.[17] Respondent in its posthearing brief

[16] Even if the default language were germane to the instant proceeding, evidence has not been developed to show that it was intended to apply, or had been applied, to lessees, who in their own right, were nonsignatories whose employees were not within the primary work unit. See, e.g., *Teamsters Local 982 (Barker Trucking)*, 181 NLRB 515, 520 (1970), wherein it was stated: "As the . . . clauses are not clearly unlawful on thier face, we will interpret them to require not more than what is allowed by law." Consistent therewith, the instant default provision would be perfectly legitimate for purposes of Sec. 8(e) if intended to apply only to lessees whose employees were part of the primary work unit, *National Woodwork Mfrs. Assn. v. NLRB*, 386 U.S. 612 (1967), including those lessees which constitute an alter ego of Respondent.

[17] It is argued on behalf of the defense that since the lands mined under the leases involved methods and equipment distinct from the technique used by Respondent, the Union's request under art. 2, sec. (g), could not have carried a work preservation objective. However, under settled authority, it is work performed in the "bargaining unit" that controls the "issue of primary *versus* secondary activity." *Teamsters Local 710 v. NLRB*, 335 F.2d 709 (D.C. Cir. 1964). Here the appropriate unit was multiemployer in scope and the contract expressly defined the work thereof as including both "deep" and "strip" mining. See art. 2, sec. (a). In such circumstances, the employer's business judgment as to its own method of operation, affecting as it does, only a segment of the overall bargaining unit, is irrelevant. See *National Woodwork Mfrs. Assn. v. NLRB*, supra, where the legitimacy of a boycott was upheld despite the absence of a showing that the signatory employer, a general contractor in the construction industry, had ever engaged in the offsite manufacture of preset, prefitted doors. Cf. *Teamsters Local 216 (Bigge Drayage)*, 198 NLRB 1046, 1047 (1972), where none of the employees in the multiemployer unit had ever performed the disputed work.

cites *Mine Workers Local 1854 (Amax Coal)*, 238 NLRB 1583 (1978). It neglects to mention, however, the specific finding in that case addressed to a contract term having identical substantive content to the instant leasing restriction. Thus, at 1625, it was stated as follows:

> The first paragraph is addressed only to the actions of the signatory employer and the interests of the unit employees. It secures an agreement that the signatory employer will not transfer coal lands by lease, sublease, or license where "the purpose thereof is to avoid the application of this Agreement." On its face the first paragraph is designed to prevent the erosion of the contract bargaining unit by a series of licensing of leasing agreements, and, as such, it "is addressed to the labor relations of the contracting employer vis-a-vis his own employees" . . . hence it is not proscribed by Section 8(e) of the Act.

My ruling, made at the hearing, that the relevant provision of article 2, section (g), involved a legitimate arrangement designed to protect the work of represented employees in the primary work unit derives direct support from the foregoing holding and is reaffirmed.

CONCLUSIONS OF LAW

1. Reading Anthracite Company is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. United Mine Workers of America is a labor organization within the meaning of Section 2(5) of the Act.
3. By failing and refusing to provide the Union with relevant information requested by the Union through its letters of May 2 and September 23, 1983, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.
4. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent has violated Section 8(a)(5) and (1) of the Act it shall be ordered to cease and deist from engaging in such conduct in the future and to take certain affirmative action designed to effectuate the policies of the Act.

As it has been concluded that Respondent has refused to provide relevant information, requested by the Union to assure compliance with provisions of a subsisting collective-bargaining agreement, it shall be recommended that Respondent be ordered to furnish the Union said information.

On the face of this entire proceeding, a question also exists as to whether the defenses raised were so baseless and lacking in merit as to warrant extraordinary relief. It is true that there is no licensing authority that imposes performance standards upon those who plead causes under this Act. At the same time, however, extraordinary relief is available to protect the Board and the courts from trifling, baseless litigation. In *NLRB v. Tiidee Products*, 426 F.2d 1243 (D.C. Cir. 1970), the Board was sharply criticized for failing to devise a remedy which would deal effectively with employers whose violation of the duty to bargain, on the face of clear evidence, is nondebatable. The court stated as follows:

> [I]mportant considerations of judicial administration are involved. Simply put, the present posture of the Board encourages frivolous litigation not only before the Board, but in the reviewing courts. The case and hand is in point. The position of the Company is palpably without merit with respect to its refusal to bargain. Yet it profited through the delay that review entails; all during this litigation it has not had to bargain collectively over wages and other financial aspects of employment.
>
> The courts, then, are doubly concerned when Board inadequacies drain and divert judicial resources from the provision of justice to the crowded calendars and to meritorious litigants whose claims clamor for attention. The same considerations are presumably applicable at the administrative level. [426 F.2d at 1249–50.]

In accordance therewith the Board subsequently fashioned a remedy tailored to discourage needless litigation as follows:

> We find merit, however, in the Union's request that it be reimbursed for certain litigation costs and expenses. Normally as the Board recently noted, litigation expenses are not recoverable by the charging party in Board proceedings even though the public interest is served when the charging party protects its private interests before the Board.
>
> We agree with the court, however, that frivolous litigation such as this is clearly unwarranted and should be kept from the nation's already crowded court dockets, as well as our own. While we do not seek to foreclose access to the Board and courts for meritorious cases, we likewise do not want to encourage frivolous proceedings. The policy of the Act to insure industrial peace through collective bargaining can only be effectuated when speedy access to uncrowded Board and court dockets is available. Accordingly, in order to discourage future frivolous litigation, to effectuate the policies of the Act, and to serve the public interest we find that it would be just and proper to order Respondent to reimburse the Board and the union for their expenses incurred in the investigation, preparation, presentation, and conduct of these cases, including the following costs and expenses incurred in both the Board and court proceedings: Reasonable counsel fees, salaries, witness fees, transcript and record cost, printing cost, travel expenses and per diem, and other reasonable costs and expenses." [*Tiidee Products*, 194 NLRB 1234, 1236–37 (1974).]

With this policy in mind, it is noted that in this case there is no material dispute of fact. The Charging Party on May 2, 1983, made a detailed request for information,

expressly pointing out that any questions or need for clarification would be provided to the Employer upon demand. Respondent ignored the request, forcing the Union to invoke the Board's jurisdiction. In justification of its position Respondent has offered defenses and a line of reasoning authoritatively discredited by longstanding precedent. Clearly pertinent and unambiguous policy emanating from the Supreme Court has been knowingly overlooked,[18] and no effort is made to distinguish a court decision which appears to be dispositive at least as to the Union's prima facie entitlement to the information.[19] Moreover, not a single, legally competent, fact is offered to refute the complaint's allegation of relevance. Indeed, Respondent's factual position includes mischaracterizations, some of which heretofore have been discussed and misstatement as to rulings made by me, which in the circumstances cannot be lightly dismissed as attributable to careless zeal.[20]

Finally, in what can only be taken as a transparent and baseless attempt to divert attention from the merits and to format delay, Respondent seeks to make me the center of controversy though a prejorative laden, otherwise vacuous assault upon his basic fitness and integrity. Respondent's propensity to portray falsely the record facts in this respect continues and has been documented by a report, prepared by me and incorporated herein as Administrative Law Judge's Exhibit 3. The effort to discredit the judge is a ploy so meretricious and lacking in substance as to warrant a strong recommendation that appropriate disciplinary action be taken pursuant to the rules governing practice before the Board.

For these reasons, and as the various defenses interposed by the Respondent merge within that class of frivolous posturing condemned in *Tiidee*, supra, extraordinary relief, in the form of litigation costs to the Board and Charging Party, is deemed appropriate redress herein. See also *Koval Press*, 241 NLRB 1261, 1263-64 (1980), enfd. 106 LRRM 2603 (3d Cir. May 27, 1980, unpublished). In so recommending, it is my considered judgment that in order to create delay herein, "the offending party has intentionally used defenses meritless on their face in a clear attempt to burden the processes of the Board and the courts." *Admiral Merchants Motor Freight*, 265 NLRB 134 (1982); see also *NLRB v. Daniel Construction Co.*, 732 F.2d 139 (1st Cir. 1984), enfg. 257 NLRB 1276 (1981). Accordingly, it shall be recommended that Respondent be ordered to compensate the Board and Charging Party for reasonable counsel fees, salaries, witness fees, transcript, and all record costs, printing costs, travel expenses, and per diem, and other reasonable costs and expenses dervived from maintenance of this action, including interest as prescribed in *Florida Steel Corp.*, 231 NLRB 651 (1977).

[Recommended Order omitted from publication.]

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[18] Respondent's contentions on the issue of "relevance" cannot be reconciled with (1) the "liberal discovery-type standard" and (2) "the blind man's bluff" analogy adopted by the Supreme Court in *NLRB v. Acme Industrial Co.*, supra. Respondent continues to maintain these positions as if the Court's pronouncements did not exist. This, despite the fact that the aforesaid decision and both concepts were mentioned prominently in *NLRB v. Leonard B. Hebert, Jr. & Co.*, supra, a case cited by the Respondent.

[19] *NLRB v. Leonard B. Hebert, Jr. & Co.*, supra, which, as indicated, was cited by Respondent for purposes other than its holding.

[20] The Respondent at p. 7 of its brief states that "The ALJ . . . acknowledged that if the work being done under the coal lease is *no* normally performed by Reading Anthracite's employees, then there would be *not* work preservation purpose incorporated in Article 2, Section (g)." Just how anyone acquainted with this proceeding could honestly and in good faith make such an interpretation of any comment made by me is incomprehensible. At several points in the hearing, including distinct segments quoted by Respondent in this regard in charging me with bias, it was consistently ruled from the bench that it was the work assigned to the multiemployer bargaining unit *by the contract* rather than that actually performed by Respondent that was controlling.

Hennessy Products, Inc. *and* International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local Union No. 992. Case 6–CA–13640

18 January 1985

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS HUNTER AND DENNIS

On 26 August 1981 Administrative Law Judge James T. Youngblood issued the attached decision. The General Counsel filed exceptions and a memorandum in support thereof, the Charging Party Union filed exceptions and a brief in support thereof, and the Respondent filed a brief in support of the decision and also filed an answering brief to the General Counsel's and the Union's exceptions and a memorandum in support thereof.

The Board has considered the decision and the record in light of the exceptions, briefs, and memoranda and has decided to affirm the judge's rulings, findings, and conclusions[1] and to adopt the recommended Order.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

[1] In agreeing with the judge's decision to dismiss the complaint herein because no violation was made out under the precedent of *Telautograph Corp.*, 199 NLRB 892 (1972), we note that the Board, while overruling *Telautograph* in *Dresser Industries*, 264 NLRB 1088 (1982), decided to apply *Dresser* prospectively only, and therefore would not find unlawful actions taken pursuant to the applicable law at the time of the action, i.e., while *Telautograph* was the law. In finding no violation here, we do not necessarily agree with all of the statements made by the judge with respect to the parameters of *Telautograph*. We also note the unusual factual matrix presented here, and specifically note the lack of any pending grievance or the existence of a current or recently expired contract.

Chairman Dotson and Member Dennis, who agree that Dresser was prospective only and therefore would not apply to the instant case, find it unnecessary to intimate any views regarding the issues presented in *Dresser*.

DECISION

STATEMENT OF THE CASE

JAMES T. YOUNGBLOOD, Administrative Law Judge. The complaint which issued on October 16, 1980, alleges that since about May 20, 1980, Hennessy Products, Inc. (the Respondent or the Employer) has failed and refused to furnish International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local Union No. 992 (the Union) with certain necessary and relevant information requested by the Union, in violation of Section 8(a)(1) and (5) of the Act. The Respondent filed an answer denying the commission of any unfair labor practices. This matter was heard by me on May 20, 1981, in Chambersburg, Pennsylvania. All parties were represented at the hearing and following the hearing the Respondent and the General Counsel filed briefs which have been duly considered.[1]

On the entire record in this matter, and from my observation of the witnesses and their demeanor, and after due consideration of the briefs filed, I make the following

FINDINGS OF FACT AND CONCLUSIONS

I. THE BUSINESS OF THE RESPONDENT

The Respondent, with its office and place of business in Chambersburg, Pennsylvania, is engaged in the manufacture and nonretail sale and distribution of railroad speciality equipment and vending machines and related products. The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The complaint alleges, the Respondent admits, and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

On October 11, 1978, the Union was certified as the exclusive collective-bargaining representative of the Respondent's production and maintenance employees.[2] Between December 1978 and October 1979,[3] the Union and the Respondent unsuccessfully attempted to negotiate a collective-bargaining agreement. On April 23, 81 of 119 unit employees went out on a union authorized strike. The strike continued until October 27. The remaining 38 unit employees crossed the picket line and continued to work throughout all or part of the strike. During the

[1] To its brief the Respondent attached the affidavit of James B. Nicklas, vice president of the Respondent, and two pieces of union literature soliciting employees to sign union authorization cards and a copy of a union authorization card. In the affidavit Nicklas states that on the afternoon of June 4, 1981, after the hearing in this matter he witnessed organizers of the Union distributing this literature at the Respondent's premises. The General Counsel filed a motion to strike that portion of the Respondent's brief which made reference to the above material. The Respondent filed an opposition to the General Counsel's motion. Whether or not the Union was soliciting employees to join the Union, or to sign authorization cards, after the hearing in this matter, to me, is totally irrelevant and immaterial to the issues in this proceeding. In any event no consideration was given to this material in this decision. Additionally, on June 29, 1981, the Charging Party filed a motion to reopen the record so that the transcript and exhibits in a prior proceeding between the same parties could be incorporated into the present record. That case was settled on May 15, 1980, by an informal settlement agreement, a copy of which is in this record. As the issues involved in that proceeding have no bearing on the issues in this proceeding, I see no reason to reopen the record. Accordingly, the Charging Party's motion to reopen the record is denied.

[2] The appropriate unit is described as follows:

All full-time and regular part-time production and maintenance employees of Hennessy Products, Inc. employed at its plant located in Chambersburg, Pennsylvania, including group leaders and shipping and receiving clerks; excluding all co-op students and summer help and other temporary employees, office clerical employees and professional employees, guards, and supervisors as defined in the Act.

[3] Unless otherwise specified all dates refer to 1979.

course of the strike, the Respondent hired 64 permanent replacements. It also appears that, during the course of the strike, at least 11 striking employees returned to work. During the strike, the Respondent had group meetings with all of the employees at least once a week. James Hennessy, the Respondent's president, on more than one occasion, informed the assembled nonstriking employees that they could get rid of the Union after 1 year from the date of the certification.[4] On October 23, one of the strike replacements, Ralph G. Fries, filed a decertification petition in Case 6-RD-693.

By letter dated October 25, the Respondent's counsel John G. Kruchko advised the Union that the Employer had been notified that its employees had filed a decertification petition and that "consistent with Board policy, the Company is hereby suspending negotiations pending the outcome of this election."

By letter dated October 26,[5] the Union notified the Employer that it accepted "the contract proposal" and made an unconditional offer to return to work on behalf of all of the striking employees. On October 27, the picketing ceased and each of the striking employees made an individual and unconditional request to return to work.

By letter dated October 30, the Respondent's counsel acknowledged receipt of the Union's October 26 letter, and indicated that there was no proposal outstanding which could be agreed to at that time, and reiterated its refusal to negotiate pending the outcome of the decertification petition. He emphasized that the Company was not withdrawing recognition, but rather only refusing to bargain while the RD petition was pending. The letter also informed the Union that the Company would recall striking employees on a nondiscriminatory basis, as job openings become available.

A few strikers were reinstated immediately and on November 7 the Respondent informed striker James Mongold that he was being denied reinstatement because of picket line misconduct. The remaining unreinstated strikers were informed that they had been permanently replaced and would be recalled when jobs became available.

On November 14, the Union filed an unfair labor practice charge alleging that the Respondent violated Section 8(a)(1) and (3) of the Act by terminating or refusing to reinstate Mongold. The decertification petition was held in abeyance pending the resolution of that charge. Following a complaint and hearing in that matter on May 15 the parties entered into an informal settlement agreement in which Mongold waived reinstatement.

By letter dated May 29, 1980, the Union requested that the Respondent forward the following information:

> 1. The names and addresses of the present employees in the bargaining unit and their date of employment. In listing the employees, please indicate their work classification and wage rate.
>
> 2. The names and addresses of any employees hired since October 20, 1979, and include the date hired, the classification of work, and the wage rate.
>
> 3. Indicate when you intend to recall the laid off striking employees.
>
> 4. State whether there are any laid off striking employees whom you do not intend to recall. We raise the issue because at the NLRB hearing there was an unstated implication that there may be employees who will be refused employment. The Union's position is that you are obligated to reinstate all of the laid off employees and this position is supported by all of your conduct to date including, but not limited to, your letters. If you are attempting to deprive any laid off employee of employment, we should like to be advised of the specific factual basis for your position.

On receipt of the Union's request for the above information, James Nicklas, the Respondent's vice president, who is also in charge of labor relations for the Respondent, made the decision for the Respondent not to respond to the Union's letter. As of the date of the hearing in this matter, the Respondent had not responded to the Union's request for information and had not communicated to the Union that the Respondent had withdrawn recognition of the Union as the exclusive representative of its employees.

The complaint alleges that the information requested by the Union on May 29, 1980, was necessary for, and relevant to, the Union's performance of its function as the exclusive collective-bargaining representative of the employees in the appropriate unit and as the Respondent has failed and refused to furnish the requested information, the Respondent has engaged in conduct violative of Section 8(a)(1) and (5) of the Act.

At the hearing the General Counsel and the Respondent entered into a stipulation setting forth the above facts, and the General Counsel, relying on a presumption of continued majority status and a presumption of relevance of the requested information, offered no further evidence and rested his case in chief on the complaint, answer, stipulation, exhibits, and the presumptions as stated above.

The Respondent contends that, because of the pendency of the decertification petition, it has no duty to bargain with the Union and therefore had no duty to supply the requested information to the Union pending that decertification petition; and that the General Counsel must establish by testimony or other evidence, the relevance of the requested information. In any event it has a good-faith doubt that the Union continues to represent a majority of the bargaining unit employees.

Discussion and Conclusion

The Respondent relies on the Board's decision in *Telautograph Corp.*, 199 NLRB 892 (1972), in support of its general proposition that it had no duty to meet and bargain with the Union, and therefore it had no duty to supply the Union with any information, which might otherwise have been necessary and relevant to the bar-

[4] This appeared to be in response to employee questions.

[5] This letter was hand delivered by Harrison L. Lushbaugh, secretary-treasurer of the Union, to James Nicklas, the Respondent's vice president of manufacturing on October 26.

gaining process. In *Telautograph* the employer and the union had a contractual relationship for many years, and their last contract covered the period November 3, 1969, through November 2, 1970. On September 3, 1970, an employee filed an RD petition. The Board's Regional Director concluded that the decertification petition was timely filed and raised a question concerning representation, and directed an election by secret ballot. On October 16, 1970, while the decertification petition was pending, the union requested the company to meet and discuss changes and modifications in the current agreement. On November 4, 1970, the company replied that it would be inappropriate to meet due to some questions regarding representation of the unit. On November 9, 1970, the union filed an unfair labor practice charge, alleging that the company had refused to bargain. Thereafter, under the Board's usual practice involving a blocking charge, the election was held in abeyance and the Regional Director issued a refusal-to-bargain complaint. The administrative law judge (relying on the facts that the Regional Director had concluded that the decertification petition was timely, and raised a question concerning representation; the absence of any unfair labor practices or antiunion activity to render improper, or in any way taint, the atmosphere for an election; that the respondent company in no way assisted or participated in the filing of the decertification petition) concluded that such circumstances, independent of any objective considerations of good-faith doubt concerning the union's continued majority, foreclosed the company from dealing with the union on and after November 4, 1970, the date on which respondent suspended negotiations. The Board agreed.

In the instant case, the Union was certified on October 11, 1978. Between December 1978 and October, the Union and the Respondent unsuccessfully attempted to negotiate a collective-bargaining agreement. On April 23, the Union authorized a strike which lasted until October 27. On October 22, after the expiration of the certification year, one of the striker replacements filed a decertification petition. By letter dated October 25, the Respondent informed the Union that it had been notified of the decertification petition filed with the National Labor Relations Board and, consistent with Board policy, it was suspending negotiations pending outcome of the election. On October 26, the Union hand delivered a letter to the Respondent accepting its last contract proposal. This letter also made an unconditional offer on behalf of all striking employees to return to work. The picketing ceased on October 27 with each of the striking employees making an individual request to return to work. On October 30, the Respondent sent a second letter to the Union reiterating that because of the decertification petition the Company would continue to refuse to bargain with the Union during the pendency of that petition, and further stating that the Company was not completely withdrawing recognition but rather was only refusing to bargain while the decertification petition was pending. The Respondent further informed the Union that striking employees would be recalled on a nondiscriminatory basis as job openings become available.

By letter dated November 7, the Respondent informed striking employee James Mongold that his request for reinstatement was denied because of picket line misconduct. On November 14, the Union filed a charge in Case 6–CA–12915 alleging that the Respondent violated, inter alia, Section 8(a)(1) and (3) of the Act by terminating James Mongold. The decertification petition in Case 6–RD–693 was held in abeyance pending resolution of the charge in Case 6–CA–12915. On January 16, 1980, a complaint issued in Case 6–CA–12915 alleging that the Respondent violated Section 8(a)(1) and (3) of the Act by terminating James Mongold. On May 6, 1980, a hearing opened in that case and on May 15, 1980, the parties entered into an informal settlement agreement in Case 6–CA–12915. On May 29, 1980, the Union requested that the Respondent supply the information, as set forth above, and the Respondent failed to respond in any manner to the Union's request for information. By letter dated July 17, 1980, the Regional Office notified the parties that the decertification petition in Case 6–RD–693 was being held in abeyance pending resolution of the instant Case 6–CA–13640.[6]

On October 22 and on May 29, 1980, no charges were pending against the Respondent in Region 6 of the National Labor Relations Board and, so far as this record reflects, the settlement agreement in Case 6–CA–12915 was fully complied with by the Respondent.

As indicated above, at the time of the filing of the decertification petition on October 22, there were no unfair labor practice charges pending against this Employer, and it appears that none had been filed against this Employer from the date of the certification until November. In November, the Union filed the charge in Case 6–CA–12915 alleging, in addition to the 8(a)(1) and (3) violation involving James Mongold, that there was employer involvement in the filing of the RD petition. By letter dated December 19, the Acting Regional Director for Region 6 advised the Union that:

> With respect to the alleged instigation of the decertification petition by the Employer, the investigation reveals that no evidence of any involvement by the Employer in the filing of the petition. To the contrary, it appears that the petition was initiated by the employees without any assistance from the Employer. I am, therefore refusing to issue complaint on this aspect of the charge.

It would appear that from this letter the Region found no evidence to indicate employer interference in the filing of the RD petition. Other than the fact that the Employer informed the employees that they could file a decertification petition after 1 year, there is nothing in

[6] On October 31, 1979, a complaint issued against the Union in Cases 6–CB–4835, 6–CB–4850–1, 6–CB–4850–2, and Case 6–CB–4851. On April 9, 1980, the General Counsel approved a stipulation entered into by the parties in these cases submitting the matter to the Board for issuance of a Decision and Order. On May 21, 1980, the Board issued a Decision and Order and on September 9, 1980, the U.S. Court of Appeals for the Third Circuit issued a judgment, enforcing the Board's Decision and Order.

this record to indicate that the Employer in any way initiated the filing of the RD petition.

Therefore, it is my conclusion that the RD petition, which was timely filed, adequately raises a question concerning representation, and precludes the Employer from bargaining with the Union until the question concerning representation is settled. I agree that the filing of the decertification petition in itself does not justify withdrawal of recognition, but it does relieve the Company of its obligation to bargain with the Union and, in fact, forecloses the Employer from dealing with the Union, pending resolution of the petition. Other than the current charge there is no evidence that the Respondent has engaged in unfair labor practices or antiunion activity to render improper or in any way taint the atmosphere for an election. It in no way assisted or participated in the filing of the decertification petition or otherwise sought to dissipate the Union's majority status. Therefore, it is my conclusion that, at the time of the filing of the decertification petition, the Employer was under a duty to suspend its bargaining negotiations with the Union pending the outcome of the RD petition. And it is my conclusion that the Employer did not violate Section 8(a)(5) by refusing to bargain with the Union during the pendency of the decertification petition or by suspending negotiations pending resolution of that petition. Here there was no contract or grievance procedure to administer and, therefore, no reason to bargain with the Union pending the decertification petition outcome.

Under these circumstances, it would appear to me that, having no duty to bargain with the Union, the Employer would have no duty to disclose any information which might otherwise be relevant to contract negotiations or the institution of grievance and arbitration procedures under contractual arrangements. It seems to me that the duty to furnish a union with information, exists only insofar as there is a duty to bargain with the majority representative. In the absence of a bargaining obligation, and there being no contract to administer, no sound reason exists for compelling an employer to furnish information to a union which might be ousted as the collective-bargaining representative in the pending representation proceeding and therefore would have no entitlement or need for the requested information. It would seem to me that the duty to furnish information stems from the underlying statutory duty imposed on employers to bargain in good faith with respect to mandatory subjects of bargaining and where that duty does not exist or has been suspended any other duty derived from that statutory duty would also be suspended.

In my view, *Telautograph* makes it clear that when a valid decertification petition is filed, charges based on an employer's refusal to continue negotiations with the incumbent union thereafter, should be promptly dismissed as nonmeretricious, unless the charge contains allegations that the respondent has committed other acts which may be a basis for finding a violation of the Act.

Here there is nothing to prevent the processing of the RD petition except the instant charge. To compel the Employer to furnish the information under the circumstances of this case seems totally inconsistent with the underlying principles in *Telautograph*, supra; *Shea Chemical Corp.*, 121 NLRB 1027 (1958); and *Midwest Piping Co.*, 63 NLRB 1060 (1945).

Therefore it is my conclusion that the Respondent has not violated Section 8(a)(5) of the Act as alleged in the complaint, and I shall recommend that the complaint be dismissed in its entirety.[7]

CONCLUSIONS OF LAW

1. Hennessy Products, Inc. is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Teamsters Local Union No. 992 is a labor organization within the meaning of Section 2(5) of the Act.

3. Hennessy Products, Inc., the Respondent, did not violate Section 8(a)(1) and (5) of the Act as alleged in the complaint.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[8]

ORDER

The complaint is dismissed in its entirety.

[7] The General Counsel and the Respondent submitted a stipulation dated June 10, 1981, correcting the transcript in certain regards. There being no objection on the part of the Union and as the corrections appear appropriate the record is corrected as set forth in the stipulation.

[8] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

Cone Mills Corporation-White Oak Plant *and* Marie E. Darr. Case 11–CA–7458

22 January 1985

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS HUNTER AND DENNIS

On 31 December 1979 Administrative Law Judge Benjamin Schlesinger issued the attached decision. The General Counsel and the Respondent filed exceptions and supporting briefs.[1]

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

The case of employee Marie Darr's discharge was submitted to the judge upon a stipulated record to determine whether deferral to an arbitration award is appropriate under *Spielberg Mfg. Co.*, 112 NLRB 1080 (1955). The arbitrator found that the Respondent did not have "just cause" under its collective-bargaining agreement for discharging Darr but that some discipline was warranted because she had been insubordinate. He ordered that Darr be reinstated, but without backpay. The judge found that deferral is not warranted because the award was clearly repugnant to the Act.[2] We do not agree. We believe that the judge substituted his judgment for that of the arbitrator, ignoring a fundamental tenet of *Spielberg*—that deferral is appropriate even where the arbitrator reaches a result different from the one the Board might have reached had it considered the case de novo. Contrary to the judge, we shall defer to the arbitration award and dismiss the complaint insofar as it alleges that the Respondent violated Section 8(a)(3) and (1) of the Act by discharging Darr.[3]

A review of the facts underlines the appropriateness of deferral here. At the time of her discharge on 4 November 1977, Darr had been employed by the Respondent for 3 years as a frame cleaner. She had been a union steward for almost 2 years, and the arbitrator found that she was "active and aggressive in pursuing her union duties." At the time in question, she had one written warning for leaving her department without permission.

Several days prior to 2 November 1977 Darr, along with other employees, circulated a petition to protest the discharge of three stewards. During this time, the Respondent inaugurated a new break schedule. Darr protested the schedule on the ground that it would interfere with her activities as steward.

On 2 November Darr's supervisor gave her a note with a schedule of the new breaktimes. Later in the shift they met in the supervisor's office to discuss it. When they could not agree, Darr grieved the schedule orally, and arranged to discuss it with the overseer, the next level of supervision.

Later that evening the overseer saw the petition in the employee's canteen. Darr and several other employees were present at the time. He picked it up and took it to his office, despite Darr's repeated requests for its return. She followed him to his office where they had a heated discussion about both the petition and the new break schedule. He denied her grievance about the breaktime.

About 2 hours later Darr returned with employees from the spooler department to seek the return of the petition. Darr had worked through her own breaktime in order to take her break at the time scheduled for the spoolers. When she arrived at the overseer's office, the overseer refused to return the petition. When the employees were leaving, he asked Darr to stay. He told her she had not followed instructions for her break and he asked her to go home and call in the next day. She refused, and returned to her department.

The overseer then called the Company's security officer, who arrived at the overseer's office with two city policemen. The overseer went to Darr at her work station and again asked her to leave. She refused. In the meantime, the security officer talked to the department head and they decided to take no further action at that time. Darr was subsequently discharged for altering her scheduled break without notifying her supervisor and for refusing to leave the plant when instructed to do so.

On these facts, the arbitrator concluded that the Respondent did not have "just cause" for discharging Darr. He found that her discharge for violating the breaktime rule could not be sustained, since

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[1] The Respondent has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

[2] In *Spielberg* the Board set forth the following criteria, all of which must be met before the Board will defer to an arbitration award: (1) the proceedings must be fair and regular; (2) all parties must agree to be bound; and (3) the decision must not be clearly repugnant to the purposes and policies of the Act. The parties agree that the first two conditions have been met.

[3] There were also two independent allegations of violations of Sec. 8(a)(1); specifically, that the Respondent (1) more strictly enforced the break schedule in order to discourage union and/or protected activity, and (2) interfered with its employees' union and/or protected activities by impeding the circulation of a petition. Based on the arbitrator's findings as set out below, particularly his finding that Darr should have had permission to process a grievance, we adopt the judge's conclusion that the Respondent violated Sec. 8(a)(1) as alleged above.

The parties stipulated that the facts the arbitrator recited are the pertinent facts in this case.

under all the circumstances she should have had permission to process her contractual grievance, but that her refusal to leave when instructed "[was] another matter."

> Even though the Overseer's suspension was improper at the time, the Grievant was obligated to leave the plant. She failed to follow a direct order of her Overseer. This misconduct was insubordination under the just cause doctrine in the labor Agreement.

The arbitrator found, however, that this act of insubordination was not sufficient grounds for discharge. Balancing the overseer's misconduct with respect to Darr's protected activities against Darr's misconduct, he found that Darr should be reinstated, but without backpay because

> . . . a sustaining of the discharge in this case would leave employees with no assurances that their agreement would protect them when they engaged in concerted activity. At the same time, an award of back pay would provide supervisors with little assurance that their instructions would be obeyed by employees. This Grievant must recognize and accept managerial authority and use the grievance procedure to resolve private contract disputes.

The judge found that the Respondent's only motive for the discharge was Darr's protected activity, and that therefore the discharge was unlawful.[4] He recommended a complete make-whole remedy because he found that Darr's insubordination was condoned or, in any event, provoked. Because the arbitrator upheld discipline for Darr's insubordination and compromised the backpay, the judge found the award "clearly repugnant."

With regard to the "clearly repugnant" standard in *Olin Corp.*, 268 NLRB 573 (1984), we stated that we would not require an arbitrator's award to be totally consistent with Board precedent. Unless the General Counsel sustains his burden of proof that the award is "palpably wrong," i.e., that the arbitrator's decision in not susceptible to an interpretation consistent with the Act, we will defer.

The arbitrator's award here meets this test for deferral. It is well settled that a failure to give a complete make-whole remedy does not render an award clearly repugnant.[5] As the Board stated in *Crown Zellerbach Corp.*, 215 NLRB 385, 387 (1974), in adopting the decision of the administrative law judge:

> Certainly in reaching his decision and issuing an award, an arbitrator may consider the relative merits of the positions of the parties before him and may determine to give a complete award or a partial award, depending on how he assesses the merit of the situation.

That is all the arbitrator did here. He recognized that:

> To maintain an orderly operation, a company's supervisors must have the authority to issue rules and instructions with the expectation that they will be followed by employees, including Union Stewards. At the same time, union representatives must have an opportunity to present grievances and receive prompt answers from supervisors in order to enforce the Labor Agreement. Employees involved in grievance processing must be protected from discriminatory and retaliatory actions designed to discourage their participation in the dispute resolution procedures under the Labor Agreement.

It is the essential nature of the arbitration process to balance the competing claims of the parties by adjusting the equities involved to reach a harmonious result. That is what the parties have agreed upon as an acceptable resolution of their labor-management dispute. We find that the General Counsel has not carried his burden proving that the arbitrator's award is palpably wrong.

Accordingly, we dismiss the complaint with respect to the allegation that the Respondent violated the Act by discharging Marie Darr.

ORDER

The National Labor Relations Board orders that the Respondent, Cone Mills Corporation-White Oak Plant, Greensboro, North Carolina, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Strictly enforcing its employees' break schedule in order to discourage its employees' union and protected concerted activities.

(b) Interfering with its employees' protected concerted activities by impeding circulation of and confiscating a petition protesting the discharge of fellow employees.

[4] For this finding, he relied on the arbitrator's conclusion in a section entitled "NLRA Issues" that there was no "compelling reason for the discharge other than for union activity." The judge seemed to conclude that this finding was inconsistent with the arbitrator's withholding of backpay because of Darr's insubordination. There is, however, no inconsistency. The arbitrator found no justifiable reason for discharge, but he did find that *some* discipline was warranted because of Darr's insubordinate refusal to leave.

[5] See, e.g., *Combustion Engineering*, 272 NLRB 215 (1984), where we deferred to an arbitration award that found that an improperly discharged employee was entitled only to reinstatement, and not backpay, in view of the employee's poor attitude toward improving his attendance.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Post at its facility in Greensboro, North Carolina, copies of the attached notice marked "Appendix."[6] Copies of the notice, on forms provided by the Regional Director for Region 11, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[6] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT strictly enforce our employees' break schedule in order to discourage their union and concerted and protected activities.

WE WILL NOT interfere with our employees' concerted and protected activities by impeding circulation of and confiscating a petition protesting the discharge of fellow employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

CONE MILLS CORPORATION-WHITE OAK PLANT

DECISION

STATEMENT OF THE CASE

BENJAMIN SCHLESINGER, Administrative Law Judge. This proceeding was submitted to me, without hearing and upon a stipulated record,[1] to determine whether deferral to an arbitration award is appropriate under *Spielberg Mfg. Co.*, 112 NLRB 1080 (1955), where the arbitrator found that the discharge of Charging Party Marie E. Darr was a violation of Section 8(a)(3) and (1) of the Act, but also found that she was insubordinate under the "just cause doctrine" of the applicable collective-bargaining agreement. As the remedy, the arbitrator ordered that she be reinstated to her job without backpay. The General Counsel claims that, under *Spielberg*, the relief granted is repugnant to the Act, while the Respondent contends that, because the arbitrator found a dual motive for Darr's discipline, the award should be deferred to. For the reasons set forth, I find that deferral to the award is not warranted and make my findings of facts and conclusions of law consistent with the allegations of the complaint, and order the appropriate remedy of backpay and the posting of a notice.

FINDINGS OF FACT

I. JURISDICTION

Cone Mills Corporation (Respondent) is now, and has been at all times material, a North Carolina corporation engaged in the manufacture and sale of textile products at various locations. Respondent's White Oak plant, located at Greensboro, North Carolina, is the only plant involved in this proceeding. During the past 12 months, which period is representative of all times material, Respondent received raw materials at its White Oak plant from points directly outside the State of North Carolina valued in excess of $50,000. During the same period, Respondent, from its White Oak plant, shipped directly to points outside the State of North Carolina finished products valued in excess of $50,000. As a result, I find, as the parties have stipulated, that Respondent is now, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

I also find, as the parties have stipulated, that Amalgamated Clothing and Textile Workers Union, AFL–CIO–CLC, Local 391 (Union) is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Facts*[2]

Darr was hired by the Respondent on September 30, 1974. On June 14, 1977,[3] she received a written warning

[1] The parties' stipulation to dispense with oral testimony adduced at a hearing is approved.

[2] Pursuant to the parties' stipulation, the facts recited by the arbitrator are the pertinent facts in this case. My recitation is almost a quotation of the arbitrator's findings, interpolating names and certain minor clarifications, where necessary and as agreed by the parties.

[3] Unless otherwise indicated, all dates refer to the year 1977.

for leaving her department without permission. When she was terminated on November 4, she was a frame cleaner in the spinning department on the third shift. Her job involved rotating through a designated area cleaning spinning frames, heads, and the like. In December 1975, Darr was elected to one of 8–10 union steward positions in Respondent's plant. Prior to November 1, Darr pursued her union activities and responsibilities at her discretion during her shift and was active and aggressive in pursuing her union activities.

During the several weeks prior to November 2, three union shop stewards were discharged by the Respondent and Darr was aware of them. Two were the subject of complaints issued by the National Labor Relations Board. Several days prior to November 2, Darr, along with other employees, began to circulate a petition among employees to protest these discharges. Supervisor Lonnie Walker, the Respondent's overseer on the third shift, who had been assigned to the third shift in the spinning department for 2–3 weeks prior to Darr's discharge, learned of this petition activity and reported it to his department head, Supervisor LeRoy Drinkwater. On Tuesday morning, November 1, Drinkwater instructed Walker to pick up the petition if he saw it.

On the prior Friday, October 28, Darr was informed by her substitute supervisor, Elmer Dickerson, that frame cleaners were going to be required to take their breaks at the scheduled hours of 12:30 to 12:45 a.m., 2:30 to 2:50 a.m., and 4:45 to 5 a.m. Darr protested this break schedule on the grounds that it limited her ability to perform her duties as a union steward. She did not follow the break schedule on her shifts which began on Sunday and Monday, October 30 and 31, and the schedule was not enforced by Dickerson. Although the new break schedule applied to approximately 70 employees in various job classifications throughout the plant, there was no proof that Darr was informed of the general applicability of the new schedule at the time it was adopted.

Darr's regular supervisor, Maurice Willis, returned to work on Tuesday, November 1. About 11 p.m. the beginning of the third shift, Willis gave Darr a note with the new scheduled break times on it. Darr asked, "When did this happen?", to which Willis replied, "I'll get back to you later." Darr then proceeded to her job.

About 11:30 p.m., Willis met Darr, and they went to his office to discuss the break schedule, where they discussed the effect of the schedule on her duties as a shop steward. Willis indicated that grievances must be filed during scheduled breaktimes, but did not state that Darr would be given permission to leave her job at other times for union business. At this meeting a verbal grievance was made, and they agreed it should be taken up with Walker. Darr then returned to her job.

About an hour later, at 12:30 a.m., Walker walked into the canteen and found on a table the petition that he had been instructed to pick up if he saw it. The petition, a handwritten document, stated:

> Andria Brewer was fired on a false charge of refusing to be transferred to a spooling job. *She did not refuse!* The only thing she refused to do was let these supervisors push her around.
>
> We, the undersigned, demand that she along with the other two shop stewards who were fired be reinstated with back pay, Christine O'Flaherty in the Weave Room and Thomas Anderson in the Dye House.

The petition was signed by 33 employees—Darr's signature was number one and the petition appeared to be in her handwriting. Walker identified the document as the one he was to pick up and took it with him.

Darr and several other employees were in the canteen when this happened. She repeatedly asked Walker to return the petition, but Walker refused. Darr followed Walker to his office and again asked that the petition be returned, but Walker stated that it would not be returned. While there, Darr also complained about the new break schedule. There followed a discussion, the contents of which Darr and Walker were in considerable conflict—a conflict left almost wholly unresolved by the arbitrator. Darr testified that Walker had stated that she did not have time to file a grievance before her break was ended and that she could file grievances only when she and other employees were on their breaks. Walker testified that he had denied the break schedule grievance and informed Darr that she had to check with her supervisor about union activity time. He also testified that Darr had said: "I think the assignment of break schedule is unreasonable, absurd, and we won't follow it." At the conclusion of this discussion, Darr returned to her job about 12:45 a.m.

Following this meeting, Darr and several spooler employees decided to return to Walker to recover their petition. Because the break of the spooler employees began at 3 a.m., Darr decided to work past her 2:30 a.m. scheduled breaktime. At 2:45 a.m., Darr went to the restroom and then met the spooler employees about 3 a.m. They arrived at Walker's office about 5 minutes later and again requested and argued for the return of their petition. Once again, Walker refused; and, as the employees were leaving, Walker requested that Darr remain there. Walker told her that she had not followed her scheduled breaktime and that he believed her conduct involved a flagrant failure to follow instructions pertaining to her assigned break schedule. Walker then suspended Darr and instructed her to go home and call Department Head Drinkwater the following day. Darr refused and returned to her job. Walker noted on his records, "This is clearly insubordination and I do not want any other charge."

Walker then instructed Willis to keep an eye on Darr and called the Respondent's security officer, who sometime later appeared with two city police officers. Walker went to Darr and requested that she leave the plant, advising her that the security officer and policemen were waiting in his office. Darr refused. In the meantime, however, the security officer had consulted with Drinkwater and they decided to leave Darr alone. Later, Darr was observed returning to her job 5 minutes late from her 4:45 a.m. scheduled break. Darr finished her shift at 6:30 and left the plant.

On Friday, November 4, Darr met with Drinkwater, who reviewed the events of November 2. He emphasized

that Darr had altered her scheduled break without notifying her supervisor and that she had refused to leave the plant when instructed to do so by her overseer. Darr was then informed that she was being discharged. During the meeting, Darr stated that the Respondent's rules were violated when she was not removed from the plant. Drinkwater replied that: (1) there had been no disorderly conduct; (2) Darr returned to her job without any further incidents; (3) Darr remained on her job performing her job duties and did not associate with any groups nor attempt to disrupt the operation; and (4) Darr was suspended and not discharged.

B. *The Arbitrator's Award*

The arbitrator considered separately the Respondent's claim that Darr was discharged for insubordination and the Union's claim that Darr was discharged for her union activities and found that both were correct. In so doing, he recognized that:

> To maintain an orderly operation, a company's supervisors must have the authority to issue rules and instructions with the expectation that they will be followed by employees, including Union Stewards. At the same time, union representatives must have an opportunity to present grievances and receive prompt answers from supervisors in order to enforce the Labor Agreement. Employees involved in grievance processing must be protected from discriminatory and retaliatory actions designed to discourage their participation in the dispute resolution procedures under the Labor Agreement.

With these principles in mind, the arbitrator found that, while the Respondent "had planned and attempted to enforce scheduled break times . . . [it] also set in motion a plan to stifle [Darr] and some thirty-two other employees in their concerted activity to prepare a petition . . . [and that Walker] deprived [Darr] and other employees of the opportunity to engage in this protected activity." Darr believed that Respondent was attempting to curtail her grievance time and her associations with her fellow employees, and Walker's taking of the petition provoked Darr's hostility, and the repeated refusal to return it exacerbated the hostility. Although Darr recognized, and then deviated from, the scheduled breaktime, and stated that the schedule was "absurd" and that she would not follow it, what precipitated her suspension on November 2 were her "efforts to process a complaint under the Labor Agreement and not just a fifteen minute deviation from the scheduled break time." The arbitrator found no evidence that the deviation either interfered with operations or was an inappropriate time for a grievance meeting, which was held at a time when all the spooler employees were on their breaktime, thus avoiding any interruption of services. Darr's failure to seek permission for union activity time was condoned by the arbitrator, since, if she had requested such time, it could not have been unreasonably withheld.

Thus, up to this point, the arbitrator found no just cause for Darr's discharge. However, he held that Darr's failure to leave the plant was "another matter"—that she was obligated to leave the plant and that her failure to follow Willis' order was insubordination. Noting that Walker's conduct and accusations contributed to and provoked Darr's insubordination, the arbitrator refused to sustain the discharge because that "would leave employees with no assurances that their agreement would protect them when they engaged in concerted activity." On the other hand, backpay was not warranted because, if granted, that "would provide supervisors with little assurance that their instructions would be obeyed by employees . . . [Darr] must recognize and accept managerial authority and use the grievance procedure to resolve private contract disputes."

Turning to the alleged violations of the Act, the arbitrator found that Drinkwater's plan to stifle Darr's petition-preparation activities and Walker's implementation of that plan constituted a violation of Section 8(a)(1), but that the development and implementation of the new break schedule was for legitimate business reasons. However, the November 2 suspension of Darr for deviating from the break schedule was merely a means to an illegal end. The arbitrator wrote:

> Given the fact the break schedule was not enforced on two prior days, the fact that grievance time was permitted at the plant, and the fact [Walker] did not object to [Darr's] presence at the beginning of the meeting, the reasonable inference is that [Walker's] primary motive for the suspension was [Darr's] vigorous pursuit of grievances and her petition preparation activity. The removal of [Darr] from the plant would have deprived fellow employees of a Shop Steward and discouraged their participation in the union.

Drinkwater then became the "prime mover" in permitting Darr to remain on her job for the remainder of the November 2 shift and informing her of her discharge on November 4, when he condoned Darr's

> remaining on the job because she ceased her protected activities. In his notes he referred to the fact that she ceased her "disorderly conduct," "returned to her job without further incident," "did not associate with any groups nor attempt to disrupt the operation." The significant conduct which would precipitate such comments was [Darr's] engaging in protected activities. [Drinkwater] made no attempt to explain his decision in terms of any desire to avoid a possible scene at the plant. Instead, he accepted her refusal to leave the plant because she ceased her union activities. The primary motive and concern of [Drinkwater] in taking the disciplinary actions in this case were [Darr's] concerted union activities. Considering the record in this case, I believe the Union has met its burden of proving that the discharge was a violation of [Section] 8(a)(1) and 8(a)(3).

Pursuant to the terms of the award, Darr was reinstated to her former position on October 16, 1978, having

been on maternity leave from August 22, 1978, until her reinstatement. She has not received backpay.

C. *Discussion and Analysis*

Both the arbitrator and the Respondent refer to the discipline of Darr as a "dual-motive case." From that vantage point, Respondent contends that if there were two reasons for disciplining Darr, one valid under its collective-bargaining agreement, and the other in violation of the Act, the award cannot be repugnant to the Act[4] because the reinstatement of Darr without backpay was a remedy for its breach of contract and had nothing to do with the Respondent's violations of the Act. On the other hand, the General Counsel argues that, because the arbitrator found that the Act was violated, a remedy of reinstatement without backpay is not justified under Board law and is per se repugnant to the Act.

It is unnecessary to rule upon the contention of the General Counsel,[5] for I find that under well-established principles of Board law, if *a* motive for the discipline of an employee is in violation of the Act, that is sufficient for the finding of a violation, despite the fact that there may be other valid reasons for the same discipline *Johnson Motor Lines*, 228 NLRB 393 (1977).[6] Under any reading of the award, there can be no question that the "primary motive" for the discipline was Darr's concerted and union activities, which were so inextricably intertwined with the alleged insubordination that no punishment of Darr was warranted.

Further, not only may it be said that *a* motive (again, "primary," according to the arbitrator) was discriminatory, but also a fair reading of his award indicates that the *only* motive for Darr's discharge was her union and protected activities. Recognizing that the arbitrator wrote in terms of a "dual-motive case" and that he characterized Darr's discharge for protected activities as the "primary motive," thus implying that there was a secondary motive, nonetheless, I note that he stated: "The evidence in this case does not show a compelling reason for the discharge other than for union activity." If this is correct, and the parties' stipulation requires that I be bound by the arbitrator's factual findings, I may go no further to find some other valid reason for Respondent's discipline of Darr.

Assuming, however, that there is some ambiguity in the award, caused by the separate findings on the two issues before the arbitrator—breach of contract and violation of the Act—and the arbitrator's reference to a "dual-motive case," the award finds no other conduct committed by Darr which would merit discipline under the collective-bargaining agreement. Her failure to follow the break schedule on October 30 and 31 was excused because the rule was not enforced. Her violation of the break schedule on November 2 to attend a grievance meeting was excused by the arbitrator on the grounds that (1) the 15-minute deviation did not interfere with Respondent's operations; (2) the time for the grievance meetings was not inappropriate since it coincided with the break of the spooler employees; and (3) Darr would have been entitled to meet for union activities at that time, had she sought permission. Darr's suspension, he held, was thus "improper." Finally, despite the fact that Darr's refusal to leave the plant was "another matter," Willis' "conduct and accusations contributed to and provoked" her insubordination, which was in any event condoned by Drinkwater on November 4 because Darr "ceased her protected activities."[7]

As a consequence, I find that Drinkwater's "primary motive and concern" in taking disciplinary action against Darr was the sole motive[8]—Darr's concerted and union activities—and that the award is thus clearly repugnant to the Act in finding there was just cause for discipline under the agreement. *Sea-Land Service*, 240 NLRB 1146 (1979).

Further, there are two allegations contained in the complaint of 8(a)(1) violations which the arbitration award does not remedy and thus cannot be deferred to: that the Respondent "[m]ore strictly enforced its employees' break schedule in order to discourage its employees' union and/or protected concerted activities"; and that the Respondent "[i]nterfered with its employees' union

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[4] *Spielberg* enunciates the Board's policy of deferring to the decisions of arbitrators where the arbitration proceedings appear to have been fair and regular; the parties agreed to be bound by the results of the arbitration; and the arbitrator's decision was not clearly repugnant to the Act. The parties agree that the first two conditions have been met.

[5] In *Sea-Land Service*, 240 NLRB 1146 fn. 4 (1979), the Board (Member Penello, dissenting) refused to reach the General Counsel's contention that an award was repugnant to the Act solely because it did not make the grievant whole for his loss of backpay, stating at 1147 fn. 4:

> The dissent finds undue support in the cases itn cites for the proposition that less than a make-whole remedy is not clearly repugnant to the Act. It is true that in *Crown Zellerbach Corp.*, 215 NLRB 385, 387 (1974), a Board panel adopted the Administrative Law Judge's dismissal of a complaint where the the arbitrator awarded less than full backpay, but "insubordination was the reason for the discharge," not an unfair labor practice. Likewise, *International Great Lakes Shipping Co.*, 215 NLRB 701 (1974), dismissed a complaint based on *Spielberg* where the arbitrator ordered reinstatement without backpay, but once again the discharges were not for protected activity. *Ohio Ferro-Alloys Corp.*, 209 NLRB 577 (1974), at fn. 2, specifically disavowed the Administrative Law Judge's characterization of the arbitrator's award as a "compromise" and his rationale suggesting deferral to such an award. The decision was based on the fact that the employee had obtained his employment under false pretenses. To be sure in *Fikse Bros. Inc.*, 220 NLRB 1301 (1975), a panel majority stated that a lump-sum award in lieu of a "make-whole" remedy was insufficient to require ouster of an arbitrator's decision, but not without Chairman Fanning's dissent. More to the point is *Cessna Aircraft Co.*, 220 NLRB 873 (1975) (then-Chairman Murphy concurring on other grounds), where a panel held that reinstatement without a make-whole remedy is repugnant to the Act.

[6] See, however, *Coletti's Furniture v. NLRB*, 550 F.2d 1292 (1st Cir. 1977); *NLRB v. Eastern Smelting & Refining Corp.*, 598 F.2d 666 (1979). The Board has not acquiesced in the circuit's rationale. *J.P. Stevens & Co.*, 240 NLRB 579 (1979); *Glenside Hospital*, 234 NLRB 62 (1978).

[7] There is ample justification in Board law for finding that Darr's conduct in refusing to leave Respondent's premises was condoned and, therefore, should not be considered in determining the motive for her discharge. *Heath International*, 196 NLRB 318 (1972). In any event, Darr's conduct was provoked by the Respondent's stealing of her petition, her antagonism because of her protected activities, and her illegal suspension. *Hawaiian Hauling Service*, 219 NLRB 765 (1975). While her postdischarge conduct might not be deserving of condonation, in the circumstances herein, it was not sufficiently serious to warrant the denial of reinstatement. *Hagerty Catering Co.*, 236 NLRB 1553 (1978).

[8] For this reason, I do not rely on *Douglas Aircraft Co. v. NLRB*, 609 F.2d 252 (9th Cir. 1979), cited by Respondent, which refused to enforce the Board's decision at 234 NLRB 578 (1978). The award herein is not susceptible of a nonrepugnant interpretation.

and/or protected concerted activities by impeding circulation of and confiscating a petition, protesting the discharge of a co-worker." The latter violation is clearly evident from the award and requires no further discussion. I find a violation. The former has also been proved because the arbitrator found that Walker's "primary motive for the suspension was [Darr's] vigorous pursuit of grievances and her petition preparation activity."

In finding that the award may not be deferred to and finding that the Respondent has violated the Act, I have considered and I reject a number of Respondent's arguments. The Board's mechanism for deferring to arbitration is by no means compromised herein. An arbitrator's award cannot oust the Board of jurisdiction to decide whether the Act has been violated and to remedy unfair labor practices. *International Harvester Co.*, 138 NLRB 923, 929 (1962), enfd. sub nom. *Ramsey v. NLRB*, 327 F.2d 784 (7th Cir., 1964), cert. denied 377 U.S. 1003 (1964). Issues in an award must be resolved in a manner compatible with the Act, *Eastman Broadcasting Co.*, 199 NLRB 434 (1972), which Congress has entrusted to the Board to enforce. The policies of *Dubo Mfg. Corp.*, 142 NLRB 431 (1963),[9] and *Spielberg* do not divest the Board from its obligation to insure that the purposes and policies of the Act are effectuated.

Respondent seeks to differentiate between "effectuating the purposes and policies of the Act"—a positive test, Respondent argues—which requires more than the *Spielberg* test of repugnancy—a negative test—which leaves a "broad range of remedies which would be acceptable as not being repugnant to the Act, but yet would fall short of fully effectuating the policies of the Act." Although there may be some instances presented to the Board in the future where this distinction may have some appeal, Respondent has cited no authority to support its proposition. Indeed, Respondent may be hard-pressed to cite a decision where the Board, finding that a discharge of an employee violated the Act, ordered reinstatement, without backpay, more than 9 months later. *Community Medical Services*, 236 NLRB 853 at 856 (1978).

Finally, Respondent contends that the failure to defer herein would show that it is a waste of time for the Employer to submit to arbitration; that the declaration of repugnancy would merely be the substitution by the Board of its judgment for that of the arbitrator; and that the favorable consequences of *Spielberg*—the preservation of the bargain of the parties, their "harmonious interaction," the reduction of the Board's work load, and the speed of arbitration when compared with the delay of the Board—would be greatly diminished. Perhaps the wisdom of *Dubo* and *Spielberg* may be demonstrated by the fact that so few cases, such as the instant one, have come to the Board for resolution. The arbitration process must be resolving the vast majority of disputes.

That the Board may substitute its judgment for that of the arbitrator is due solely to the fact that the Board, and not an arbitrator, has the ultimate responsibility to ensure that the Act is complied with. Where the arbitrator has found facts which demonstrate that no violation of the Act or the contract has occurred, or that only the contract has been violated, the Board willingly defers. But the Board cannot abdicate its responsibility when an arbitrator errs in his application of the facts and defeats the Act's purposes. Arbitration is consensual; the parties agree that, right or wrong, an arbitrator's award is the expedient method for resolving disputes. Not so the Act. The parties cannot give the Board jurisdiction to dispose of their disputes, nor can the parties divest the Board of its obligation to effectuate the policies of the Act.

It may well be that arbitration may more quickly dispose of contractual and statutory disputes, but speed is not necessarily the only desirable aim of the Act. There is no question that, because of its everincreasing caseload, the Board is fully cognizant of its duty to carefully and expeditiously dispose of the issues presented to it. The Board has also made known that it may not "[sacrifice] the public interest in the vindication of statutory rights for the sake of reducing [its] caseload." *Community Medical Services*, supra at 856. At the same time, I would be remiss if I did not note that Darr's grievance was filed on November 11, 1977, the hearing was held on May 18, 1978, and the award was rendered 3 months later, on August 18, 1978. That is not the "matter of weeks" that the Respondent refers to in its brief. This is not to say that the delay (which, unfortunately, may be less than the delay encountered in Board proceedings) is unconscionable or was not justified. Unfortunately, litigation—even arbitration—takes time and will probably never be as expeditious as the parties might like. However, any delay is singularly unhelpful in justifying the arbitrator's decision to reinstate Darr without backpay. That effectively denied her of three-quarters of a year's pay, without discussion of why a lesser penalty might have been imposed and why the discipline meted out by the arbitrator was appropriate in the circumstances. Although it is unnecessary for the purposes of this decision, it appears that some consideration of the justification for particular discipline ought to be spelled out, rather than the unsupported discipline which is inherent because of the delay of the arbitration process.

III. THE EFFECT OF THE UNFAIR LABOR PRACTICES ON COMMERCE

The activities of the Respondent set forth in section II, above, occurring in connection with the Respondent's operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

[9] Darr filed a grievance concerning her discharge on November 11, 1977, and the unfair labor practice charge which instituted this proceeding on February 13, 1978. On March 31, 1978, the Regional Director for Region 11 notified the parties that further proceedings would be administratively deferred to the grievance procedure in accordance with *Dubo*, because the matters involved in the charge were pending arbitration. After the arbitration award issued on August 18, 1978, the Regional Director, on May 10, 1979, issued the complaint herein.

CONCLUSIONS OF LAW

1. Cone Mills Corporation-White Oak Plant is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Amalgamated Clothing and Textile Workers Union, AFL-CIO-CLC, Local 391, is a labor organization within the meaning of Section 2(5) of the Act.

3. The arbitration award, dated August 18, 1978, concerning grievant Marie E. Darr, is repugnant to the Act and may not be deferred to.

4. By enforcing its employees' break schedules in order to discourage its employees' union and concerted and protected activities by impeding circulation of and confiscating a petition protesting the discharge of fellow employees, Respondent engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(1) of the Act.

5. By suspending and discharging Marie E. Darr because of her union and concerted and protected activities, Respondent engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(3) and (1) of the Act.

6. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent has engaged in an unfair labor practice, I will recommend that Respondent cease and desist therefrom and take certain affirmative action to effectuate the policies of the Act.

Having found that Respondent discharged Marie E. Darr on November 4, 1977, in violation of Section 8(a)(3) and (1) of the Act, but has subsequently reinstated her without prejudice to her seniority or other rights and benefits previously enjoyed, I will recommend that Respondent make her whole for any loss of wages or other benefits to which she may be entitled as a result of the discrimination against her, with interest, as provided by *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and *Florida Steel Corp.*, 231 NLRB 651 (1977),[10] and expunge from her personnel records all references to her suspension and discharge.

[Recommended Order omitted from publication.]

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[10] See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962). The General Counsel seeks an order requiring that interest on backpay be computed on the basis of 9 percent per annum. The Board has already rejected that requested relief. *Southern California Edison Co.*, 243 NLRB 372 (1979); but see *Hansen Cakes*, 242 NLRB 472 (1979).

Chaim Babad, Bernard Steinmetz and Emanuel Steinmetz, a co-partnership d/b/a J.R.R. Realty Co. *and* Local 32B-32J, Service Employees International Union, AFL-CIO. Cases 29-CA-8809 and 29-CA-8880

22 January 1985

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS HUNTER AND DENNIS

On 3 September 1982 Administrative Law Judge Julius Cohn issued the attached decision. The Respondent filed exceptions and a supporting brief.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order as modified.

The judge found, and we agree, that Ezekiel Correa was not a supervisor within the meaning of the Act, although he did act as an agent for the Respondent. None of the parties has excepted to the finding that Correa was not a supervisor. We note, however, that Correa testified, without providing any details, that he "hired" the porter at the Respondent's building. Although the "hiring" of an employee is often a dispositive indicator of supervisory status, the "hiring," just like any other indicium of supervisory status, must reflect some meaningful measure of independent judgment. Thus, an individual may "hire" an employee in the colloquial sense, yet not be a supervisor within the meaning of the Act if the "hiring" individual is merely performing a ministerial act or carrying out the directions of another who actually possesses the necessary authority. See, e.g., *Bricklayers Local 44 (Raymond International)*, 207 NLRB 354, 356 (1973). In the instant case, none of the detailed evidence concerning Correa's day-to-day authority demonstrates any meaningful indicia of supervisory authority. Instead, it appears that Correa, at most, acted as a leadman or a conduit between the employees and the Respondent. Accordingly, we are unwilling to confer supervisory status on Correa merely on the basis of his undetailed statement, particularly in view of the fact that none of the parties now contends that he possessed any supervisory authority.

THE REMEDY

Contrary to the judge, we find that the amounts of money paid by the Respondent to the discriminatees in "settlement" of their claims for "severance pay" should be included in the discriminatees' interim earnings for purposes of the make-whole remedy. *A. S. Abell Co.*, 230 NLRB 17, 21 (1977); 243 NLRB 171 (1979). In our view, exclusion of these payments from the employees' interim earnings, in the circumstances here, clearly results in a windfall to the employees and a penalty against the Respondent.[1] In all other respects, backpay shall be computed as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *Florida Steel Corp.*, 231 NLRB 651 (1977).[2]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Chaim Babad, Bernard Steinmetz, and Emanuel Steinmetz, a co-partnership d/b/a J.R.R. Realty Co., Forest Hills, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

Substitute the following for paragraph 2(c).

"(c) Offer Ezekiel Correa, Gilberto Concepcion, Lorenzo Cruz, Charles Darmendo, Curtis Phillip, and Hugh Robertson immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges previously enjoyed, and make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the Board's decision."

[1] The judge relied on *Roadway Express*, 246 NLRB 174 (1979). We find that case inapposite. *Roadway* involved the issue of whether the Board should have declined to adjudicate alleged unfair labor practices in deference to the parties' private settlement and not the specific issue here of whether, as a matter of the Board's remedy, certain payments to employees properly are offset against backpay. We find it unnecessary to express any view on the Board's holding in *Roadway*.

[2] See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962).

DECISION

STATEMENT OF THE CASE

JULIUS COHN, Administrative Law Judge. This proceeding was heard in Brooklyn and New York, New York, on March 15 and 16, 1982. On charges filed on April 10 and May 8, 1981, the Regional Director for Region 29 issued an order consolidating cases and a complaint on August 31, 1981, alleging that J.R.R. Realty Co. (Respondent) violated Section 8(a)(1), (3), and (5) of the Act by refusing to recognize and bargain with Local 32B-32J, Service Employees International Union, AFL-CIO (the Union); by bypassing the Union and bargaining directly with employees, and by discharging employees because of their membership in the Union. Respondent filed an answer denying the commission of unfair labor practices.

All parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-ex-

amine witnesses, to argue orally, and to file briefs. All parties submitted briefs which have been carefully considered. On the entire record in the case, and from my observation of the witnesses and their demeanor, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, also called J.R.R., is a partnership composed of nine individuals, principally Chaim Babad and members of his family, and, in addition, two other partnerships, one composed of Bernard Steinmetz and members of his family, and the other of Emanuel Steinmetz and his immediate relations. J.R.R. owns and operates an apartment building in Forest Hills, Queens, New York, from which it derives gross annual income of $410,000. Respondent contends that inasmuch as it does not receive revenues in excess of $500,000, the Board's standard for asserting jurisdiction over apartment housing,[1] this proceeding should be dismissed for lack of jurisdiction.

However, based on documents stipulated for the record, it appears that Babad and members of his immediate family, as well as the two Steinmetz families (Babad being, in addition, a cousin of the Steinmetz'), are all partners in five other partnerships which together total gross revenues of almost $1-1/2 million. These other partnerships similarly, as does Respondent, own apartment buildings. The record further reveals that Babad is the manager of all the partnerships and buildings, that the addresses of each are the same address as Babad's home, where he maintains the books and records for the partnerships and the buildings they own. As managing agent and partner, Babad controls the daily operations of all the buildings, including labor relations. In the latter connection, it is noted that Babad transferred employees from one of the partnerships to Respondent when, as will be more fully described later, it took over the building which is the subject of this proceeding.

I find, therefore, that the six partnerships are sufficiently interrelated in operations, management, control of labor relations, and in effect function as a single employer. The Board has found in these circumstances that a number of corporations operating in the apartment housing industry could combine their total gross revenues so as to arrive at a figure of at least $500,000 in receipts which meets the standard set by the Board for jurisdiction.[2] The record further reveals that Respondent purchased fuel oil valued in excess of $30,000 in the year preceding the issuance of the complaint herein from enterprises which, in turn, received such materials in interstate commerce directly from States other than the State of New York. Accordingly, I find that both the statutory requirement and the Board's relevant standard for asserting jurisdiction have been met and conclude that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.[3]

II. LABOR ORGANIZATION

The Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Facts*

The facts are, in the main, uncontroverted. On March 31, 1981, pursuant to a title closing, Respondent acquired the apartment building on Austin Street in Forest Hills which provides the locale for this proceeding. The building had been owned by Jaru Properties, Inc. and ASCR Realty Co., Inc., and managed by J.A.R. Management Corp., all of said entities being owned by the Rose family. As of the date of the title closing, there were six employees at the building.[4] These employees were represented by the Union in accordance with a collective-bargaining agreement dated August 27, 1979, and effective until April 20, 1982, between J.A.R. Management and the Union.

On November 6, 1980, Jaru Properties, Inc. and ASCR Realty Co., Inc. contracted to sell the property to a corporation named Joshua Estates, Inc. This agreement was executed on behalf of the latter by Harry Newman, as vice president. Newman was the attorney for the Respondent in these transactions and, according to the testimony of Alfred Rose, a principal owner of the seller, the contract closing occurred in the office of his attorney, Maurer, and was attended by Newman and Babad. Rose stated it was understood that the purchasers were Babad and Steinmetz who gave checks totaling $165,000 as a deposit on the sale. Rose also said he had a number of conversations with Babad prior to the signing of the contract relating to financing and the purchase price. The ultimate title closing took place at Rose's attorney's office on March 31, 1981, and once more Babad was present.

The contract of sale provided that the purchaser (Joshua) shall take the property subject to certain "permitted incumbences," and among those specified was the union contract, a copy of which was annexed to the contract of sale. At the closing on March 31, Joshua Estates, Inc. by Harry Newman executed an assignment of the contract of sale to JRR Realty Co., which was signed and acknowledged by Babad's partner. At the same time the seller assigned to J.R.R. (Respondent), as assignee of Joshua, all rights and title to certain agreements includ-

[1] *Parkview Gardens*, 166 NLRB 697 (1967).

[2] *Arlington Ridge Development Co.*, 203 NLRB 787 (1973).

[3] Alternatively, the record reveals that in a state court proceeding brought by the Union on this matter, Respondent pleaded successfully that the arbitration be stayed since the same issues were brought before the Board. In *Pollack Electric Co.*, 219 NLRB 1237 (1975), the Board affirmed a decision by an administrative law judge asserting jurisdiction over a respondent whose business met statutory but not discretionary standards and who had not questioned NLRB jurisdiction before the State Labor Board.

[4] The employees were Ezekiel Correa, building superintendent, Gilberto Concepcion, porter, Curtis Phillip, Hugh Robertson, and Lorenzo Cruz, full-time elevator operators, and Charles Darmendo, part-time elevator operator.

ing the 1979 agreement with the Union. Also at the closing, both Joshua and J.R.R. by Babad as partner agreed to take title subject to the payment and performance of all obligations of seller under the leases, contracts, and agreements and service and maintenance contracts in effect on March 31, 1981, and further agreed to indemnify the seller and hold it harmless for any claims and liabilities arising on such agreements. Finally, it is noted that the collective-bargaining agreement itself contained a provision requiring that the seller of the building obtain an adoption of the union contract from the purchaser, and offer continued employment to all unit employees and give the Union 2 weeks' written notice prior to the sale. However, it does not appear that the seller complied with these provisions.

Correa, the building superintendent, and Curtis Phillip, the elevator operator on the afternoon shift, both testified that late in the afternoon of April 1 some people came to the building with a moving truck and said they were moving into apartment 3C. They asked Correa for the key which he refused, saying he had no orders to give the key to anybody. About 2 hours later, approximately 7 p.m., Babad came to the premises and told Correa that the new owner was renting that apartment to these people and Correa gave him the key. The people then moved into the apartment. Phillip stated that Babad told him that he was the owner of the building and these people moving in were his men who were going to work there. Babad asked Phillip if he wanted to make a deal to leave his job but the latter said he expected to continue working and was not thinking about any deal. Although Babad offered him $500 to leave, Phillip said he would not do it because he needed the job and pleaded with Babad to keep him on. Phillip also stated that Babad told him he could not pay what the Union was paying and would not be able to hire him.

Also on this occasion Bahad told Correa to contact Gilberto Concepcion because as of that day the porter was out. Concepcion came to Correa's apartment later that evening and Babad offered him $1000 to make the deal. Concepcion accepted it and then waited until Babad returned around midnight with the money. He gave Concepcion $1000 in cash for which Concepcion signed a release. That evening Babad also tried to buy out Correa offering him $1400 to leave the Union, the job, and for severance pay. Correa refused stating he was going to call the Union the next day. Babad told him he wanted the Union "off," and would make a deal with him and the porter without the Union.

The next day Correa telephoned and reported what happened to the Union, and Phillip actually visited the Union and informed the delegate. Correa was directed not to sign any papers and not to leave the Union because a representative would be there the day after. Phillip was told to go back to work at 3 o'clock but shortly thereafter Babad came to the elevator and informed him that one of the new men would be working the elevator from then on. Phillip said he went to Correa's apartment and Babad came in and took their keys for the boiler room and the elevator key.

The next day, Friday, April 3, a union representative came to the building with a picket sign and, from that point on, the employees picketed the building. All the employees had been replaced by the family who moved into the building on April 1.

A few days later Babad came to Correa's apartment in the building and offered him $2500 to leave his job, and indicated that he would give more money to the other employees. He told Correa he would give Phillip $1700 and $700 to the part-timer, Darmendo, and another amount for Cruz. He asked Correa to speak to the others who were then picketing and tell them that Babad was offering a better deal but without the Union which he did not want. Correa did communicate with the other employees who told him there would be no deal without the Union, and Correa reported their refusal to Babad. In the ensuing weeks, Babad offered Correa money on a number of occasions either by telephone or by person. At one point, Babad threatened Correa, who was still living in the building, with eviction and cutting off his utilities. Babad claimed he did this because the pickets had engaged in some violent actions.

Babad testified that, when he took over the building, he brought these new people to the building as described above. He proposed to pay the new superintendent a lump sum from which the latter would take care of the other people who were working with him and were part of his family. Since the previous employees were picketing the building, Babad stated he needed four people to be at the building, but after the strike he retained three, all of whom were brothers, and a fourth person who was the wife of the superintendent. He stated that he intended to automate the elevator but this has not been done yet. Babad further testified that while the picketing was going on about the latter part of April, he received a telephone call from Rudy Larmond, a union official, and, after some discussion, an appointment was made to meet on April 27. During the telephone conversations Babad told Larmond that, since he was putting in an automatic elevator, there was no need for elevator men and, in addition, the superintendent (Correa) was looking for another job. He concluded there was no sense keeping all the men there and, while he did not have anything against the Union, he had not taken over the contract when he purchased the building. At the meeting, after discussion of these various problems raised by Babad, a settlement agreement was prepared but never signed, and indeed Babad stated he never read the paper. Basically the agreement provided for a settlement with the employees consisting of a 4 weeks' pay to each of them. Babad stated that the Union said he could talk to the superintendent and work out a private deal with him if he wished, and the amount of 4 weeks' pay to the other people had been left open.

In any case Babad conceded that, until the telephone call setting up the meeting and the meeting itself on April 27, he had not talked to or notified the Union concerning offers of settlement made to the employees, Concepcion, Cruz, Darmendo, Robertson, and Phillip. Nor did the Union give permission for Babad to talk or deal with these employees. By the same token before April 27 Babad did not discuss with the Union the problem of dealing with Superintendent Correa.

On April 28 Babad came to the building and asked Correa to communicate with the other employees. Shortly thereafter some of them came to Correa's apartment. Babad then gave Concepcion, whom he had already paid $1000, another $150; he gave Darmendo, the part-timer, $850; $1500 to Cruz and struck his deal finally with Correa for the payment of $2500 in addition to 3 months' free rent. The employees agreed to give up rights to their jobs and signed receipts for the money which had been given them by check and then cashed by Babad. According to Curtis Phillip, he and Robertson continued their picketing until April 30 when they decided that it was too lonely and dangerous to continue. Robertson then called Babad and made an appointment and they met at the building with him and the new superintendent. After some negotiation Babad finally offered Phillip $2100, and Robertson $1850. After endorsing checks they were paid in cash by Babad. In addition they signed receipts, as did the other employees before them.

In his testimony Babad maintained that he had never agreed to assume the contract and consequently he did not abide by any of the terms and conditions of employment set forth therein. His new superintendent did the work of the porter and consequently Babad no longer employed anyone in that latter capacity. The three elevator men, whom Babad employed to replace the former employees, were reduced to two shortly after taking over the building. Moreover, clearly Babad did not negotiate any of the terms and conditions of employment of his new employees with the Union and, as noted, he has reduced the number of employees, and those that remain are paid less than the union contract rates. Finally, as of the time of the hearing, the elevator had not been automated, the reason asserted for not hiring the former elevator operators.

B. *Discussion and Analysis*

1. The successorship issue

In *NLRB v. Burns Security Services*, 406 U.S. 272 (1972), the Supreme Court affirmed the Board's successor-employer doctrine, finding that a successor-employer, absent a reasonably based good-faith doubt of the incumbent union's majority, is obligated to recognize the continuing representative status of the bargaining agent of its predecessor's employees in an appropriate unit taken over from the predecessor. This is applied not only where the union's status was established by Board certification but also where it had been established by voluntary recognition.[5]

In the instant case, Respondent continued the same business as its predecessor, that is, the ownership and operation of a residential apartment building. However, an essential factor in the determination of successorship is absent as Respondent did not continue at least a majority of the employees of the predecessor in its work force. Indeed, Respondent immediately replaced the predecessor's employees with a family of employees that Babad transferred from one of his apartment house operations at another location. Nevertheless, Respondent's obligation to recognize and bargain with the Union and even more to honor the contract is founded on another ground. In *NLRB v. Ethan Allen, Inc.*, 544 F.2d 742 (4th Cir. 1976), the court enforced a Board Order finding there had been an adoption by the successor of the contract.

In the instant case the assumption of the collective-bargaining agreement by Respondent may be spelled out from the series of not unusual real estate transactions and documents described and set forth above. The contract of sale was executed by Newman, Respondent's attorney, as vice president of Joshua Estates, Inc., undoubtedly a dummy corporation, acting on behalf of Babad who incidently was present at this and all of the other transactions. The contract specifically provided that the purchaser take title subject to, among other things, union contracts, a copy of the collective-bargaining agreement even being annexed thereto. At the title closing on March 31, Joshua, again by Newman, assigned the contract of sale to Respondent, an assignment acknowledged by Babad, in which Joshua assigned all rights of the purchaser to Respondent as assignee, which assumed all obligations of the purchaser under the original contract with the seller. Finally, at the closing both Joshua and J.R.R., the Respondent, agreed to take title subject to all existing leases, contracts, agreements, service and maintenance contracts then in effect. By these undertakings and assumptions, Respondent succeeded the seller of the building with respect to obligations under the collective-bargaining agreement.

In his testimony, Babad apparently chose to ignore his own written assumptions and indemnifications concerning the labor agreement, and preferred to remark on the sellers' alleged failure to abide by the collective-bargaining provision requiring it to notify the Union of the impending sale. I find in all the circumstances that Respondent, by its failure to recognize the Union and to assume all the obligations under the collective-bargaining agreement relating to the Union itself and the employees who were employed at the time of his takeover, violated Section 8(a)(5) and (1) of the Act.[6]

Turning back to the question of successorship and the principles established in *Burns*, supra, it has been noted above that all factors for the finding of a successorship are present except for the failure of Respondent to retain the former employees at the apartment building. The Board has stated, "[I]t is well settled that successorship will be found in such circumstances if the new owner fails to hire the predecessor's employees because of their affiliation with the Union."[7] The issue then is whether the employees were not hired for unlawful discriminatory motives.

After closing title to the building on March 31, Babad, on behalf of Respondent, went to the building on April 1. At the time Superintendent Correa was there inas-

[5] *Virginia Sportswear*, 226 NLRB 1296, 1300 (1976).

[6] The Union's letter dated April 23, 1981, addressed to Respondent does not militate against this finding. While the letter appears to be simply a request that Respondent, as an ordinary successor, agree to be bound by the collective-bargaining agreement with its predecessor, it is clear that the Union had no knowledge at that time of the express assumption of the collective-bargaining agreement by Respondent.

[7] *Love's Barbeque Restaurant No. 62*, 245 NLRB 78 (1979).

much as he lived in an apartment in the building, and employee Phillip was working on the elevator. That day Babad replaced them with a family of employees whom he transferred from another building he managed in Brooklyn. The remainder of the employees were advised that they no longer had jobs. Actually, whether the employees were discharged or refused hire by Respondent, the result is the same. The uncontradicted testimony of Phillip, an elevator operator, was to the effect that, during the course of his conversation on April 1 with Babad, the latter stated he could not pay the union rates and therefore he would not be able to hire Phillip, who, at the time, was actually pleading for his job. In reality, Babad attempted to make some sort of deal with Phillip whereby, for a certain sum of money, he would relieve himself of the obligations which he knew were part of the union contract such as severance pay and the like. As a result, he or Correa went through this routine with all of the old employees. It was implicit in his course of conduct that the reason he was trying to "buy out" these former employees was his desire not to retain them under the union agreement. Indeed, Babad paid some of these employees sums in excess of what would have been severance pay under the terms of the union contract. Clearly, Babad was aware of what he was doing. As a bona fide purchaser and successor to the former employer, Respondent would have no obligation to retain the employees; consequently it had no need to pay money in lieu of severance pay or for any other reason to these employees. The only logical purpose of these payments was to strike a deal with individual employees so that they would forgo not only the Union, but also their jobs and he could start afresh with his own crew. Finally, Babad's claim throughout the proceeding, that he had no need for the elevator operators in view of his plan to automate the elevator as soon as he took over the building, was pretextual. The hearing in this matter was conducted almost a year after Respondent took title to the building and the elevator was still not automated. In these circumstances, I find that Respondent violated Section 8(a)(3) of the Act by refusing to hire the former employees of J.A.R.

I further conclude that, but for the unlawful conduct in failing to hire these employees, the Union's majority status as collective-bargaining representative would have continued following the takeover and Respondent's obligation to recognize and bargain with the Union as a successor would have also continued. By its conduct in refusing to recognize and bargain with the Union as representative of the employees, I further find that Respondent violated Section 8(a)(1) and (5) of the Act.[8]

2. The bypassing issue

The General Counsel alleges that Respondent further violated Section 8(a)(1) and (5) of the Act by dealing individually with employees and thereby bypassing the Union as their collective-bargaining representative.

a. *The status of Correa*

Preliminary to the discussion of this issue, it is necessary to determine whether Correa was an employee or a supervisor within the meaning of the Act. Correa had been superintendent since 1977, approximately 4 years before the building was sold to Respondent and, as such, was within the bargaining unit described in the collective-bargaining agreement between the Union and J.A.R. As building superintendent, he was mainly concerned with the general maintenance of the building including checking the boiler, and making minor repairs. He also checked employees coming in to work but, if someone called in sick, he would call J.A.R. Management and inform them of this circumstance. Correa was paid about $25 above the stipulated contract rate for a building superintendent, but he explained that this was in payment for extra work which he was called upon to do. In addition his compensation included free rent for an apartment and utilities, such as a telephone. Correa testified that during his tenure he had never hired anyone for a job except the porter, Concepcion, nor had he ever interviewed anyone for a job. Moreover, the other employees had been employed prior to the time he started in 1977 and there was no occasion to discharge any of them. Correa stated that, on the one occasion when he hired the porter, he merely told Concepcion what his work duties were and that was it. He did state that, if an employee wanted an off day, he would tell him whether he could take it or not. Further, Correa said he never suspended any employee or even issued a warning. Correa said under the established policy, if an elevator man for the midnight shift called in sick, nobody would run it. However, if there were an absentee for an elevator on another shift, he would run it himself for a while or ask others to do it, but often they would refuse if they had their own shift or for any other reason. Sometimes, at his request, another operator would take over the shift in order to obtain overtime pay. Finally, Correa stated that a representative of his employer, J.A.R. Management, would come to the building once a week and inspect what was going on.

On the basis of the foregoing I find that Superintendent Correa is not a supervisor within the meaning of the Act but is more in the nature of an experienced, senior employee who routinely oversees the maintenance of the building, and is subject to regular and constant higher supervision.[9] In this connection it is also noted that the elevator operators' jobs are unchanged and require no particular further instruction or assignment, and the porter had a similar position, merely repeating the tasks and duties he was told to perform when hired.

The General Counsel and the Charging Party have alleged, alternatively, that Correa is an agent of Respondent whose statements and conduct would be binding upon it. This is clearly evidenced in the instant case by

[8] *Burns*, supra; *Love's Barbeque Restaurant No. 62*, supra. The appropriate unit is:

All service employees of Respondent, employed at its Forest Hills apartment building, exclusive of all office clerical employees, guards and supervisors as defined in Section 2(11) of the Act.

[9] See *Washington Post Co.*, 254 NLRB 168 (1981); *Peat Mfg. Co.*, 251 NLRB 1117 (1980).

reason of Babad having asked Correa to approach employees and make offers of settlement to them. This was done at the outset since Correa transmitted, on behalf of Respondent, all of Babad's offers to Concepcion and to other employees on other occasions. Since Correa actually spoke to the former employees of J.A.R. and offered to them specific sums of money, proposals acted upon by Babad, the employees could reasonably believe that Correa was acting on behalf of and as a conduit for Respondent, and accordingly I find him to have been an agent of Respondent.[10]

b. *The bypassing*

The uncontroverted evidence is to the effect that Babad, either by his own efforts or through Correa, dealt with the employees, communicated offers of settlement of their status as employees, and negotiated severance pay. Babad, either by himself or through Correa, engaged in this conduct without permission of the Union, the collective-bargaining representative of the employees. Indeed, Babad ultimately reached agreements with all the employees, including Correa, and paid sums of money and obtained signed receipts from them. As to Correa, Babad also made numerous attempts to make a deal with him and, since Correa was a member of the bargaining unit, Babad also bypassed the Union in his case, at least until April 27, when he received permission from the Union to deal with him. However, no such permission was granted to the other employees with whom Babad made a final "settlement" after the meeting, again without notifying the Union or obtaining any authorization to do so.

It has been established that it is the duty of an employer to bargain solely with the statutory representative and no other person or group.[11] Respondent acted in derogation of this principle when, on April 1 and thereafter, Babad or Correa began discussions individually with employees concerning an attempt to have them voluntarily leave their positions for which they would be reimbursed. In his effort to rid himself of the Union, Babad actually paid them perhaps more than they would have been entitled under the severance pay provisions of the collective-bargaining agreement. This bypassing of the Union and dealing on these matters directly with the employees further violated Section 8(a)(5) of the Act.[12]

3. The alleged violations of Section 8(a)(3) of the Act

In the circumstances of this case, in order to establish that Respondent was a successor to the former owner of the apartment building, it was necessary and I found that Respondent violated Section 8(a)(1) and (3) of the Act by refusing employment to the employees of J.A.R. In addition, since I have found that Correa was not a supervisor within the meaning of the Act, but rather was an employee, I find further that he was also subject to Respondent's discrimination in violation of Section 8(a)(1) and (3) of the Act. In sum, as previously stated, I find that Respondent failed to offer employment to Correa, Concepcion, Cruz, Darmendo, Phillip, and Robertson, in violation of Section 8(a)(3) and (1) of the Act.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent set forth in section III above, occurring in connection with the operations of Respondent described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that Respondent as a successor-employer violated Section 8(a)(5) and (1) of the Act by failing and refusing to bargain with the Union as the collective-bargaining representative of the employees in the unit found appropriate, I recommend that Respondent be ordered to recognize and bargain in good faith with the Union.

I have further found that, as a result of its contractual undertakings in the course of the closing of title to the apartment building it had purchased, Respondent had adopted the collective-bargaining agreement between the Union and its predecessor, J.A.R., which it then repudiated, and discharged or refused to hire the employees of the predecessor on and after April 1. Accordingly, I shall recommend that Respondent make whole the discharged employees in the unit found appropriate, from April 1, 1981, in accordance with the terms and conditions of employment set forth in the contract repudiated by Respondent. This remedy is not limited to the end of the contract term since the obligation to bargain continues after the expiration of the agreement.

Having found Respondent discharged Correa, Concepcion, Cruz, Darmendo, Phillip, and Robertson, in violation of Section 8(a)(1) and (3) of the Act, I recommend that Respondent be ordered to offer them reinstatement and to make them whole for any loss of earnings and other benefits resulting from their discharge. The amount of backpay shall be computed in the manner set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest to be computed in the manner prescribed in *Florida Steel Corp.*, 231 NLRB 651 (1977).[13] In making whole the employees for their loss of earnings and other benefits, Respondent should not be credited with the amounts it paid to the employees allegedly in settlement of their claims for severance pay, as these payments were made in violation of Section 8(a)(3) of the Act, and constituted bribes to the employees for the purposes of their renouncing their ties with the Union and leaving their jobs. Nor do I find merit in the contention of Respondent that these

[10] *B–P Custom Building Products*, 251 NLRB 1337, 1338 (1980).
[11] *Medo Photo Supply Corp. v. NLRB*, 321 U.S. 678 (1944).
[12] *D & H Mfg. Co.*, 239 NLRB 393, 404 (1978).
[13] See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962).

payments resulted from voluntary settlement agreements and receipts signed by the individual employees. The agreements were not really voluntary since it was clear from the evidence that the employees desired continued employment and were forced to take these amounts as an alternative. The Board has not normally refrained from adjudicating unfair labor practices because of private settlement agreements. Particularly in this situation, where the agreements in themselves were violative of the Act, I find it would not effectuate the policies of the Act to give effect to and credit the settlements made by Respondent.[14]

Because of the egregious nature of the violations herein, including discharge or refusal to hire the entire complement of the predecessor's employees, I shall recommend entry of a broad order.[15]

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Union is the collective-bargaining representative of the employees in the following unit found appropriate. All service employees of Respondent, employed at its Forest Hills apartment building, exclusive of all office clerical employees, guards, and supervisors as defined in Section 2(11) of the Act.

4. Respondent is the successor-employer to J.A.R., the former employer at the apartment building involved.

5. Respondent violated Section 8(a)(5) and (1) by refusing to bargain, after April 1, 1981, collectively in good faith with the Union as the exclusive bargaining representative of the employees in the unit found appropriate.

6. Respondent violated Section 8(a)(5) and (1) of the Act by refusing to honor the collective-bargaining agreement then in effect, and by its discharge of all of the former employees at the apartment building.

7. Respondent violated Section 8(a)(5) and (1) of the Act by bargaining directly with the building service employees and bypassing the Union.

8. Respondent violated Section 8(a)(3) and (1) of the Act by discharging Ezekiel Correa, Gilberto Concepcion, Lorenzo Cruz, Charles Darmendo, Curtis Phillip, and Hugh Robertson, because of their membership in and support of the Union.

9. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[16]

ORDER

The Respondent, Chaim Babad, Bernard Steinmetz and Emanuel Steinmetz, a co-partnership d/b/a J.R.R. Realty Co., Forest Hills, New York, its partners, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to recognize and bargain collectively with respect to wages, hours, and other terms and conditions of employment with Local 32B–32J, Service Employees International Union, AFL–CIO as the exclusive bargaining representative of its employees in the unit described above as appropriate herein.

(b) Refusing to honor and abide by the contract entered into between its predecessor J.A.R. Management Corp., and the Union, for the period from April 1, 1981.

(c) Disregarding the Union and bargaining directly with the employees in derogation of their bargaining representative.

(d) Discharging employees because of their membership in or support for the Union.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act.

(a) Bargain collectively, on request, with the above-named Union as the exclusive representative of the employees in the appropriate unit.

(b) Honor and give retroactive effect from April 1, 1981, to the terms and conditions of the collective-bargaining contract with the Union, including payment of wages and benefits as prescribed.

(c) Offer Ezekiel Correa, Gilberto Concepcion, Lorenzo Cruz, Charles Darmendo, Curtis Phillip, and Hugh Robertson immediate and full reinstatement to their former jobs or, if those jobs no longer exists, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and make them whole for their loss of earnings in the manner set forth in the section of this decision entitled "The Remedy."

(d) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Post at the Forest Hills, Queens, New York apartment building copies of the attached notice marked "Appendix."[17] Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the

[14] See *Roadway Express*, 246 NLRB 174 (1979).

[15] See *Hickmott Foods*, 242 NLRB 1357 (1979).

[16] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[17] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director in writing within 20 days from the date of his Order what steps the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to recognize and bargain collectively with respect to rates of pay, wages, hours, and other terms and conditions of employment with Local 32B–32J, Service Employees International Union, AFL–CIO as the exclusive representative of the employees in the appropriate unit described below:

> All service employees of Respondent, employed at its Forest Hills apartment building, exclusive of all office clerical employees, guards and supervisors as defined in Section 2(11) of the Act.

WE WILL NOT refuse to honor the terms of an existing contract with the Union.

WE WILL NOT disregard the Union and bargain directly with our employees in derogation of their bargaining representative.

WE WILL NOT discharge employees because of their membership in or support for the Union.

WE WILL NOT in any other manner interfere with, restrain, or coerce employees in the exercise of their rights guaranteed in Section 7 of the Act.

WE WILL bargain collectively, on request, with the above-named Union as the exclusive representative of the employees in the appropriate unit.

WE WILL honor and give retroactive effect from April 1, 1981, to the terms and conditions of the collective-bargaining contract with the Union including the payment of wages and benefits.

WE WILL offer Ezekiel Correa, Gilberto Concepcion, Lorenzo Cruz, Charles Darmendo, Curtis Phillip, and Hugh Robertson full reinstatement to their jobs, with backpay plus interest.

CHAIM BABAD, BERNARD STEINMETZ AND EMANUEL STEINMETZ, A CO-PARTNERSHIP D/B/A J. R.R. REALTY CO.

Harley-Davidson Transportation Co., Inc. *and* Teamsters, Chauffeurs, Warehousemen and Helpers, Local Union No. 430. Case 4–CA–13710

22 January 1985

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS HUNTER AND DENNIS

On 24 February 1984 Administrative Law Judge David S. Davidson issued the attached decision. The Respondent filed exceptions and a supporting brief. The Charging Party filed a brief in support of the judge's decision. The General Counsel filed a brief in support of the judge's decision and in answer to the Respondent's exceptions.[1]

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

The pertinent facts are undisputed. Prior to 1 April 1982, Service Group, Inc. (SGI) provided freight transportation services to Harley-Davidson Motor Co. (H-DMC) at its York, Pennsylvania facility. The Union had successive collective-bargaining agreements with SGI for 3 years covering a unit of truckdrivers engaged in hauling for H-DMC. The latest of these agreements expired on 31 March 1982.

On 1 April 1982 Respondent Harley-Davidson Transportation Co. (HDT) assumed control of SGI's trucking operation for H-DMC. A majority of the drivers then hired by HDT had been employed previously by SGI in the bargaining unit represented by the Union. These employees continued to comprise a majority of the Respondent's drivers through the date of the hearing in this case.

On 6 July 1982 the Union called on the Respondent to bargain with it as a successor to SGI. Recognizing that it might be a successor employer to SGI, the Respondent agreed on 19 January 1983 to bargain with the Union. The Respondent does not now dispute its successor status.

The Union and the Respondent met to negotiate three times in February and April 1983 and had scheduled a fourth meeting for 16 May 1983. The fourth meeting did not take place. On 9 May 1983 the Respondent withdrew from negotiations because, inter alia, it had been presented on 7 or 8 May with a petition signed by a majority of its employees stating that they did not wish to be represented by the Union.

The judge found that by conceding its obligation as a successor and agreeing to negotiate, the Respondent voluntarily recognized the Union. He further found that by so doing the Respondent impliedly admitted that it had no reason to doubt the Union's majority status on the date the Union requested bargaining. Relying on the Board's statement in *Landmark International Trucks*, 257 NLRB 1375 fn. 4 (1981), enf. denied in pertinent part 699 F.2d 815 (6th Cir. 1983), that "we can discern no principle that would support distinguishing a successor's bargaining obligation based on voluntary recognition of a majority union from any other employer's duty to bargain for a reasonable period," the judge concluded that the Respondent had incurred the obligation arising from voluntary recognition to bargain for a "reasonable time" notwithstanding any subsequent good-faith doubt of the Union's majority status. Alternatively, the judge cited *Holiday Inn of Niles Michigan*, 241 NLRB 555, 559 (1979), for the proposition that a successor employer can deny recognition only if its good-faith doubt is based on circumstances existing on the date recognition is sought, and that once a successor has agreed to bargain, it is not privileged to withdraw recognition based on circumstances arising thereafter until a reasonable time for bargaining has elapsed. Accordingly, the judge concluded that the Respondent violated Section 8(a)(5) of the Act because it withdrew from negotiations before the parties had bargained for a reasonable period.

We do not adopt the judge's conclusion because we disagree with his characterization of a successor employer's bargaining obligation.[2] We adhere to the view expressed in *Barrington Plaza & Tragniew*, 185 NLRB 962, 963 (1970), and cases cited therein, that where, as here, a successor employer recognizes a union which has been certified for a year or more, the union enjoys a rebuttable presumption of majority status only. A successor may lawfully withdraw from negotiation at any time following recognition if it can show that the union had in fact lost its majority status at the time of the refusal to bargain or that the refusal to bargain was grounded on a good-faith doubt based on objective factors that the union continued to command majority support.[3] Accordingly, we overrule *Landmark*, *Holiday Inn*, and similar cases to the extent they are inconsistent with this view.

[1] The Respondent has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

[2] We therefore do not pass on the judge's conclusion that a reasonable time for bargaining had not elapsed.

[3] See also *Grico Corp.*, 265 NLRB 1344 (1982).

The rule set forth today is supported by the Sixth Circuit's decision in *Landmark International Trucks v. NLRB*, 699 F.2d 815, 818 (6th Cir. 1983). The court observed that a successor employer's obligation to bargain with the representative of its predecessor's employees arises by operation of law and cannot be truly voluntary. The court concluded as follows:

> There is no reason to treat a change in ownership of the employer as the equivalent of a certification or voluntary recognition of a union following an organization drive. In the latter cases the employees must be given an opportunity to determine the effectiveness of the union's representation free of any attempts to decertify or otherwise change the relationship. However, where the union has represented the employees for a year or more a change in ownership of the employer does not disturb the relationship between employees and the union. While the relationship between employees and employer is a new one, the relationship between employees and union is one of long standing. A successor's duty to continue recognition under such circumstances is no different from that of any other employer after the certification year expires. Recognition under these circumstances carries with it no irrebuttable presumption of contiunued majority status.

Applying the above rule to the instant case, we turn to the Respondent's defense that on 9 May 1983, when it withdrew from bargaining, it harbored an objectively based good-faith doubt of the Union's majority status. The judge found that the Respondent had relied on, inter alia, a petition presented to it on 7 or 8 May 1983 apparently signed by a majority of its employees. The petition stated that the employees did not want to be represented by the Union. The judge further found that the Respondent's general manager made no attempt to authenticate the signatures because they looked at a glance to be those of his employees. We conclude that the employee petition constituted a sufficient objective ground to support the Respondent's good-faith doubt of the Union's majority status. An employer may rely on a petition apparently signed by a majority of its employees as a basis for good-faith doubt even though the employer did not authenticate the signatures. *Guerdon Industries*, 218 NLRB 658, 660 (1975). The Respondent therefore did not violate Section 8(a)(5) of the Act by withdrawing from bargaining on 9 May 1983. Accordingly, we shall dismiss the complaint in its entirety.

ORDER

The complaint is dismissed.

DECISION

STATEMENT OF THE CASE

DAVID S. DAVIDSON, Administrative Law Judge. The charge in this case was filed on May 12, 1983, and the complaint issued on June 24, 1983, alleging that Respondent violated Section 8(a)(1) and (5) of the Act by withdrawing its recognition of the Union as the exclusive collective-bargaining representative of its truckdrivers on May 9, 1983, and by refusing to bargain collectively with the Union after that date. Respondent denies the commission of any unfair labor practices.

A hearing in this case was held before me in Harrisburg, Pennsylvania, October 20, 1983. Briefs have been received from the General Counsel, the Charging Party, and Respondent.

The issue in this case is whether, after initially recognizing the Union and meeting for negotiations with it three times during a 3-month period, Respondent was obligated to continue bargaining with the Union after receiving a petition containing the presumed signatures of a majority of the bargaining unit in support of a recently filed decertification petition.

On the entire record in this case, including my observation of the witnesses and their demeanor, I make the following

FINDINGS AND CONCLUSIONS

I. THE BUSINESS OF RESPONDENT

Respondent, a Delaware corporation, engages in the over-the-road truck transportation of motorcycles and other freight from its York, Pennsylvania facility. During the past fiscal year, Respondent received revenue exceeding $50,000 for the transportation of goods directly to points outside Pennsylvania.

The complaint alleges, Respondent admits, and I find that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Facts*

1. Background

The facts in this case are largely undisputed. Before April 1, 1982, Service Group, Inc. (SGI), an independent contractor, provided transportation services to Harley-Davidson Motor Company (H-DMC) from the facility at 2400 East Market Street in York, Pennsylvania. The Union had collective-bargaining agreements with SGI

for 3 years covering its drivers; the most recent contract ran from January 1, 1981, to March 31, 1982.

In early March 1982, H-DMC notified the Union of its decision to terminate its agreement with SGI. On April 1, 1982, Respondent, a wholly owned subsidiary of H-DMC, assumed control of the operations previously handled by SGI. A majority of the drivers then hired by Respondent had been previously employed by SGI in the bargaining unit represented by the Union. That majority continued through the date of the hearing. The unit contained 25 drivers in May 1983, when the issue in this case arose.

On April 27, 1982, the Union filed a charge alleging, inter alia, that H-DMC and SGI were joint employers refusing to bargain with the Union (Case 4–CA–12889). On June 30, 1982, the Regional Director dismissed the complaint, noting that SGI and H-DMC were not joint employers, that the Union had failed to make a bargaining request of Respondent, and that the evidence indicated that Respondent was a successor employer to SGI. On November 1, 1982, the General Counsel denied the Union's appeal of the Regional Director's dismissal; on December 8, 1982, the General Counsel denied the Union's request for reconsideration of the denial of the appeal.

In the meantime on July 6, 1982, the Union, claiming that Respondent was a successor to SGI, requested Respondent to begin bargaining. On July 13, 1982, Respondent refused, pending the resolution of the Union's appeal in Case 4–CA–12889, above, and pending the expiration of the appeal deadline for another charge filed by the collective-bargaining representative of parent company H-DMC's employees (Case 4–CA–12920) alleging that the drivers were an accretion to the unit it represented. On July 19, 1982, the Union filed a further charge alleging that Respondent was a successor to SGI and had refused to bargain (Case 4–CA–13081).

On January 19, 1983, after the appeals in Cases 4–CA–12889 and 4–CA–12920 were exhausted, Respondent agreed to bargain with the Union, disclaiming, however, any acknowledgement that the Union represented a majority of the employees in the unit. On January 24, the Union requested withdrawal of the charge in Case 4–CA–13081; on January 31, the Regional Director approved the request.

2. The bargaining sessions

The Union and Respondent met to negotiate on February 1 and 28 and April 21, 1983,[1] and had scheduled a fourth meeting for May 16. The meetings took place over this somewhat extended period largely as an accommodation to the schedule of Respondent's attorney. Union Business Agent Bricker testified, without contradiction, that February 28 was the earliest date Respondent offered for the second meeting. At this second meeting, Respondent proposed that the third session occur on one of seven dates between March 29 and April 13, an earlier date being impossible due to its attorney's impending medical treatment. On March 4 the Union sent a letter to Respondent agreeing to meet on three of the dates proposed by Respondent, March 31 and April 12 and 21. However, in a March 8 reply Respondent stated that other obligations now made it available only on April 21. Bricker testified that at the April 21 meeting the parties found scheduling conflicts which were mutually resolved by the May 16 date.

There is some slight disagreement regarding the length of each meeting. Union Business Agent Bricker testified that the first meeting lasted 2 hours, the second meeting lasted 45 minutes, and the third meeting lasted 4-1/2 hours. Respondent's general manager Schwarz testified that the first meeting lasted about 30 to 45 minutes, the second lasted 2 hours, and the third lasted 3 to 4 hours. The discrepancy is not material, as, in either case, the parties spent approximately 7 hours in negotiations.

At the February 1 meeting, the Union submitted its contract proposal; at the February 28 meeting Respondent offered its proposal. At the end of the April 21 meeting the parties had reached agreement on the following articles:[2] 1. Coverage; 3. Dues Checkoff; 5. Casuals; 7. Leave of Absence; 10. Holidays; 11. Military Clause; 12. Non-Discrimination/Union Activities; 13. Passengers; 14. Meal Period; 15. Pay Period; 17. Equipment, Accident Reports; 18. Federal, State and Municipal Laws; 19. Bonds; 23. Protective Clothing and Equipment; 25. Suspended Licenses; 27. Examination of Records; 28. Examination/Examination and Identification; 29. Time Sheets; 30. Management Prerogatives; 32. Death in the Family; 34. Mileage Determination; 36. Road Expenses; 37. Fuel Time; and 38. Credit Union.

Differences remained as to the following: 2. Shop Conditions; 4. Discharge or Suspension; 6. Grievances; 8. Seniority; 9. Vacations; 16. Protection of Conditions; 20. Loss or Damage; 21. Health and Welfare Insurance/-Health and Welfare Fund; 22. Pension Plan/Pension Fund; 24. Employee's Bail; 26. Protection of Rights; 35. Paid-for-Time; 39. Term of Agreement; and possibly 31. Savings and Separability. In addition, the parties had reached agreement as to first year wages, but not as to wages for later years of a proposed 3-year contract.

During the negotiations the parties compromised on a number of issues and agreed to a number of changes to initial proposals. The May 16 meeting was scheduled for the purpose of discussing the remaining areas in dispute. Although the parties were far apart with respect to two issues, union security and a pension plan, with both strongly adhering to their initial positions as of the end of the third meeting, those issues were still on the table, there is no claim that the parties had reached an impasse, and it is clear that they had not. As Schwarz testified, at the end of the last bargaining meeting, there was "no question" that Respondent intended to negotiate until a contract was reached. The Union, anticipating a successful May 16 session, posted signs after the April 21 session announcing a union meeting to occur on May 22 for the purpose of voting on the contract.

[1] All dates are in 1983 unless otherwise indicated.

[2] Numbers and headings were almost identical in the two proposals; where headings differ, Respondent's heading is listed first, followed by a slash and the Union's heading.

3. The discontinuation of negotiations

On May 9, Respondent, by letter, informed the Union that it was halting contract negotiations pending the outcome of a representation case arising from the filing of a decertification petition. Respondent noted that its withdrawal was based not merely on the petition but on its being "informed by a majority of the employees of this bargaining unit that they do not want to be represented by Teamsters Local 430 at this time." Respondent contends that its determination that employees did not want union representation was based on some generalized dissatisfaction with the Union expressed at a January 16 company-called meeting of the drivers; the decertification petition filed by Joe Avaritt on April 15; two petitions containing the purported signatures of a total of 16 of the drivers, in support of the decertification petition; and the knowledge that none of the unit's drivers were currently dues paying members of the Union.

a. *The January 16 meeting*

On January 16, Respondent held a meeting for its drivers at Respondent's plant to discuss Respondent's obligation to bargain with Local 430.[3] An animated discussion ensued, during which an undisclosed number of unnamed drivers asked if they had "any choice in the matter as to whether or not we want a union"; if there were "anything we can do on our own behalf"; and if they were "being placed in a position that we don't have anything to say about it." Respondent's vice president for human relations, Hamilton, responded by telling the drivers that they had "every freedom, whether individually or as a group, to respond to the situation"; that they had "the right to do on your own behalf, what you feel is necessary"; and that it would be improper for the Company to intervene. The meeting lasted approximately 2 to 2-1/2 hours. Union officials were neither invited to nor attended this meeting, although David Hartman, shop steward under the SGI collective-bargaining agreement, was present.

b. *The decertification petition*

On April 15, employee Joe Avaritt filed a decertification petition with the Regional Director (Case 4–RD–1115). On April 18, a copy of the petition was mailed by the Board to Respondent and received on April 22 or 23. A member of the union negotiating team informed Respondent, at the April 21 bargaining session, of the petition, suggesting Respondent's complicity in its filing. Respondent denied prior knowledge of the petition. Around April 25, Schwarz was approached by Avaritt who handed him a copy of a petition in support of decertification containing the purported signatures of 12 drivers.

On May 4, Avaritt filed a second decertification petition (Case 4–RD–1117), after withdrawing the first. Respondent's copy was mailed on May 4 and received on May 7 or 8. A day or two later Avaritt gave Schwarz a copy of a petition containing the purported signatures of 13 drivers, with dates alongside the names, supporting decertification.[4]

c. *The petitions*

The first petition which Avaritt gave Schwarz on April 25 has the typewritten caption: "WE THE UNDERSIGN ARE HARLEY-DAVIDSON DRIVERS WISH TO LET YOU KNOW THAT WE DO NOT WANT TO BE REPRESENTED BY THE TEAMSTERS LOCAL 430 AT THIS TIME." Below the heading, in a column, are the following 12 signed names: Joe K. Avaritt Sr., Earle D. Snyder, Jim Heare, Earl S. Baer Jr., Clarence Frey, Walter Almony, Ben Schmittel, E. E. Worley, Lynn C. Kaufman, R. S. Pannebaker, J. Merle McLaughlin, and Richard A. Burk. None of the signatures were dated.

The second petition, which Avaritt gave Schwarz on May 7 or 8, has exactly the same typewritten heading as the first. However, below the heading are the further typewritten captions "NAME" and "DATE." In columns below the captions are the following 13 purported signatures and handwritten dates: Earle D. Snyder 4–19–83; Joe K. Avaritt Sr. 4–19–83; Monte Poff 4–19–83; Richard A. Burk 4–19–83; E. E. Worley 4–19–83; W. H. Tyson 4–19–83; J. Merle McLaughlin 4–19–83; David K. Burke 4–20–83; Clarence E. Frey 4–21–83; Earl S. Baer 4–21–83; B. H. Schmittel 4–21–83; Walter S. Almony Jr. 4–23–83; and Alvin W. Sprenkle 4–23–83. All 16 different names appearing on the two petitions were names of drivers then employed by Respondent.

Schwarz made no attempt to authenticate the signatures on the petitions. He testified that they looked familiar to him based on his experience reviewing the drivers' signed daily logs, that "the signatures were at a glance those of my people," and that "I had no reason to question them." At the hearing however, when presented with employees' W–4 forms signed in April 1982, Schwarz noted dissimilarities between the compared signatures of Richard Burk and stated, "It might have been a failing on my part" that he did not question the authenticity of the signatures.

Schwarz testified that until the hearing, when it was called to his attention, he found nothing curious about the fact that the dates entered on the second petition fell between April 19 and 23 even though the need for a second petition was not established until sometime after the first petition was presented to him on April 24 or 25.

d. *Union membership*

Testimony was sharply divided over whether the question of active union membership arose during the negotiating sessions. Bricker repeatedly maintained that the topic was not discussed; Schwarz recalls Respondent's attorney asking the question in the context of the union-security clause during the April 21 meeting. Schwarz remembers Bricker admitting that "none of the people on

[3] The findings concerning this meeting are based on the uncontradicted testimony of Schwarz, who was present.

[4] There is some apparent confusion in the testimony of Schwarz as to the sequence of events. He testified that on May 5 he was contacted by a Board agent who told him that the petition was deficient because it lacked dates alongside the names and asked him to contact Avaritt so that Avaritt could remedy the deficiency. It seems unlikely the events occurred in the sequence described by Schwarz.

the fleet force were then members on a dues paying basis," that "they were on withdrawal cards." While Bricker denied that this conversation occurred, he acknowledged that since March or April all the drivers of Respondent—acting on Bricker's instructions—had taken out withdrawal cards. Bricker, at the hearing, explained that members were encouraged to take out "honorary withdrawal" cards for a 50-cent fee, during the period their unit was without a contract. Once a contract was signed, the members were expected to turn in the cards and "pick up their dues." Members on withdrawal cards lost some union benefits but retained the right to vote on a new contract. Bricker claims that he explained to Respondent, at negotiations, none of the mechanics of this process as he claimed that no discussion was held concerning union membership.

I have credited Schwarz whose version included specific details which were acknowledged at the hearing to be true (no drivers were dues-paying members; all were on withdrawal cards) and which were hardly self-serving, as these details, in the absence of testimony to the contrary by Schwarz, indicate that Schwarz was aware that the drivers had maintained their affiliation with the Union.

B. *Concluding Findings*

1. Did Respondent voluntarily recognize the Union?

In its January 19 letter to the Union, Respondent stated that it agreed to bargain as a result of the Regional Director's opinion that Respondent "may be a successor employer of Service Group, Incorporated" and noted that "[w]e do not acknowledge that Teamsters Local 430 represents a majority of the employees in the bargaining unit." In its brief, Respondent argues that it agreed to bargain only because it "inherited that obligation by virtue of the Board's successorship rule enunciated in *NLRB v. Burns Security Services*, 406 U.S. 272 (1972)."

Under *Burns*, absent a reasonably based good-faith doubt of an incumbent union's majority, a successor employer must recognize the continuing representative status of the union within an appropriate unit. See *Landmark International Trucks*, 257 NLRB 1375, 1378 (1981).

While Respondent may have refused to acknowledge expressly the Union's majority status, it clearly granted voluntary recognition to it as the exclusive representative of its employees. It thereby acknowledged that it lacked a reasonably based good-faith doubt of the Union's majority sufficient to overcome the presumption that the Union's majority continued among Respondent's employees after it succeeded SGI. Thus, Respondent acknowledged that the Union was presumed to represent a majority of its drivers and voluntarily recognized the Union as the exclusive representative of its employees.

2. Was the Union's majority status rebuttable before a reasonable period of bargaining time had elapsed?

Respondent contends that the settled rule, requiring an employer to bargain for a reasonable period with a voluntarily recognized union, does not apply to successor employers who recognize incumbent unions after expiration of the certification year. Rather, Respondent contends, in such a case the employer may withdraw recognition and cease bargaining whenever it forms a reasonably based good-faith doubt of the union's continuing majority

In *Landmark International Trucks*, 257 NLRB 1375 (1981), vacated and remanded 699 F.2d 815 (6th Cir. 1983), the Board held otherwise, stating: "We can discern no principle that would support distinguishing a successor employer's bargaining obligation based on voluntary recognition of a majority union from any other employer's duty to bargain for a reasonable period." 257 NLRB at 1375 fn. 4.

The court of appeals disagreed, and rejected the Board's holding. It reasoned as follows (699 F.2d at 818–819):

> There is no reason to treat a change in ownership of the employer as the equivalent of a certification or voluntary recognition of a union following an organization drive. In the latter cases the employees must be given an opportunity to determine the effectiveness of the union's representation free of any attempts to decertify or otherwise change the relationship. However, where the union has represented the employees for a year or more a change in ownership of the employer does not disturb the relationship between employees and the union. While the relationship between employees and employer is a new one, the relationship between employees and union is one of long standing. A successor's duty to continue recognition under such circumstances is no different from that of any other employer after the certification year expires. Recognition under these circumstances carries with it no irrebuttable presumption of continued majority status. When a successor employer recognizes a union which has been certified as the exclusive representative of employees of the predecessor employer for one year or more, there is a rebuttable presumption only that the union continues to have the support of a majority of the employees.

While the Board did not articulate the basis for its holding, there does appear to be a substantial basis for it. Although the court saw the relationship between the employees and the union as the only critical element and stated that a change in ownership did not disturb that relationship, the rationale for providing a reasonable period for bargaining following voluntary recognition draws from the rationale for the Board's certification year rule and focuses not only on the relationship between employees and union but on the relationship between union and employer and the effect upon bargaining of rules which permit withdrawal of recognition at any time. Thus, in *Ray Brooks v. NLRB*, 348 U.S. 96 (1954), among the reasons advanced and found persuasive to support the certification year rule were:

> (c) A union should be given ample time for carrying out its mandate on behalf of its members and should not be under exigent pressure to produce hothouse results or be turned out.

> (d) It is scarcely conducive to bargaining in good faith for an employer to know that, if he dillydallies or subtly undermines, union strength may erode and thereby relieve him of his statutory duties at any time, while if he works conscientiously toward agreement, the rank and file may, at the last moment, repudiate their agent. [348 U.S. at 100.]

In *Keller Plastics Eastern, Inc.*, 157 NLRB 583, 588 (1966), the Board relied on *Brooks* and *Franks Bros. Co. v. NLRB*, 321 U.S. 702 (1944), in holding that "the parties must be afforded a reasonable time to bargain and to execute the contracts resulting from such bargaining" following voluntary recognition. In *NLRB v. Universal Gear Service Corp.*, 394 F.2d 396 (6th Cir. 1968), enfg. 157 NLRB 1169 (1966), the court of appeals agreed with the Board that the above quoted reasons from *Brooks* "have relevance to the problem presented in the instant case and support its determination that only if the parties can rely on the continuing representative status of the lawfully recognized union, at least for a reasonable period of time, can bargaining negotiations succeed and the policies of the Act be effectuated." 394 F.2d at 398. See also *NLRB v. Montgomery Ward & Co.*, 399 F.2d 409 (7th Cir. 1968).

The focus on the bargaining relationship between union and employer is most strongly stated in the decision of the administrative law judge, adopted by the Board, in *San Clemente Publishing Corp.*, 167 NLRB 6, 8 (1967):

> [I]t is . . . easy to visualize the obstruction to effective bargaining and denigration of statutory policy that could result if the employer in any of the given situations were permitted to repudiate his obligation solely because the union in question has lost majority status. Fluctuations in a labor force may cost a union its majority in the midst of pending bargaining; restore it a week or two later; remove it once more in another week or two; and return it still again after some such period . . . the result could be negotiations by fits and starts tailored to repeated fine measurements of a union's numbers, with attendant haggling over a range of matters such as . . . real or fancied problems of unit inclusion of new employees, or of the validity of the form in which they have designated the union; and accompanied by provocative pressures by one side or the other to compel agreement to a position, or dilatory dodges to prevent one, conditioned by the state of the union's numerical support in the unit at any given time. . . . This type of jousting would make for shackles and climates of friction in the bargaining process and would tend to frustrate the statutory aim of promoting industrial peace and stability.

As the Declaration of Policy in Section 1(b) of the Act recognizes, the relationships with which the Act deals are triangular and interrelated. The relationship between employees and union is not independent of the relationship between union and employer. In the case of a successor, while the same union represents the same employees, the introduction of a successor employer means that the established contractual relationship is ended. The negotiations between union and successor employer are not like the negotiation of a typical renewal agreement with a continuing employer where only selected issues are usually raised in the context of an otherwise established contractual framework. Rather, as the facts in this case show, all contract provisions are open, and the negotiations are in fact negotiations for an initial agreement. Absent protection of the bargaining relationship for a reasonable period of time following recognition by a successor employer, the same adverse impact on the bargaining process would follow as in the case of initial recognition.

While the Board's rule prevents withdrawal for a reasonable time following recognition, it does not bar an employer from denying recognition where a good-faith doubt is based on circumstances existing at the time recognition is sought. *Holiday Inn of Niles Michigan*, 241 NLRB 555, 559 (1979). The right to withdraw is lost only after recognition has been granted where the good-faith doubt is based on what has happened since negotiations commenced, either fluctuations in the work force or temporary swings in union support that may themselves reflect the momentary status of collective-bargaining negotiations. After a reasonable time for bargaining has elapsed, the right to withdraw recognition based on a good-faith doubt is restored. Thus, the right to withdraw recognition is suspended only for a reasonable period of time in which the interest in promoting collective bargaining outweighs it.

Here, 3 months elapsed between Respondent's takeover of the operations previously carried on by SGI and the Union's first claim of the right to represent the employees of Respondent as successor to SGI. Another 6 months elapsed before Respondent agreed to bargain with the Union. During the entire period Respondent made no claim that it had a good-faith doubt of the Union's majority. After that 9-month hiatus a bargaining relationship was rightfully established, and it is not excessively restrictive of employers' or employees' rights to require that the bargaining relationship "be permitted to exist and function for a reasonable period in which it can be given a fair chance to succeed,"[5] without challenge based on doubts arising after bargaining began.

Accordingly, I find that after Respondent agreed to bargain with the Union in January 1983, it was obligated to bargain for a reasonable period of time without regard to any good-faith doubt it might acquire as to the Union's continuing majority.

3. Did Respondent bargain for a reasonable period before withdrawing recognition?

In determining what constitutes a reasonable bargaining period "[t]here are no rules" and "each case must rest upon its own individual facts." Thus, "reasonable time does not depend upon either the passage of time or the number of calendar days on which the parties met," but "the issue turns on what transpired during [the]

[5] *Franks Bros. Co. v. NLRB*, supra at 705, quoted with approval in *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 613 (1969).

meetings and what was accomplished therein." *Brennan's Cadillac, Inc.*, 231 NLRB 225, 226 (1977). The fact that the parties reached impasse can cause an otherwise shorter time to be seen as reasonable. *N. J. MacDonald & Sons, Inc.*, 155 NLRB 67, 71 (1965). However, "Generally, the Board will not find that an impasse has occurred unless the negotiations between the parties have been exhaustive." *Betlem Service Corp.*, 268 NLRB 354 (1983).

Here, Respondent does not contend that impasse had been reached, but a suggestion was raised that irreconcilable differences existed between the parties as to union security and pensions. It is clear, however, that bargaining had been anything but exhaustive. The parties were negotiating for what was for them an initial contract. In approximately 7 hours of negotiations considerable progress was made with many compromises and changes in initial proposals.

At the conclusion of the April 21 meeting all unresolved issues were still on the table, both sides were still bargaining on many issues, and both parties intended to negotiate until a contract was reached. The Union was clearly optimistic; after the April 21 meeting the Union posted signs announcing that a vote on the contract would occur on May 22 following the scheduled May 16 session. While the 7 hours of negotiations were spread over a 3-month period, the timing of negotiating sessions was the result of scheduling conflicts and did not reflect any exhaustion of prospects for agreement. Based on the orderly and substantial progress in the three bargaining sessions that occurred and the indication that both parties looked forward to an equally fruitful fourth bargaining session, I conclude that a reasonable period for bargaining had not elapsed and, regardless of the difficulties that may have remained in the way of agreement on all issues, the parties were nowhere near impasse.

Accordingly, I find that Respondent was obligated to continue bargaining with the Union when it withdrew recognition from the Union and that Respondent's withdrawal from bargaining violated Section 8(a)(1) and (5) of the Act.

IV. THE REMEDY

Having found that Respondent engaged in unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

As I have found that Respondent violated Section 8(a)(1) and (5) of the Act by refusing to bargain with the Union as the exclusive bargaining representative of the unit comprising its truckdrivers, I shall recommend that Respondent be ordered, upon request, to bargain for a reasonable time with the Union as the exclusive representative of its employees in the unit and, if an understanding is reached, embody such understanding in a signed agreement.

On the basis of the above findings of fact and the entire record in this case, I make the following

CONCLUSIONS OF LAW

1. Harley-Davidson Transportation Co., Inc. is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Teamsters, Chauffeurs, Warehousemen and Helpers Local Union No. 430, is a labor organization within the meaning of Section 2(5) of the Act.

3. All truckdrivers employed by Respondent who are assigned to perform services at its York, Pennsylvania facility, excluding all clerks, dispatchers, guards, and supervisors as defined in the Act, constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act.

4. At all times since April 1, 1983, the Union has been, and now is, the exclusive representative of the employees in said unit for the purposes of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing to recognize or bargain with the Union at all times on and after May 9, 1983, with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment for the employees in the appropriate unit described above, Respondent engaged in unfair labor practices affecting commerce within the meaning of Sections 8(a)(5) and (1) and 2(6) and (7) of the Act.

[Recomended Order omitted from publication.]

Lycee Francais de New York *and* United Federation of Teachers, Local No. 2, New York State United Teachers, American Federation of Teachers, AFL–CIO. Cases 2–CA–19291 and 2–RC–19215

23 January 1985

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS HUNTER AND DENNIS

Upon a charge filed by the Union 3 December 1982, the General Counsel of the National Labor Relations Board issued a complaint 18 January 1983 against the School (Lycee), the Respondent, alleging that it has violated Section 8(a)(5) and (1) of the National Labor Relations Act.

The complaint alleges that on 18 November 1982, following a Board election in Case 2–RC–19215, the Union was certified as the exclusive collective-bargaining representative of the School's employees in the unit found appropriate. (Official notice is taken of the "record" in the representation proceeding as defined in the Board's Rules and Regulations, Secs. 102.68 and 102.69(g), amended Sept. 9, 1981, 46 Fed.Reg. 45922 (1981); *Frontier Hotel*, 265 NLRB 343 (1982).) The complaint further alleges that since 29 November 1982 the School has refused to bargain with the Union. On 31 January 1983 the School filed its answer admitting in part and denying in part the allegations in the complaint.

On 8 February 1983 the General Counsel filed a Motion for Summary Judgment. On 10 February 1983 the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The School filed a response.

The School's answer admits its refusal to bargain but attacks the validity of the certification based on its contention, set forth in its request for review and motion to reopen record in the representation proceeding, that the certified unit is not appropriate for the purposes of collective bargaining within the meaning of Section 9 of the Act. The General Counsel argues that all material issues have previously been decided. Upon reconsideration, we have decided that review of the unit question was erroneously denied. Accordingly, the Board has reconsidered the issue under review in this case and makes the following findings.

Rulings on the Motion for Summary Judgment

The Employer (Lycee) is engaged in the operation of a private school offering a French curriculum for about 944 nursery, elementary, and secondary school students. The Lycee is accredited by the Board of Regents of the State of New York, the French Ministry of Education, and the French Ministry of Foreign Affairs. It offers the same comprehensive curriculum, in the French language, taught in French schools which leads to the French baccalaureate examination.

The Lycee employs about 83 teachers, 13 surveillants, 2 library aides, and 1 laboratory technician. Of these, 40 members of the faculty and a few surveillants and aides are exchange visitors. Exchange visitors are personnel from France who are assigned to the Lycee for up to 3 years. The Lycee contends that, contrary to the certificaton by the Board, the exchange visitors should be excluded from the unit as temporary employees or because they lack a community of interest with locally hired employees.

The locally hired employees and the exchange visitors share some significant terms and conditions of employment. All of the employees are hired by the president of the Lycee, who also evaluates them and renews their contracts. They all may participate in the Lycee's medical insurance program, are paid monthly, have yearly contracts, and receive the same gross wages and supplemental work payments. Both groups are supervised by the directors of their units, are required to meet with parents, and are required to attend parent and teacher meetings. They also share work and lounge areas and have the same holidays, vacations, and work year.

At the same time, there are significant differences in the employment conditions of the two groups. French nationals who wish to become exchange visitors file an application with the president of the Lycee. The president interviews some of the applicants in France and then chooses from among them. Those selected have a 1-year contract with the Lycee.[1]

Exchange visitors receive a $1200 travel allowance and $1000 allowance for settling costs. Their visas do not allow them to work anywhere other than the Lycee. Additionally, they are permitted to work only for 3 years within an exchange visitor program without special permission for an extension of time from U.S. immigration authorities. If no extension is forthcoming from the immigration authorities after 3 years, the employee must change

[1] Contracts of exchange visitors on leave from the French Ministry of Education must be approved by the Ministry. All but four or five of the exchange visitors are connected with the French Ministry of Education, and the ensuing discussion refers primarily to their terms and conditions of employment. No party contends that the few exchange visitors who are not in the Ministry of Education should be treated differently, in terms of unit determination, from those who are.

his or her immigration status in order to continue working in the United States. For 2 years the exchange visitors are not subject to local, state, or Federal taxes. Thereafter, the exemption is lost.

The exchange visitors are not eligible to participate in the Lycee's pension program since it requires 3 years of service at the Lycee. They continue to contribute to their own French government pension program. Their time spent working at the Lycee is credited toward their pension and seniority status in France. They work the same hours that they work in France and, according to regulation of the French Ministry of Education, cannot work additional hours.

The exchange visitors from the Ministry of Education continue to be covered by their French health care program, although they may participate in the Lycee's health plan if they desire. Should they become ill and unable to work during their term at the Lycee, exchange visitors are paid until the end of their contract.

Significantly, the exchange visitors from the Ministry of Education are evaluated by inspector generals from the Ministry. The Lycee does not receive a copy of the inspector general's evaluation, but it becomes a part of the teacher's record in France. Moreover, the Ministry exchange visitors can only be discharged with permission of the Ministry of Education. The exchange visitors are required to comply with French statutes which establish the rules of their profession. They also are required, if selected, to sit on juries testing candidates for French baccalaureates. For the latter task the exchange visitors are paid by the French embassy rather than the Lycee.

In contrast, the locally hired employees average 8 to 9 years with the Lycee, although some have been employed there for 20 or 25 years. They are eligible for a deferred compensation plan after 3 years of employment. They have pension and medical insurance plans. Unlike the Ministry exchange visitors, the hours of locally hired employees are based on the type and level of education degree so that teachers with lesser degrees are required to work more hours than those with higher degrees. Locally hired employees are given 3 months of sick leave with full pay and 3 months at half salary, but do not have the contractual arrangement afforded exchange visitors. Similarly, the few exchange visitors not from the Ministry of Education and locally hired employees may be discharged by the president of the Lycee and are evaluated solely by either the Lycee's director of studies or by the director of their unit.

These facts demonstrate that the interests of the exchange visitors diverge from those of the locally hired employees in several significant ways. Although their gross salaries are the same, those of the exchange visitors are not subject to United States' taxes for 2 years, which is as long as most of the exchange visitors stay at the Lycee. Exchange visitors have their own pension and health plans, although they may participate in the Lycee health plan also if they desire. Their time at the Lycee is credited to their pension and seniority status in France. At the same time, exchange visitors by virtue of the duration of their employment are not eligible for the Lycee's deferred compensation plan. Most of the exchange visitors come from the Ministry of Education and, thus, their contracts, hours, and work performance are subject to standards of the Ministry. Moreover, they are evaluated by inspector generals from the Ministry and cannot be discharged without permission of the Ministry. Pursuant to United States' immigration laws, the duration of the exchange visitors' employment is limited, and they are not permitted to work anywhere but the Lycee.[2]

As noted by the Regional Director, the exchange visitors do share some terms and conditions of employment with the locally hired employees. Upon reconsideration, however, we have concluded that the instances when the interests of the exchange visitors diverge from or are in conflict with those of the locally hired employees are fundamental and outweigh the instances of shared concerns. Thus, when viewed in the totality, the community of interest between the exchange visitors and the locally hired employees is insufficient to warrant the inclusion of the exchange visitors in the unit.[3]

ORDER

It is ordered that the General Counsel's Motion for Summary Judgment be denied.

IT IS FURTHER ORDERED that the complaint be dismissed and that the certification issued in Case 2–RC–19215 on 18 November 1982 be revoked, and the election conducted therein on 9 November 1982 be set aside and that the representation proceeding be remanded to the Regional Director for Region 2 for appropriate action consistent herewith.

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[2] This factor is of possible relevance in the event of a strike.

[3] In view of our finding regarding community of interest, we find it unnecessary to pass on whether the exchange visitors are temporary employees. Additionally, we note that while *German School Society*, 260 NLRB 1250 (1982), is distinguishable in that there the "assigned" teachers from the Federal Republic of Germany shared the same hours and hiring procedures with the locally hired teachers, to the extent that our decision there is inconsistent with our decision here it is overruled.

Indiana & Michigan Electric Company *and* Local Union No. 1392, International Brotherhood Of Electrical Workers, AFL–CIO. Case 25–CA–10346

23 January 1985

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS HUNTER AND DENNIS

On 17 December 1979 Administrative Law Judge Michael O. Miller issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed a brief in support of the judge's decision.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

The stipulated facts in brief are as follows. The Union and the Respondent have a collective-bargaining agreement which covers, inter alia, the line department of the Respondent's Marion-Muncie Division. This agreement contains an article entitled "Mutual Responsibilities," to wit:

MUTUAL RESPONSIBILITIES

Section 1. It is the mutual desire of both parties hereto to provide for uninterrupted and continuous service; therefore,

a. The Company agrees that while this Contract is in effect, there shall be no lockout of the Employees of the Company.
b. The Union agrees that while this Contract is in effect none of its members will cause, directly or indirectly or participate in any strike, or stoppage of work of the Company.

Section 2. The Union agrees that, in the event of a violation (other than lockout) of the provisions of the foregoing paragraph, it will in good faith and without delay publicly disavow such violation, exert itself to bring about a quick termination of such violation and insist that the employee or employees involved cease such violation. To that end the Union will promptly take whatever affirmative action is necessary. If the Union has not authorized, participated in or condoned such violation and fulfills its obligations under this paragraph with respect to any such violation, the Company agrees that it will not sue the Union for any damages resulting from such violation.

On 21 August 1978 about 15 employees in the line department engaged in an unauthorized work stoppage in violation of the collective-bargaining agreement. The Union's highest official at the division, Unit Chairman Baldridge, along with two stewards, Maxwell and Ridley, participated in the work stoppage. Baldridge and Maxwell ceased work shortly after the walkout began. Ridley failed to report to work after discovering that the line department employees had left the premises. None of the union officials instigated the work stoppage.

On 25 August 16 line employees received suspension notices and/or warning slips from the Respondent. Baldridge received only a written warning for failing to report to his supervisor before leaving, but was not suspended because the Respondent's investigation revealed that his failure to report to work on 21 August was for the purpose of attempting to get the striking employees to return to work. Two employees received 5-day suspensions because they induced other employees to participate in the work stoppage. The remaining employees, except for Maxwell and Ridley, received 3-day suspensions essentially for participating in the work stoppage. Maxwell and Ridley received 5-day suspensions for participating in the stoppage in "total disregard of your obligation as a Union Steward."

The judge in effect concluded that by holding the union stewards to a higher standard of conduct than other rank-and-file employees the Respondent violated Section 8(a)(3) and (1) of the Act. We disagree.

The issue was considered recently by the Supreme Court in *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693 (1983). In *Metropolitan Edison*, the Court held that an employer may impose greater discipline on union officials only when the collective-bargaining agreement and circumstances surrounding the collective-bargaining relationship indicate the union has waived its officials' Section 7 rights to the extent that the officials have an affirmative duty to prevent illegal work stoppages.[1] There the parties' collective-bargaining agreement contained a general no-strike/no-lockout clause. Two earlier arbitration awards had interpreted a similar clause as imposing a higher duty on union officials to enforce the no-strike obligation. These arbitration awards, however, were rendered under prior contracts, and the agreement in force at the time of the alleged unfair labor practice contained a provision stating that "[a] decision [by an arbitrator] shall be binding . . . for the term of *this* agreement" (emphasis added). 460 U.S. at 709. In this context the Court held that the union had not clearly and explicitly waived the Section 7 rights

[1] *Metropolitan Edison*, 460 U.S. at 698.

of its employee officials. Therefore, the employer violated Section 8(a)(3) by disciplining the employee officials for failing or refusing to take affirmative steps to end the unlawful work stoppage.

While finding that the union had not bound the union officials to enforce the no-strike clause, the Court concluded that since "[n]o-strike provisions, central to national labor policy, often have proven difficult to enforce"[2] a "union and an employer reasonably could choose to secure the integrity of a no-strike clause by requiring union officials to take affirmative steps to end unlawful work stoppages."[3] Indeed, the Court found that a union lawfully may bargain away the statutory protection accorded union officials in order to secure gains it considers of more value to its members, and that such contractual obligations promote labor peace and clearly fall within the range of reasonableness accorded bargaining representatives.

With regard to the specificity required for a finding that a union has waived union officials' rights, the Court found on the record before it that there was no showing that the parties intended to incorporate the two prior arbitration decisions into the subsequent agreement, particularly in light of the provision restricting the binding effect of arbitration decisions to the term of the agreement. Accordingly, the Court considered that the general no-strike clause alone was insufficiently clear to constitute a waiver. Nevertheless, the Court stated that arbitration decisions may be relevant to establishing waiver of the statutory right in question either when an arbitrator has stated that the bargaining agreement clearly and unmistakably imposes an explicit duty or when there is a clear and consistent pattern of arbitration decisions which may be said to have been incorporated in subsequent agreements.[4] The Court thus held that a waiver may be established by circumstances surrounding the collective-bargaining relationship as well as by the language of the agreement itself. "Assessing the clarity with which a party's duties have been defined . . . will require consideration of the specific circumstances of each case."[5]

Turning to the instant case, we find a contract clause which unequivocally requires the Union to disavow publicly an unlawful strike and take whatever affirmative action is necessary to bring about a quick termination of such a strike. To find that this clause imposes no greater duty on union officials than they would have without it would be to misconstrue both the scope and intent of the Supreme Court's opinion in *Metropolitan Edison*. Nothing in the Supreme Court's opinion in *Metropolitan Edison* or the Third Circuit decision which it affirmed indicates that the courts intended to require specificity with regard to the naming of union officials as opposed to specificity regarding what affirmative action can be expected of the union by and through its officials in the event of an unlawful strike. Indeed, all indications are to the contrary.

The Supreme Court defined the question before it as follows: "[W]hether an employer unilaterally may define the *actions* a union official is required to take to enforce a no-strike clause and penalize him for his failure to comply."[6] (Emphasis added.) One need only look at the facts in *Metropolitan Edison* to interpret this statement. There, unlike here, the no-strike clause was merely a general clause which imposed *no* affirmative obligation on the union. Moreover, the union officials who were disparately disciplined, unlike those in the instant case, *did* take conscientious affirmative steps to bring the walkout to an end—though not the steps the employer deemed necessary. In particular, the courts focused on the employer's decision that the union officials must cross the picket line, a requirement the courts regarded as especially problematical for union officials and possibly counterproductive in terms of ending the walkout. Nowhere is there any indication that the courts were concerned with an employer unilaterally determining which officials, if any, should represent the union. That the courts did not express such a concern is not surprising—it has long been well established that a union, like an employer, acts through its agents.[7] Indeed, it would be a radical departure from longstanding precedent to hold that contractual or other obligations imposed on unions or employers must be explicitly designated as the responsibility of specified officials or agents. Nor is it surprising that the courts consistently used the term "union officials" instead of "union" when describing the specificity necessary for a waiver of Section 7 rights. The union cannot act *but* through its agents.[8]

[2] Id. at 707.
[3] Id. at 707.
[4] Id. at 709 fn. 13.
[5] Id. at 709.

[6] Id. at 700.
[7] Indeed, since the 1947 amendments to the Act, Sec. 2(2) has defined the term "employer" as including "any person acting as an agent," and Sec. 8(b) has applied to acts committed by "a labor organization or its agents." As Senator Taft stated, "What is a labor organization? It is an organization with officers, exactly like a corporation." 93 Cong.Rec. 4142 (1947), reprinted in 2 Leg. Hist. 1026 (LMRA 1948).
[8] Although the Board specifies that a union's "officers, agents, and representatives" are responsible for effectuating the Board's order, this fact is of little relevance since the Board inserts a similar provision referring to "officers, agents, successors, and assigns" in its orders against employers. And, no one would question seriously the responsibility of an employer's officials for carrying out the employer's obligations, contractual or otherwise. See *Riley Aeronautics Corp.*, 178 NLRB 495, 501 (1969).

Thus, we conclude that the Supreme Court in *Metropolitan Edison* found that affirmative action cannot be required of the union and its officials unless such a requirement is bargained for. Nevertheless, in our view the Court clearly left open the question of what contractual language would suffice to constitute such a waiver. The Court merely held that the general "no-strike" language in that case was not enough. Here, the contract unequivocally imposed an affirmative duty to take steps to terminate the unlawful walkout. Since Union Stewards Maxwell and Ridley here not only took no action to halt the work stoppage but actually participated in it, we need not speculate as to what particular language would be necessary to require those union officials to take particular actions. Clearly, Maxwell and Ridley have not fulfilled their contractual obligations even under the most narrow construction of this contract.

In view of the foregoing, we find that the Union has clearly assumed the duty to attempt to prevent unlawful strikes and has thereby waived its employee officers' Section 7 protection from the Employer's disparate discipline for failing to do so. Accordingly, we find that the Respondent has not violated Section 8(a)(3) and (1) by disparately disciplining Stewards Maxwell and Ridley, and we shall dismiss the complaint in its entirety.

ORDER

The complaint is dismissed.

DECISION

STATEMENT OF THE CASE

MICHAEL O. MILLER, Administrative Law Judge. This case was heard in Fort Wayne, Indiana, on August 27, 1979, based on an unfair labor practice charge filed on November 13, 1978, by Local Union No. 1392, International Brotherhood of Electrical Workers, AFL–CIO (the Union), and a complaint issued by the Regional Director for Region 25 of the National Labor Relations Board (the Board) on December 20, 1978.[1]

The complaint alleges that Indiana & Michigan Electric Company (Respondent) violated Section 8(a)(1) and (3) of the Act by discriminatorily disciplining union stewards for their participation in an unprotected work stoppage. Respondent, by its timely filed answer, denies the substantive allegations of the complaint.

All parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, and to argue orally. Briefs were filed by Respondent and the General Counsel and have been carefully considered.

On the entire record, including the stipulations entered into by the parties, I make the following

FINDINGS OF FACT

I. RESPONDENT'S BUSINESS AND THE UNION'S LABOR ORGANIZATION STATUS—PRELIMINARY CONCLUSIONS OF LAW

Respondent is an Indiana corporation engaged at Fort Wayne, Indiana, and other locations within the States of Indiana and Michigan in the production, sale, and transmission of electrical energy as a public utility. Jurisdiction is not in issue. The complaint alleges, Respondent has admitted, and I find and conclude that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The complaint alleges, Respondent has admitted, and I find and conclude that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE UNFAIR LABOR PRACTICES

A. *The Stipulated Facts*

The Union represents certain employees of Respondent in four separate units, each having its own collective-bargaining agreement. The events involved in this case occurred in Muncie, Indiana, at Respondent's Marion-Muncie Division.

The collective-bargaining agreement for Marion-Muncie in effect at the time involved herein provided at article III as follows:

> MUTUAL RESPONSIBILITIES
>
> Section 1. It is the mutual desire of both parties hereto to provide for uninterrupted and continuous service; therefore,
>
> a. The Company agrees that while this Contract is in effect, there shall be no lockout of the Employees of the Company.
> b. The Union agrees that while this Contract is in effect none of its members will cause, directly or indirectly or participate in any strike, or stoppage of work of the Company.
>
> Section 2. The Union agrees that, in the event of any violation (other than lockout) of the provisions of the foregoing paragraph, it will in good faith and without delay publicly disavow such violation, exert itself to bring about a quick termination of such violation and insist that the employee or employees involved cease such violation. To that end the Union will promptly take whatever affirmative action is necessary. If the Union has not authorized,

[1] Pursuant to an Order dated August 3, 1979, this case was consolidated for hearing with Case 25–CA–8593 involving the same parties but distinct issues, and the two cases were presented seriatim. However, as resolution of the issues involved in Case 25–CA–8593 may potentially be affected by, and must therefore await, disposition of the Employer's petition to the Supreme Court for a writ of certiorari in the substantially similar case of *Indiana & Michigan Electric Co.*, 229 NLRB 576 (1977), Supplemental Decision and Order at 235 NLRB 1128 (1978), enfd. 599 F.2d 185 (7th Cir. 1979), and as the issues of this case arise under Sec. 8(a)(3) and (1) of the Act, affect individual employees, and are subject to immediate resolution, I have determined, sua sponte, to sever the two cases for decisional purposes in order to avoid unnecessary delay.

participated in or condoned such violation and fulfills its obligations under this paragraph with respect to any such violation, the Company agrees that it will not sue the Union for any damages resulting from such violation.

The Union's highest official at the Marion-Muncie Division was its unit chairman Phillip Baldridge. Six employees served as union stewards. Baldridge and two of the stewards, Robert Maxwell and Keith Ridley, worked in the line department, the department involved in the instant dispute.

On August 21, 1978,[2] about 15 employees in the line department engaged in an unauthorized work stoppage in violation of the collective-bargaining agreement. The work stoppage lasted from 8 a.m. until 7:30 the following morning.

Baldridge and Maxwell participated in the work stoppage to the extent that both ceased work and left Respondent's premises shortly after the walkout began. Ridley participated to the extent that he failed to report to work at his scheduled starting time on that day after discovering, on his arrival, that the line department employees had left the premises. The work stoppage was not instigated by either Baldridge, Maxwell, or Ridley.

On August 25, Respondent issued disciplinary suspension notices and/or warning slips to 16 line department employees (a 17th discipline was issued in error and was subsequently rescinded). Of these, Unit Chairman Baldridge received merely a written warning for failing to report to his supervisor before leaving the premises, but no suspension because the Company's investigation revealed that his failure to work on August 21 was for the purpose of attempting to secure the return to work of the striking employees. Two employees, not union officers or stewards, received 5-day suspensions because the Employer believed that they had induced other employees to participate in the work stoppage. The remaining employees, except for Ridley and Maxwell, received 3-day suspensions for "Participating in a stoppage of work on August 21, 1978, in direct violation of Article III of the Agreement and the Company's Rules of Conduct." Union Stewards Ridley and Maxwell received 5-day suspension notices stating:

> Participating in a stoppage of work on August 21, 1978 in direct violation of Article III of the Agreement and the Company's Rules of Conduct. Your participation indicated a total disregard of your obligation as a Union Steward, to uphold the provisions of the Agreement to which the Union is a party and to refrain from condoning, by your own actions, the violation of that Agreement.

During the investigative interviews conducted with Ridley and Maxwell, Respondent informed them that, as stewards, they had a greater responsibility than the rank-and-file employees to stop an unauthorized work stoppage in violation of the collective-bargaining agreement and to secure the return of the striking employees. Based on those interviews, it was stipulated, Respondent had reason to believe that neither Ridley nor Maxwell took any action to secure the return to work of the striking employees.[3]

The employees served the suspensions assessed against them.

B. *The Prior Case*

The parties stipulated that *Indiana & Michigan Electric Co.*, 237 NLRB 226 (1978), enf. denied 599 F.2d 227 (7th Cir. 1979), involved the same parties and the same issue, arising from an earlier unauthorized work stoppage in violation of the collective-agreement at a different location and in a different bargaining unit.[4] In that earlier case, the Board, adopting the administrative law judge's decision, rejected Respondent's contention that "stewards and the union officials have a greater responsibility to the Employer than do ordinary rank-and-file members to uphold the collective-bargaining agreement particularly Article III, and that Article III should be construed as to set forth that union officials are to be subject to a more severe punishment for breach of same." It refused to require, as urged by Respondent, that the contract should be read so as to require stewards to take positive action to halt unauthorized work stoppages. The Board decision was based on its earlier holding in *Precision Castings Co.*, 233 NLRB 183 (1977). Therein, the Board had stated, at 183–184, as follows:

> The fact that the disciplined employees participated in an unauthorized strike in breach of a valid contract provision does not legitimatize Respondent's action in this situation. Respondent's freedom to discipline anyone remained unfettered so long as the criteria employed were not union-related. In the case before us, however, Respondent admits that the reason for selecting these five employees for discipline was that each held the position of shop steward and, therefore, under the terms of the contract, could assertedly be held to a greater degree of accountability for participating in the strike. However, discrimination directed against an employee on the basis of his or her holding union office is contrary to the plain meaning of Section 8(a)(3) and would frustrate the policies of the Act if allowed to stand.

[2] All dates hereinafter are 1978 unless otherwise specified.

[3] In a similar unauthorized work stoppage in violation of the contract occurring on April 24, among other employees of the Marion-Muncie Division, all participating employees, including stewards, received warning notices. The steward of that department, who participated in the work stoppage, received no greater discipline than the other employees "since the Respondent has reason to believe that the steward took efforts to secure the return to work of striking employees."

[4] The only distinguishing factor between that case and the instant case was that in the "Mutual Responsibilities" article of the contract involved in the earlier case there was no language requiring the Union to "promptly take whatever affirmative action is necessary to "bring about a quick termination of" a work stoppage in violation of the agreement. The article involved in the earlier case provided that the Union agreed "that the employees covered by this Agreement, or any of them WILL NOT be called upon or permitted to cease or abstain from the continuous performance of the duties pertaining to the position held by them with the Company."

As noted, the Court of Appeals for the Seventh Circuit denied enforcement to the Board's Order in the *Indiana & Michigan Electric* case. The court stated (599 F.2d at 232):

> Differentiating between union officers and rank-and-file in meting out discipline for participating in a clearly illegal strike did not penalize or deter the exercise of any protected employee right. We believe the employer was entitled to take into account the union officials' greater responsibility and hence greater fault, and that the resulting different treatment of union officials could not be reasonably considered inherently destructive of important employee rights.

The Board did not seek certiorari review in the Supreme Court.

C. *Analysis and Conclusions*

The Board has repeatedly stated, "Under [our] consistent policy it is the Administrative Law Judge's duty to apply established Board precedent which the Board or the Supreme Court has not reversed." *Club Cal-Neva*, 231 NLRB 22, 23 fn. 5 (1977), and cases cited therein. See also *Ford Motor Co.*, 230 NLRB 716 (1977),[5] where the Board, at 718 fn. 12, stated:

> By relying on U.S. court of appeals' decisions which are contrary to applicable Board precedent, the Administrative Law Judge in this case has committed an error. It is not for an Administrative Law Judge to speculate as to what course the Board should or would follow where a circuit court has expressed disagreement with the Board's views. That is the province of the Board alone. It remains the Administrative Law Judge's duty to apply established Board precedent which the Supreme Court or the Board has not reversed.

I am therefore bound to follow the relevant Board precedent on the issues raised herein.

While, as noted, the Board in the earlier case herein found *Precision Castings* controlling and determinative of an 8(a)(3) and (1) violation, Respondent contends that the Board's most recent decision on this question, *Midwest Precision Castings Co.*, 244 NLRB 597 (1979), evidences a modification of the Board view. Respondent argues, based on that latter case, that "all members of the Board now appear to recognize that a union steward may, under appropriate circumstances, be held to 'a higher standard of conduct than rank-and-file employees.'" I cannot agree that this is the import of *Midwest Precision Castings*. The Board expressly distinguished the steward's conduct in that case from the conduct of the union officers in both *Precision Castings* and *Gould Co.*, 237 NLRB 881 (1978). In *Midwest Precision Castings* the Board specifically found that the steward "urged support of and sought to induce employee participation in an unauthorized, illegal work slowdown" and held that the employer did not violate Section 8(a)(1) or (3) of the Act by disciplining the steward for engaging in such conduct. No such involvement existed in the original *Precision Castings* case or in the *Gould* case and none exists herein. I must therefore conclude that this case is governed by the Board decisions and rationale in *Precision Castings* and *Gould*.

In the instant case, unlike the situation in the prior *Indiana & Michigan* case, the contract provided that "the Union will promptly take whatever affirmative action is necessary" to bring about a quick termination of any violation of the no-strike, no-work-stoppage clause. That language is similar to the contract language involved in *Precision Castings*, supra, which required the union to "take all reasonable steps to restore normal operations" in the event of a work stoppage. It is less precise than the language contained in the *Gould* contract, which specifically provided that the union, its officers, and representatives should immediately order employees participating in an unlawful work stoppage to return to work. The Board in both *Precision Castings* and *Gould* held that the greater discipline assessed upon the union officers was not validated by such contractual provisions. In *Gould* it stated:

> The contract is binding between the Employer and the Union, but does not grant the Employer the power to enforce it by discharging union officials. The Employer's recourse is against the union entity rather than against the individuals who serve the unit by holding union office. Employer self-help against individual union officials for a union's breach of contract can only undermine the peaceful settling of disputes and clears a path for employer intervention in a union's internal affairs in a way that is specifically barred to unions in the corollary situation by Section 8(b)(1)(B), which prohibits restraint or coercion of an employer in the selection of his representatives for collective bargaining or adjusting grievances.

That rationale is specifically supported by the contract language involved herein, which provides: "If the Union has not authorized, participated in or condoned such violation and fulfills its obligations under this paragraph with respect to any such violation, the Company agrees that it will not sue the Union for any damages resulting from such violation." It is implicit from such contract language that the contemplated recourse available to the Employer for breach of the Union's no-strike obligations is through the courts in an action against the Union, as an entity, and not in such self-help measures as Employer-imposed discipline on union officers and stewards.

It is axiomatic that organizations, such as labor unions, must have officers in order to function. Individuals assume the responsibilities of organizational office expecting to shoulder certain burdens and to derive certain tangible and intangible benefits *from the organization*. In so doing, they subject themselves to the discipline *of the organization*. They should not have to fear that those with whom they must deal as representatives of their organization will similarly have the power to unilaterally

[5] Both *Club Cal-Neva* and *Ford Motor* involved decisions of the circuit courts of appeals for the circuits in which the employers' facilities were located.

impose discipline. The Board has recognized this, stating (in the context of grievance processing) that the master-servant relationship does not carry over to the dealings between the employer and the employee when the employee is acting as a union representative; at such times, there are only company representatives on the one side and union representatives on the other. See *Crown Central Petroleum Corp.*, 177 NLRB 322, 323 fn. 4 (1969). The possibility that an employee might suffer a penalty exacted out of his or her job tenure for what an employer perceives to be a misuse of union office or a breach of its contract *with the union* would, I am convinced, act as a powerful deterrent to an employee's willingness to assume or actively pursue a leadership role in a union.

Accordingly, I find that by holding union officers and stewards to a higher standard of conduct than other, rank-and-file, employees, and by disciplining Maxwell and Ridley more severely than it disciplined rank-and-file employees who engaged in identical improper conduct, Respondent has discriminated against them because of their roles in the Union and has necessarily discouraged employees from holding union office. Such conduct is inherently discriminatory and destructive of important Section 7 rights and, even absent any showing of specific union animus, violates Section 8(a)(3) and (1) of the Act. See *NLRB v. Great Dane Trailer*, 388 U.S. 26 (1967), and *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375 (1967). See also *Crown Central Petroleum Corp.*, supra.

CONCLUSIONS OF LAW

1. By giving more severe discipline to Robert Maxwell and Keith Ridley than was given to other employees who participated in the August 21, 1978 violation of the contractual no-strike provision, because said Robert Maxwell and Keith Ridley were stewards for Local Union No. 1392, International Brotherhood of Electrical Workers, AFL–CIO, Respondent has violated Section 8(a)(3) and (1) of the Act.

2. The unfair labor practice enumerated above is an unfair labor practice affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

It having been found that Respondent has engaged in an unfair labor practice in violation of Section 8(a)(3) and (1) of the Act, it will be recommended that Respondent be required to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

It having been found that Respondent discriminatorily assigned greater discipline to Robert Maxwell and Keith Ridley by suspending them for longer periods of time than other employees who participated in the work stoppage of August 21, 1978, Respondent shall be required to make them whole for any loss of pay they suffered by reason of this discrimination. Any backpay found to be due shall be computed, with interest, in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and *Florida Steel Corp.*, 231 NLRB 651 (1977).[6]

[Recommended Order omitted from publication.]

[6] See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962).

Alpha Beta Company *and* Elizabeth Mahon *and* Terry Rendon *and* Florence O'Day *and* Norma Meyers *and* Carol Mitchum *and* Richard Hutson *and* Linda Parrette *and* Ralph's Grocery Company *and* Josie Melendez. Cases 32-CA-1275, 32-CA-1313, 32-CA-1332-1, 32-CA-1332-2, 32-CA-1332-3, 32-CA-1332-4, 32-CA-1332-5, and 32-CA-1405

23 January 1985

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS HUNTER AND DENNIS

On 17 December 1980 Administrative Law Judge Russell L. Stevens issued the attached decision. The General Counsel and the Respondents filed exceptions and supporting briefs.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions only to the extent consistent with this Decision and Order.

On 7 August 1978 members of Teamsters Locals 287 and 315 employed by the Respondents began an unsanctioned economic strike against the Respondents. Thereafter by letter dated 9 August 1978, Retail Clerks Locals 428 and 1179 (the Unions) informed their members that the Central Labor Council had sanctioned the Teamsters strike and advised that: (1) members were not to cross a picket line; (2) if members were requested to work and no bona fide picket line was present, they were authorized to go to work; and (3) if the picket line showed up later, members were to complete their shift unless they had to leave the store, but they were not to cross the line and reenter. The letter also solicited all members to fully support the strike. By letter dated 7 and 8 September, the Unions notified their members that the strike sanction had been withdrawn on 7 September. The strike lasted, however, until about 27 November 1978.

The Respondents had a discretionary policy, not challenged by the Union, of disciplining employees for taking unauthorized or unexcused absences. On 14 August 1978, by letter mailed to all employees and posted in all stores, the Respondents advised their employees as follows concerning their participation in the sympathy strike: "If there is picketing at your store, it is *your individual choice* to work or not to work . . . . If striking Teamsters have not placed a picket line at your store you are expected to work as scheduled or be subject to disciplinary action. . . . Should pickets appear after you have started your shift, you may finish your shift . . . ."[2] Pursuant to this policy the Respondents discharged 15 employees during the course of the sympathy strike because they refused to work when no pickets were present at their respective worksites. The Respondents also discharged five employees who failed to report for work after the strike sanctions were lifted.[3]

The Union filed grievances on behalf of all these employees and pursuant to the contractual grievance/arbitration procedures a board of adjustment was convened to consider the grievances. Several meetings were held and testimony was given by the affected employees, union officials, and the Respondents' store managers. The board of adjustment deadlocked on a mutually agreeable solution. As a result of private discussions between representatives of the Respondents and the Unions on 25 October, an agreement was reached whereby 15 of the employees would be reinstated without backpay and 4 would be considered voluntary quits.[4] As found by the judge, when the employees were apprised of the terms of the agreement, they were "displeased" with the refusal of backpay, but voted to accept the offer. They also decided among themselves to pursue backpay through unfair labor practice charges filed with the Board. The reinstatement occurred on 29 October.[5]

Meanwhile on various dates in October 1978, eight of the dischargees who ultimately were reinstated filed the instant labor charges alleging that the Respondents violated Section 8(a)(3) and (1) of the Act by discharging employees because of their protected activities. Regarding the 15 employees who were discharged because they failed to report for work during the sanctioned period of the strike, the judge found that deferral to the settlement agreement was improper under *Spielberg*[6] because

[1] The General Counsel and the Respondents have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] The judge found that the Respondents' letter violated Sec. 8(a)(1) of the Act because it interfered with employees' Sec. 7 rights to engage in such strikes. In view of our deferral to the settlement agreement regarding the discharge allegations we find the violation based on the 14 August letter standing alone to be de minimis and not requiring a notice posting. Accordingly, we shall dismiss it.

[3] One other employee who quit on 12 August 1978 thereafter did not seek reinstatement.

[4] These determinations were not based on whether the employee had failed to report for work during or after the sanctioned period; e.g., four of five employees who failed to report after the sanctioned period were to be reinstated.

[5] In November 1978, one other employee was classified as a voluntary quit and in January 1979 one other employee was reinstated.

[6] *Spielberg Mfg. Co.*, 112 NLRB 1080 (1955).

the discharge grievances had not been pursued to arbitration. Further finding that there had been no waiver of the employees' statutory right to engage in sympathy strikes, the judge found that the discharges were unlawful and therefore deferral to the settlement agreement—insofar as it covered those employees—would also be repugnant to the Act. However, regarding the five employees who had been discharged for failing to report for work after the strike sanction was lifted, the judge found that those discharges were lawful, and therefore the settlement agreement was not repugnant to the Act insofar as it covered those five employees.

In deciding whether deferral principles should apply to settlements arising from the parties' contractual grievance/arbitration procedures, we find the views of former Member Penello in his dissent in *Roadway Express*, 246 NLRB 174, 177 (1979), to be instructive. Member Penello stated:

> Deferral in general will encourage parties . . . to negotiate rather than to litigate their differences. The establishment of grievance-arbitration procedures has been a major factor in promoting and achieving industrial stability and peace, encouraging parties to use such procedures will further the fundamental purposes of the Act. I believe that the *Spielberg* tests for deferral apply to grievance settlements as well as arbitration awards . . . .
>
> . . . .
>
> As an administrative agency the Board should not take a narrow, legalistic view of the Act and seek to rule on every dispute that may fall within the letter of the Act, but should instead take a broad view of the Act and seek to further the spirit and purpose of the Act. The Board should encourage employers and unions to negotiate their differences arising during the term of their bargaining agreement, to discuss and settle grievances, and, if necessary, to arbitrate their differences.

We agree with former Member Penello that the deferral principles apply equally to settlements arising from the parties' contractual grievance/arbitration procedures because they further the national labor policy which favors private resolutions of labor disputes.[7] These deferral principles of *Collyer Insulated Wire*, 192 NLRB 837 (1971), and *Spielberg Mfg. Co.*, 112 NLRB 1080 (1955), were recently reaffirmed in *Olin Corp.*, 268 NLRB 573 (1984), and *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693 (1983). We particularly note that in *Olin*, supra, the Board stated its commitment to a policy of full, consistent, and evenhanded deference to the deferral process where appropriate safeguards for statutory rights are satisfied.

Applying these principles to the instant case we still defer to the settlement agreement. Our determination is based on the following. The grievance proceedings were fair and regular, and the settlement was made under the contract's grievance procedure. All parties had agreed to be bound, including the employees. Although the employees were not themselves involved in the settlement negotiations, they were fully informed as to the specific terms of the proposed settlement by the Unions. Indeed, the Unions left the final decision of acceptance or rejection of the proposed settlement up to the employees, who knew that it did not contain any provision for backpay. Instead of rejecting the settlement on that basis, and without expressing any dissatisfaction to the Respondents, the employees authorized the Unions to accept the settlement agreement on their behalf. Thus, the employees were bound by their acts and those of their collective-bargaining representative.

We further find that the General Counsel has failed to carry his burden of proving that the results of the settlement agreement are "clearly repugnant" to the principles and policies of the Act. In *Olin Corp.*, above, the Board stated that, in determining if an arbitrator's award is clearly repugnant, the test to be applied is not whether the Board would have reached the same result, but whether the award is "palpably wrong" as a matter of law. Thus, the Board's concern in a possible deferral situation is to ensure that its decision does not impinge on the parties' rights under the Act. Here, we find that the settlement of the contractual grievances was not "palpably wrong" under the law, particularly because it resulted from negotiations between the Respondents and the Unions within the context of the agreed-upon grievance/arbitration procedures.

It is clear that the settlement agreement was intended to resolve the parties' contractual dispute over the discharge of employees who failed to report for work in connection with a sympathy strike. To resolve this contractual dispute, the Union could—if they felt it necessary—waive the employees' statutory rights. *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693 (1983). The terms of this agreement suggest that both the Respondents and the Unions made concessions in order to settle the grievances without going to arbitration, with the Unions primarily concerned with getting the employees' jobs back. We note that the employees may have authorized the Unions to accept the settlement agreement solely because they wished to

[7] See also Member Penello's dissent in *Douglas Aircraft Co.*, 234 NLRB 578 (1978), enf. denied 609 F.2d 352 (9th Cir. 1979).

pursue the matter of backpay before the Board, but we find that to be insufficient to prove that the settlement of the grievances is repugnant to the Act.

Based on all the foregoing, we shall defer to the settlement agreement in this case. Accordingly, we shall dismiss the complaint in its entirety.

ORDER

The complaint is dismissed.

DECISION

STATEMENT OF THE CASE

RUSSELL L. STEVENS, Administrative Law Judge. This case was tried on various dates in May and August 1980,[1] in Campbell and Oakland, California. Charges were filed by the Charging Parties[2] as follows:

32-CA-1275—10/3/78—Beth Mahon
32-CA-1313—10/19/78—Terry Rendon
32-CA-1332-1-10/27/78—Florence O'Day
32-CA-1332-2-10/27/78—Norma L. Meyers
32-CA-1332-3—10/27/78—Carol A. Mitchum
32-CA-1332-4—10/27/78—Richard W. Hutson
32-CA-1332-5—10/30/78—Linda T. Parrette
32-CA-1405—10/30/78—Josie Melendez

By order dated May 22, 1979, the Regional Director for Region 32 of the National Labor Relations Board (NLRB) consolidated Cases 32-CA-1275, 32-CA-1313, and 32-CA-1332-1-5 and filed a complaint[3] alleging that Alpha Beta Company (Respondent Alpha Beta) violated Section 8(a)(3) and (1) of the National Labor Relations Act (Act). The complaint in Case 32-CA-1405, dated May 22, 1979, alleges that Ralph's Grocery Company (Respondent Ralph's)[4] violated Section 8(a)(3) and (1) of the Act. Respondents' answer to the consolidated complaint is dated June 1, 1979. The answer admits jurisdiction, denies the substantive allegation of the complaint, and interposes affirmative defenses. The answer was amended July 19, 1979, relative to Case 32-CA-1405, and further was amended at trial to add another affirmative defense. By order dated August 13, 1979, the Acting Regional Director for Region 32 consolidated Case 32-CA-1405 with all cases previously consolidated. Both complaints were amended May 2, 1980, to add the names of three individuals as agents of Respondent Alpha Beta and Respondent Ralph's.

All parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, to argue orally, and to file briefs. Briefs, which have been carefully considered, were filed on behalf of the General Counsel and Respondent.

On the entire record,[5] and from my observation of the witnesses and their demeanor, I make the following

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

Respondent Alpha Beta is now, and at all times material herein has been, a corporation duly organized under and existing by virtue of the laws of the State of California, with places of business located in various locations throughout California, including facilities in Danville, San Jose, and Sunnyvale, California, where it is engaged in the distribution and retail sale of grocery products and related items.

Respondent Ralph's is now, and at all times material herein has been, a corporation duly organized under and existing by virtue of the laws of the State of California, where it does business at various locations, including San Jose, California, where it is engaged in the retail sale and distribution of grocery products and related items.

During the past 12 months, Respondent Alpha Beta and Respondent Ralph's, in the course and conduct of their business operations, each derived gross revenues in excess of $500,000, and purchased and received goods or services valued in excess of $5000 which originated outside the State of California.

I find that Respondent Alpha Beta and Respondent Ralph's are, and each of them is now, and at all times material herein have been, employers engaged in commerce and in businesses affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATIONS INVOLVED

Retail Clerks Union, Local 1179 and Local 428, AFL-CIO (Locals 1179 and 428)[6] are, and each of them is, labor organizations within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background Summary*[7]

Local 428, located in San Jose, California, and Local 1179, located in Martinez, California, are part of the Retail Clerks Bay Area Council which has engaged in bargaining on a multiunion basis since 1970 with the Food Employers Council (FEC), which represents the major retail grocery store chains in the Bay area, including Alpha Beta, Ralph's, Safeway, Albertson's Lucky, Brentwood, P & W, and Cala Markets, in all labor matters including contract negotiations and grievance handling. The Retail Clerks locals which bargain with FEC in addition to Locals 428 and 1179 are the following: San Francisco, Local 648; San Mateo, Local 775; Alameda,

[1] All dates hereinafter are within 1978, unless stated to be otherwise.

[2] Individuals are referred to herein by their last names.

[3] A minor amendment was made at trial, with my permission, and an 8(a)(1) allegation was added, with similar leave, to charge a violation by Respondent in stating in a letter to employees dated August 14, 1978 (R. Exh. 7): "If striking Teamsters have not placed a picket line at your store, you're expected to work as scheduled or be subject to disciplinary action."

[4] When the context so indicates, the two Respondents sometimes are not named separately, but rather, are referred to simply as Respondent, or as Respondents.

[5] The General Counsel's motion to correct transcript was not opposed, and is granted.

[6] Where the context so indicates, the two Locals sometimes are referred to as the Union, or the Unions.

[7] This background summary is based on stipulations of counsel for the parties, credited testimony, and evidence not in dispute.

Local 870; Vallejo, Local 373; and Marin, Local 1119. Although bargaining is conducted on a multiunion-multiemployer basis, each local separately has signed agreements with individual employers. Approximately 25,000–30,000 employees of the various grocery stores represented by FEC were members of Bay Area Retail Clerks locals in the summer of 1978.

From January 1, 1977, to December 31, 1979, Local 428 was party to identical collective-bargaining agreements with Respondent Alpha Beta and Respondent Ralph's. During that same period, Local 1179 was party to a collective-bargaining agreement with Respondent.

Respondent Alpha Beta and Respondent Ralph's were struck, initially without official sanction, and picketed by the Teamsters Union, Locals 287 and 315 from August 7 until November 27, 1978. In anticipation of the strike, which was an economic strike, Respondent organized a strike preparation committee, sent communications to interested corporate divisions, and sent strike packets to store managers. The packets included such things as documents for use in obtaining replacement personnel, merchandising plans, notices to employees, and picketing information. By letter dated August 9,[8] Locals 428 and 1179 advised all their members that the Central Labor Council had sanctioned the Teamsters strike, and asked for full support of the strike. Local 428's letter stated, inter alia:[9]

> 1. Local 428 members are *not* to cross a bonafide picket line at any time to go to work.
>
> 2. If any of you are requested to go to work and there is not a bonafide picket line around the store, you are authorized to go to work.
>
> 3. If a picket shows up *after* you have gone to work, you are to complete your shift unless going out of the store for any reason. When returning and there is a picket line around the store, you are *not* to cross the picket line.
>
> 4. You should come into the Union office and sign up with our Dispatch Department.
>
> We strongly urge every Union member to respect your Union obligation in full, in spirit and letter. *Unions have full legal sanction* to discipline members who work behind a recognized picket line no matter what the Food Employers Council trys to persuade you to do.

By letter dated September 8,[10] Local 428 advised all of its members that the strike sanction had been withdrawn on September 7.[11] The letter stated, inter alia:

> This action means that you must report to work at your store immediately because you are no longer protected by the contract if you refuse to return to work. In fact, you may be subject to termination if you do not report to work behind the Teamsters picket line. We feel this is a new and tragic experience for Bay Area.

By letter dated August 14,[12] Respondent notified its employees of certain of their rights and responsibilities relative to the strike and its attendant events. The letter had been included within the prestrike packet given to all store managers; was posted in all stores, at one place in some and at two places in others; and was mailed to all of Respondent's employees at their home address.[13] The letter states, inter alia:

> If there is picketing at your store, it is *your individual choice* to work or not to work. If you choose to work, the Company will do everything possible to continue normal operations and insure available work for you to maintain your earnings. The Company will also do everything it can to protect you against coercion from any source. If striking Teamsters have not placed a picket line at your store, you are expected to work as scheduled or be subject to disciplinary action. Should pickets appear after you have started your shift, you may finish your shift.[14]

After imposition of the strike sanction, picketing by the Teamsters was fairly regular and continuous at most stores for approximately 2 weeks. Thereafter, picketing at most stores was sporadic, inexact, and uncertain.[15] On some occasions at some stores, pickets appeared late in the morning and left early in the evening; or appeared for only a few hours and then left; or appeared on some days but not on other days. From approximately September 4, picketing ceased at some stores.[16]

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[8] G.C. Exh. 5.

[9] Local 1179's letter was less instructive than that of Local 428.

[10] G.C. Exh. 4.

[11] Local 1179 similarly notified its members by letter dated September 7.

[12] R. Exh. 7.

[13] This statement is based on credited testimony of several store managers; some employees; Richard Hinshaw, Respondent's director of labor relations for the northern California division; and Gregory Tarr, Respondent's director of personnel, northern California division. Some employees testified that they did not receive, or did not read, Respondent's letter. That testimony is not consistent with the record, was not believable, and is given no credit.

[14] It is clear from the testimony of several of the General Counsel's witnesses, as well as from several of Respondent's witnesses, and it is found, that no employee of Respondent Alpha Beta or Respondent Ralph's was disciplined for refusing to cross a picket line to work. Respondent's contracts with Locals 428 and 1179 provide, inter alia:

> SECTION 17. STRIKE OR LOCKOUT
>
> 17.1 During the life of this Agreement the Union agrees not to engage in any strike or stoppage of work as long as the Employer has not committed an act held by the Adjustment Board or Arbitrator to be in violation of this Agreement, or the Employer is not in clear violation of a provision of the Agreement where no question of interpretation is involved.
>
> . . . .
>
> 17.3 Refusal of any employee covered by the terms of this Agreement to pass through any picket line which has been sanctioned by the Central Labor Council of proper jurisdiction and/or the Retail Clerks Bay Area Council shall not constitute a violation of this Agreement.

[15] Much testimony was devoted to the subject of a "bona fide" picket line. That testimony is given no weight, since it is clear that the actions of Respondent Alpha Beta and Respondent Ralph's, which resulted in charges by employees, were not controlled or affected by the nature of the picketing—clearly, store managers considered any presence of pickets, however they conducted themselves, to constitute a picket line.

[16] This statement is based on the credited testimony of store managers, and is supported, in part, by the testimony of some of the General Counsel's witnesses.

During the entire strike period, news of strike-related events was disseminated in broad fashion by newspapers, radio stations, and television stations. In addition, Local 428 maintained a "hot line" telephone which employees could call to obtain the latest information relative to the strike. Lou Menacho, a business agent of Local 428, visited employees and store managers at stores for conversations related to the strike.

Respondent's contract with Local 428 provides, inter alia:

> 7.1 POSTING OF WORK SCHEDULES: The Employer agrees to post a weekly schedule in ink of working hours specifying the starting and finishing times, meal periods and days off, and this schedule shall continue in effect until a new one is posted. The schedule shall contain the employee's full name. A twenty-four (24) hour notice of any change in such schedule, other than meal period, shall be given by the Employer, except that in the case of a change in a day off, at least five (5) days advance notice shall be posted except in case of a bona fide emergency.
>
> POST NOTICE: Work schedules must be posted by Noon on Friday of the week preceding the week in which such schedules are to be effective.

Prior to the strike, Respondent regularly posted work schedules as required by the contract. Posting of schedules during the strike was done in the same manner as prior to the strike, although store managers maintained records and systems during the strike, which were in addition to regular schedules, in order to account for the work of strike replacements.[17] These additional records were not uniform among the stores—each manager devised his own system. Both before and during the strike store managers prepared or approved and posted all work schedules. If assistance was required, the managers usually relied on assistant store managers.[18]

Although specific numbers were not established at trial, many employees continued working during the strike, and the remainder that was required for store operations was obtained "off the street" as strike replacements. Of those employees who honored the picket lines, many kept close watch of their schedules and reported to work on occasions when no pickets were present. Some employees entered through rear doors when only front entrances were picketed.[19] Of all employees of Respondent Alpha Beta and Respondent Ralph's, only a few did not come to work as scheduled, when no pickets were present at the stores. Those few were discharged, and are Charging Parties herein.[20] Some employees did not return to work immediately after the sanction was withdrawn on September 7, and were discharged for that reason. Those employees also are Charging Parties.

All employees discharged by Respondent Alpha Beta and Respondent Ralph's reported that fact to union representatives, and grievances were filed on their behalf pursuant to contract provisions, which are, in pertinent part:

> 18.2 DISCIPLINARY GRIEVANCES: Pursuant to Section 3 of this Agreement, any employee who feels he has been unjustly discharged or suspended shall file a grievance with the Union and thereafter within ten (10) business days of notice of the disciplinary action, the Union, if it desires to proceed with the grievance, shall notify the Employer or its representative that an Adjustment Board should be convened to hear the grievance. Within fifteen (15) business days (Monday-Friday, holidays excluded) thereafter, the Union and the Employer shall meet as a Board of Adjustment, consisting of two representatives of the Employer and two representatives of the Union, in an effort to settle the matter. This time limit may be extended by mutual agreement of the parties. If the matter is not adjusted and is impassed, the Union, if it so elects, within fifteen (15) business days following the meeting of the Board of Adjustment, shall proceed to arbitration. If the Employer fails to meet with the Union within the time limits herein specified, the grievance will be deemed substantiated and the employee shall be made whole. If the Union fails to comply with the time limits herein specified, such failure shall be deemed to be a conclusive waiver of the grievance. The Union's intention to proceed to arbitration shall be communicated to the Employer or its representative within the time limit specified above.

A board of adjustment meeting was held September 30, attended by Richard Dodge, who at times relevant herein was labor relations advisor for the FEC of which Respondent Alpha Beta and Respondent Ralph's were, and are, members; James Gaddis, labor relations associate of the FEC; James McLoughlin, then president of Local 428 (now retired); Claudia Wallace,[21] Local 428's inside representative (grievance handling); Menacho; and some of the employees who had been discharged. Hinshaw was present only at part of the meeting. Principal spokesmen at the meeting were Gaddis and McLoughlin. Gaddis contended that the employees who were present had been discharged for failing without justification to report for work. McLoughlin contended that the employees did not report for work because, when they arrived at the stores, picketing was in progress. Since store managers were not present, and their testimony was essential, the parties decided to depart from the usual procedure, first take the testimony of the employees, then

[17] This statement is based on credited testimony of store managers.

[18] It is clear, and not in dispute, that store managers were supervisors within the meaning of the Act. It is not clear that assistant store managers were supervisors, but it is found that they were agents of Respondent Alpha Beta and Respondent Ralph's, and that they frequently acted as agents in dealing with employees.

[19] See, e.g., the testimony of Chris Anderson, below.

[20] G.C. Exhs. 13(a)–(s) constitute the termination documents prepared for employees discharged by Respondent. The information on all documents is accepted as accurate, and in accord with Respondent's regular business practice. The documents primarily are for internal use, hence not all employees were given copies.

[21] Wallace is McLoughlin's daughter.

adjourn to a later date to hear what the store managers had to say. Respondent's termination notices for all employees who were present were available at the meeting. Employees then were asked to give their version of events leading to discharge, which they did, after which they were asked questions by those desiring to do so. All employees stated, or made it clear, that they were scheduled to work on the days they did not work. They stated that they did not work on those days because of the presence of pickets. Some employees failed to report for work after the sanction was lifted, and those employees contended that the failure was because they were out of town, or did not know the sanction had been withdrawn. No other contention was made relative to the discharges by employees or by union representatives.[22]

The next board of adjustment meeting was held on October 3, attended by Dodge; managers of stores from which employees had been discharged; McLoughlin; Wallace; Menacho; Claude Fernandez, then secretary-treasurer of Local 428;[23] and employees who had been discharged. Work schedules and termination documents were brought to the meeting by Respondent. Each employee testified and was questioned, as on September 30, after which store managers testified and were questioned. Employees contended that pickets always were present when they were scheduled to work, and the store managers contended they were not. Those who were fired for not working after the sanction was withdrawn contended they were out of town or did not know the sanction had been lifted. The meeting ended in a "deadlock," i.e., the Union wanted the employees reinstated, and Respondent declined. Dodge said, however, that he would discuss the matter further with Hinshaw. Nothing was discussed at this meeting concerning nor did the Union contend that employees had a right not to work as scheduled even in the absence of pickets.

Approximately October 25 Hinshaw and McLoughlin talked on the telephone and reached an agreement whereby four employees who had been terminated would be considered as having decided to quit their jobs, and 15 other employees who had been terminated would be reinstated without backpay. The following day McLoughlin met with the employees and discussed the offer. Although the employees were displeased with the refusal of backpay, they voted to accept the offer, and decided among themselves to seek the assistance of the NLRB in recovering backpay. McLoughlin called Hinshaw on the telephone to advise that the employees had accepted the offer. Dodge sent a letter to McLoughlin dated October 25, 1978,[24] confirming the agreement between Hinshaw and McLoughlin. The letter stated, inter alia, that the grievances filed by the employees and Local 428 "have been resolved, and the settlement in this matter is final and binding." By letter of November 9, 1978, Fernandez forwarded to Dodge a copy of the signed agreement.[25] All employees except voluntary quits were reinstated October 29.

[22] McLoughlin initially agreed with Gaddis' testimony that no contention was made by the Union at the meeting of September 30 that employees had a right to withhold their services, whether or not pickets were present. McLoughlin later changed his testimony and said that such a right was discussed at length during the meeting on September 30, and at "numerous" other meetings. McLoughlin appeared to be a confused, unrealistic witness, and his contention on this point, relative to the meeting of September 30, is given no credence. If such an employee right was the basis of the Union's defense to the discharges, there would have been no necessity for the lengthy questioning of employees on September 30, relative to the absence or presence of pickets. McLoughlin further testified that he met informally on one occasion with Hinshaw; David Cox, a labor relations associate with the Food Employers' Council; and John Bacon, executive vice president of the Food Employers' Council; and that he told the three that the question was whether the employees had a right not to work even in the absence of pickets. Bacon denied that McLoughlin made such a statement during the conversations, or that McLoughlin or any other union representative ever took that position with him. Hinshaw testified in the same manner as Bacon. Gaddis testified that he was present at the conversation, but that McLoughlin said nothing about a right of employees. Bacon, Hinshaw, and Gaddis are credited on this point. Finally, Menacho testified concerning the two board of adjustment meetings:

> We met to ask Alpha Beta and Food Employers Council to put these members back to work with their lost wages. They refused to do it and at that time we produced a letter from the Teamsters saying that they had manned their picket lines around the clock in the stores that these people had worked in.
>
> Q. To your recollection, did anyone in the Union state that it did not matter whether pickets were present or not?
>
> A. No, I don't remember that.
>
> Q. When was the second meeting held?
>
> A. The second meeting was held in the beginning of October at some time.
>
> Q. Where was it?
>
> A. We had that in our offices in San Jose.
>
> Q. Who was present?
>
> A. At that one, there was myself, Claudia Wallace, Jim McLoughlin, Claudia Fernandez was there and two other business agents. I'm not sure whether they stayed in or not. There was Lilly Sugimoto and Ed McGee.
>
> Q. What was said at this meeting?
>
> A. Again, we asked them to put the employees back to work and spoke about the letter that the Teamsters had given us and we had some managers that were there, store managers, that came in and testified.
>
> Q. To your recollection, did anyone from the Union state during this meeting that it did not matter whether pickets were present at the stores?
>
> A. No, we didn't bring that point up.

Several of the discharged employees also testified that such a right was not mentioned at either of the two board of adjustment meetings.

[23] Fernandez testified that he did not recall attending the meeting. It is found that he did attend.

[24] R. Exh. 31.

[25] The letter dated October 25 superseded a similar letter prepared by Dodge and dated November 2 (G.C. Exh. 9). Hinshaw and McLoughlin objected to some of the language in the letter dated November 2, and to the date, which they both wanted to reflect the date of the oral agreement, i.e., October 25. The new letter, agreed to by Hinshaw and McLoughlin, was prepared in November but back dated to October 25. McLoughlin and Wallace testified that the words stating that the settlement was "final and binding" were added without their knowledge or consent, and McLoughlin testified that he signed the agreement dated October 25 without reading it. The letter passed through the hands of three union representatives—McLoughlin, Wallace, and Fernandez—and remained in the union files for a long period of time without objection. It first was objected to when this controversy became ripe for litigation. It would be inappropriate at this stage of proceedings to set aside the agreement reached after such a long and trying period of time, solely on the basis that McLoughlin now seeks to disavow the agreement as not having been read before signed. The agreement was freely discussed before being reduced to writing, it was signed voluntarily and freely without protest, and there is no evidence of fraud or misrepresentation in either the inception or execution of the document. The testimony of McLoughlin and Wallace on this point is given no weight. The document is found to be a valid one, and to represent the intent of the parties.

B. *Further Findings of Fact*

1. *McLoughlin*. As pointed out supra, this witness appeared confused and uncertain in his testimony. He changed his testimony on at least two important points, and he seemed unsure of his memory in many important areas of inquiry. He now contends that he told Hinshaw and others at the board of adjustment hearings and elsewhere of his belief that the employees had the right to withhold their services even in the absence of pickets, but that contention is contrary to the record and is contrary to Menacho's testimony. It is apparent that McLoughlin's only serious concern at times prior to settlement of the grievances was the jobs of the employees—he wanted them reinstated as quickly as possible, and apparently was not too concerned with the reason for the discharges. He said he believed, and he often stated, that the employees were discharged for refusing to cross picket lines, and the record is clear that such was not the reason for the discharges. It is apparent that McLoughlin did not make serious inquiry into the background of the discharges prior to the board of adjustment meetings. McLoughlin is credited only to the extent that credit specifically is given.

2. *Menacho*. The record is clear that the picketing of the Teamsters was poorly executed. Menacho and McLoughlin acknowledged that fact. Many employees worked during the strike, being able to do so because of the frequent absence of pickets. Menacho's testimony generally was not convincing, and often appeared inconsistent with the record, e.g., his denial of conversations relative to "bona fide" picketing, and to employee rights in the absence of picketing, did not square with the general situation of employees who wanted to work, and did work when pickets were not present. Unless specifically credited, Menacho's testimony is deemed doubtful.

3. *Dodge and Hinshaw*. Both of these witnesses, and particularly Dodge, gave straightforward, credible accounts of events, and generally are credited.

4. *Store Managers*. This group of witnesses was impressive. All the managers were straightforward, sincere, and prompt in their answers. None of them appeared devious or evasive. Each of them is credited, except as otherwise noted, in specific instances.

5. Based on the testimony of Bacon, and on the record as a whole, I find that at no time prior to the controversy herein has any union representative contended with Respondent Alpha Beta and Respondent Ralph's that employees have a right to refuse to work as scheduled in the absence of pickets during a strike. (Respondent's counsel sometimes refers to this as an "invisible picket line" theory.)

C. *Individual Discharges*

The factual situation relative to each dischargee is different, and each is discussed as follows.

Jack Alarcon: Alarcon, a member of Local 428, worked at times relevant herein at Respondent's store 508, under Store Manager Willis Cole and Assistant Store Manager James Finley. Alarcon worked an irregular schedule that changed each week.

Alarcon testified that the day before the Teamsters strike started he talked with Finley and asked whether or not he should report. Finley advised him to call the following morning to ask about pickets. Alarcon did as advised and talked with someone whose name he does not know, who advised him not to come to work. He was notified by the Union that the strike had been sanctioned, and he did not work during the strike. He checked for pickets during the sanction by driving to the store each day, and on each occasion pickets were present. After the first week, he drove by every other day. On the Sunday after the sanction was lifted he talked at the store with Finley, who said he had been discharged for not reporting to work after the sanction was lifted. He asked Finley what he could do, and Finley advised him to talk with Cole the following day, Monday. He went to the store on Monday and talked with Cole, who said he had been discharged for "not showing up for work." No one from the store had called to tell him he was scheduled to work. No one from Respondent's management or the Union had told him he could be discharged for not working as scheduled when pickets were not present, nor had anyone from management called to tell him no pickets were present, or that he should come to work. He told the Union about his discharge, and about a month thereafter attended a meeting of 18 persons, including store managers and representatives from the Union. He told Cole at the meeting that he did not know the sanction had been lifted. He attended a meeting at the union hall approximately 2 weeks later, together with union representatives and other discharged employees. Respondent's offer of reinstatement without backpay was discussed, and one employee talked about going to the NLRB concerning the backpay problem.

On cross-examination, Alarcon testified that prior to the conversation with Finley he testified to on direct examination Finley told him he was supposed to come to work if no pickets were present. He said he received advice during the strike from the Union and from Respondent that he was authorized to work if no pickets were present. He did not check his schedule for the week of September 4.

Willis Cole testified that he prepares or approves and nearly always posts all work schedules. Alarcon was scheduled to work the week of September 3, and throughout the strike. Alarcon, a part-time employee, usually worked at night as a stock clerk. Alarcon did not report to work or call in when he was scheduled to work on September 8 and 9. Head clerk Matt Erkle and grocery clerk Jim Finley attempted without success to reach Alarcon by telephone. Alarcon called the store on Sunday, September 10, but Cole was not in. Alarcon came to the store to see Cole on September 11, and said he had not heard the strike sanction had been lifted, nor had he received any letter from the Union. Cole replied that Alarcon had missed two shifts and it was necessary to replace him, so he was discharged. Cole said he learned Thursday afternoon (September 7) that the sanction had been lifted. He learned that fact from clerks who came in to get their schedules, and who said they heard on the news and on the Union "hotline" about the

sanction having been lifted. Approximately 15 or 20 employees came to work or got in touch with the store on Thursday afternoon. The only three clerks who did not report as scheduled were Alarcon, Carlos Lopez, and Daniel Alvarado. (The latter two are discussed elsewhere herein.) During the strike, 50 to 60 percent of the employees honored the picket line and did not work. Picketing was constant throughout the strike, 24 hours each day and 7 days each week. Alarcon was discharged for not reporting to work as scheduled after the sanction was lifted. At the time of discharge, he checked Alarcon's work schedule and timecards.

Discussion

To the extent of any discrepancies between the testimony of Cole and Alarcon, Cole is credited. Cole's version of events is credited.

It is noted at the outset that there is no evidence that Respondent was out to "get" Alarcon or any other employee because of his or their union or other protected activity. The record does not support the argument that Respondent, as a policy matter, decided to punish employees for honoring the picket line. Respondent was organized by and bargained and contracted with the Union, and there is no evidence of any attempt by Respondent to interfere with union activity of employees. So far as the record shows, Alarcon was not treated differently from other employees similarly situated.

It is also noted that the store involved herein, as all other of Respondent's stores, was a busy place with a complicated work schedule involving long hours of operation and a sizeable number of employees. Notice is taken of the relatively low profit margin of retail grocery stores, and the consequent necessity of close scheduling and prudent use of employees' time. Cole credibly testified that Respondent's policy is to discharge employees for not reporting for work without excuse or advance notice, and that policy has the support of common sense. Alarcon did not report for work on two consecutive days. Respondent attempted, without success, to reach Alarcon by telephone. All but three employees came to work or reported the day the sanction was lifted, and only those employees, of all who honored the picket line, were discharged. Alarcon contends that he did not know the sanction was lifted, but that contention is not credited. All except three of the employees scheduled to work on September 8 and 9 reported to work or called in, and Respondent did not know why Alarcon was not in that group. Respondent was justified in concluding that Alarcon, a part-time employee, was not interested in coming back to work, or was indifferent to his obligations.

The legal issue involved in discharging Alarcon for not reporting to work as scheduled, after the sanction was withdrawn, is discussed below.

Daniel Alvarado: Alvarado, a member of Local 428, was a part-time courtesy clerk at Respondent's store 508 during times relevant herein. The store manager was Willis Cole, and the assistant manager was James Finley. Alvarado's schedule was irregular, and changed each week.

Alvarado testified that he was notified approximately August 9 by letter from the Union that the Teamsters strike had been sanctioned by Local 428. He was scheduled to work that day, but seeing pickets at the store he did not work. He did not work thereafter during the sanction, but he drove by the store three or four times to check for pickets. He telephoned the store and talked with Finley to check for pickets,[26] but was not told the pickets were absent. He was told "always" that pickets were present. He was notified by union letter dated September 8 that the sanction had been lifted. The day he received the letter, September 9, he reported for work sometime between 12 and 1 p.m. When he arrived he talked with Cole:

> I had asked him if the schedule was up for me to work. He said that he couldn't help me with that because I had not shown up for work Thursday or Friday, and he filled out a termination notice on me. I told him that I just received that letter that day, and he said he was sorry, he couldn't help me.
>
> Q. Had anyone from the store called you on Thursday, Friday or Saturday and told you that the sanction had been lifted and that you were scheduled to work.
>
> A. No.

No one from Respondent's management or the Union ever told him that he had to check the work schedule during the strike, that he had to check for pickets on days he was scheduled to work, or that he could be discharged if he failed to work as scheduled when no pickets were present. No one from Respondent's management called him during the strike to say that no pickets were present or to ask him to come to work. He never received a discharge notice. He notified the Union of his discharge and attended a meeting at the union hall in late September or early October. Also present were Cole and two other employees who had been discharged (Alarcon and Carlos Lopez). They discussed the discharges, and a subsequent meeting was held in the union hall in late October. All discharged employees and union representatives attended. They discussed Respondent's offer of reinstatement without backpay and also discussed the comments of one employee who said the NLRB may be able to assist in getting backpay. The employees voted unanimously to accept the offer.

Cole testified that he is familiar with Respondent's policy that employees are supposed to work during a sanctioned strike if no pickets are present. He prepares or approves and nearly always personally posts work schedules for the store. Schedule preparation and posting during the strike was done in the same manner as prior to the strike. Alvarado was scheduled to work throughout the strike, including the week of September 3. His reporting time for Friday, September 8, was 8 a.m. and for Saturday, September 9, was 2 p.m. Alvarado did not report or call in for either Friday or Saturday. Alvarado came to the store at 4 or 4:30 p.m. on Saturday to check

[26] Alvarado was not asked, nor did he state, how many times he telephoned the store.

on his schedule, and Cole told him he was discharged for not reporting to work as scheduled for 2 days. Alvarado said he did not know the sanction had been lifted. Head clerk Matt Erkle and grocery clerk James Finley tried unsuccessfully to reach Alvarado by telephone on Friday and Saturday. The store employed approximately 35 employees, of which 15 or 20 came to the store to work or called in on Thursday. All scheduled employees reported or called in, except three—Alvarado, Lopez, and Alarcon. Cole worked on September 8 and 9, from store opening until closing. Approximately 50 or 60 percent of the employees honored the picket line and did not work during the sanctioned period. Picketing was continuous, 24 hours per day and 7 days per week. Alvarado was discharged because he failed to work as scheduled after the sanction was lifted. Cole heard on Thursday about the sanction being lifted, when employees came to work and told him they heard it on the news. Approximately 15 employees reported on Thursday.

Discussion

As discussed in the case of Alarcon, there is no convincing evidence that Respondent personally was antagonistic toward Alvarado because of his union or other protected activity, or toward the Union. Alvarado was not treated disparately from other employees similarly situated.

To the extent of any discrepancies between the testimony of Alvarado and that of Cole, Cole is credited and his version of events is credited.

As discussed elsewhere, the store involved here, as all other of Respondent's stores, was busy and utilized employees at nearly all hours. Close scheduling was imperative, and scheduling was a complicated process because of the store's long hours and varied operations. Cole's testimony that Respondent's policy is to discharge employees for unexcused or unauthorized absences was logical and believable. Attempts to get in touch with Alvarado on two separate days were not successful. Alvarado's contention that he did not know the sanction had been lifted was not credible, in view of the publicity given to the event, and the fact that all employees except Alvarado, Alarcon, and Lopez reported for work or called in. Regardless of Alvarado's reason for not reporting, Respondent was not responsible for that fact, and it was not incumbent upon Respondent, so far as the record shows, to run Alvarado down and ask him to come to work. Alvarado should have reported for work within a reasonable time after the sanction was lifted. What was a reasonable time can be inferred from the fact that nearly all employees returned to work or reported in immediately or soon after the sanction was lifted. Respondent was justified in considering Alvarado's failure to report or call in as negligent or intentional. Possibly, discharge was a too severe penalty, but that is not a matter for the Board to consider. Whether or not Alvarado's discharge was a violation of the Act is discussed below.

Alex Avlakeotes: Avlakeotes did not testify. Counsel stipulated that Avlakeotes was an employee of store 509 during times material herein; that Avlakeotes' termination notice was prepared to show that he was terminated for not reporting to work when no pickets were present; and that Avlakeotes quit his job as of September 9, 1978.

Peter Jimenez, manager of Respondent's store 509, testified that Avlakeotes was a frozen food clerk at the store. Jimenez testified that Avlakeotes was scheduled to work 5 days during the week of September 2, but did not report for work during that week, nor did he call the store on the telephone. Jimenez prepared Avlakeotes' termination notice on September 5, based on his personal knowledge, reports of other employees, and the store's work schedules. He talked with Avlakeotes on Monday, September 11, and Avlakeotes said he was quitting before being fired. Jimenez replied, "I still was officially telling him he was terminated because he hadn't reported to work." Avlakeotes stated "he had another job bartending and that he wasn't going to work during the strike anyhow." Avlakeotes was terminated because he did not work when no pickets were at the store. Avlakeotes could have learned about his schedule by calling in, without having to cross the picket line to read the schedule.

Discussion

Based on Jimenez' testimony, which is credited, it is clear that Avlakeotes was terminated for not working when no pickets were at the store. It may be, as counsel stipulated, that Avlakeotes quit his job on September 9, but that does not alter the fact that Respondent fired Avlakeotes prior to Avlakeotes' quitting. Jimenez testified that Avlakeotes already had been fired by September 11. Whether or not Avlakeotes had been notified of his discharge, Jimenez had initiated the paperwork and, by his own testimony, notified Avlakeotes of the discharge, prior to Avlakeotes' stating that he quit his job. Even though Avlakeotes had been working elsewhere prior to September 11, he had not quit his job prior to talking with Jimenez, and he told Jimenez that he would not work during the strike. Therefore, the question is a legal one, as to whether the discharge was a violation of the Act, i.e., whether or not Respondent legally could discharge Avlakeotes for not working when no pickets were present. That question is discussed infra.

Daniel Gonzalez: Gonzalez, a member of Local 428, worked at Respondent's store 509 during times relevant herein, as a bread clerk on a regular schedule, 6 to 11 a.m. on Monday, Tuesday, Thursday, Friday, and Saturday each week. The store manager was Peter Jimenez, and the assistant store manager was Randy Rose.

Gonzalez testified that he learned of the Teamsters strike in August, and soon thereafter was notified by letter from Local 428 that the strike had been sanctioned. On the morning of the sanction he called the store on the telephone and talked with bookkeeper Debbie Barrios, who told him there was a picket at the front door, but none at the back door. She said, "You could come in the back door like some of the other people are doing." He replied, "I had talked to the Union and they informed me that the strike had been sanctioned and it was my legal right to cross or not to cross, depending on what I chose." And she said, "we'll see what happens during the day." He did not go to work during the

strike, but he checked for pickets, every day for 3 weeks, and every other day thereafter. He checked each day he was scheduled to work by driving to the store at 6 or 7 a.m. Pickets always were present when he checked. He talked with Jimenez at 6 a.m. the day after the sanction was lifted, and Jimenez said he was discharged for "failure to report to work when there were no pickets." He reported the discharge to the Union. No one in management or the Union ever told him that he was supposed to check for pickets, or that he could be discharged for not working as scheduled when no pickets were present. No one from management called him during the strike to tell him no pickets were present, or to ask him to come to work. He told the Union about his discharge, and in late September attended a meeting of terminated employees, members of the Food Employers Council, and union officials. The strike, picket lines, and work attendance were discussed. He attended a second meeting with most of the same people, plus store managers. He explained his actions, which generally were denied by Jimenez. He attended a third meeting of union officials and terminated employees in late October. The employees were told about Respondent's reinstatement offer without backpay, provided acceptance was unanimous. All the employees decided to accept the offer and to seek backpay through the NLRB.

On cross-examination, Gonzalez denied that no pickets were present when he was scheduled for work on September 11 and 12. He said that even if no pickets had been present when he checked at the store he would not have gone to work. He said he was only checking on "the status of the picket line." He changed his earlier testimony concerning September 11 and 12, and said he worked those 2 days.

Jimenez testified that Gonzalez' scheduled hours were the same prior to and during the strike. Jimenez said he based Gonzalez' termination on his own knowledge, reports of employees, and the work schedules. He said he told Gonzalez that the latter had been discharged for not working when no pickets were present.

Discussion

To the extent that there are discrepancies between the testimony of Gonzalez and Jimenez, the latter is credited. It is found that Gonzalez did not work as scheduled on some days when there were no pickets at the store, and that he was discharged for that reason. The legal issue thus raised is discussed below.

Robert Hammond: Hammond did not testify. Counsel stipulated at trial that Hammond was an employee at Respondent's store 549; that he was covered by Local 428's contract with Respondent, that the Teamsters picketed store 549 continuously from midnight, August 9–12, 1978; that there was picketing after August 12, on dates counsel could not agree to; that Hammond was terminated for not reporting to work on days he was scheduled to work when no pickets were present; and that Hammond was advised by letter dated August 31, 1978, signed by Richard Hinshaw, that he had been terminated for failing to report for work as scheduled.

Vincent Spanno, manager of store 549, testified that he prepared Hammond's termination notice, based on the work schedule involved, on Hammond's timecards, and on his personal knowledge of the absence of pickets on the dates set forth in the termination notice. When Hammond was scheduled to report to work.

Michael Lamb, assistant store manager of store 549, testified that he told Hammond and Hutson about his conversation with Menacho, discussed above, and that Hammond and Hutson worked the night of August 19.

Discussion

Lamb's testimony that Menacho told him that employees were required to work as scheduled if no pickets were present, which testimony was denied by Menacho, is credited.

Spanno's testimony that, on the dates shown in Hammond's termination notice, no pickets were present when Hammond was scheduled to report for work is credited.

The legal issue involved in Hammond's discharge is discussed below.

Arturo Herrera: Herrera, a member of Local 428 at times relevant herein, was employed as an apprentice clerk, on probation in Respondent's store 505, on a schedule that changed each week. His store manager was Lyle Born.

Herrera testified that he learned by letter from the Union that Local 428 had sanctioned the Teamsters strike. He worked the day of the strike, but not thereafter. He checked his schedule almost every week of the strike, and he checked for pickets almost every day. Pickets always were there when he checked. He learned from his father that the sanction had been lifted, and that information was verified in a telephone call to the Union. The same morning he learned the sanction was lifted, he called Born on the telephone and asked about his schedule. Born did not tell him, and said it was Herrera's responsibility to know his schedule. He went to work that day at approximately 9:30 a.m. and checked his schedule, which was different from, and earlier than, his usual schedules. Soon thereafter he talked with Born:

> He asked where I was at that morning, and I said I normally don't work 7:00 in the morning to 4:00 in the afternoon, and all he said, all he could see was that I voluntarily quit. And, well, there wasn't much I could say then, so I just said all right.
>
> But I had asked to stay, to work from 9:30 til 6:30 that night, but he said he was sorry, he couldn't do it.

No one from the store called to advise that the sanction had been lifted or that he was scheduled to work or that no pickets were present. No one from Respondent's management or the Union ever told him that he could be discharged if he did not work as scheduled when no pickets were present. He informed the Union of his discharge, and attended one board of adjustment meeting concerning his discharge.

Born testified that Herrera was a produce apprentice, who usually worked early shifts, starting at 5 a.m. because produce had to be trimmed for display early in the day. Born prepared or approved all schedules and their posting. When the sanction was lifted, the produce de-

partment head was on vacation and the department was being operated on a makeshift basis. Produce employees worked early shifts, often starting at 4, 5, or 6 a.m. After the orientation period of 13 weeks, employees sometimes started later in the day. Later in the week, or when three employees were available for the department, one employee worked from noon to 9 p.m. During the strike the store closed at 7 p.m., and all employees were scheduled for hours earlier than usual. Usually three employees worked in the department. Born learned on September 7 that the sanction had been lifted. The schedule for that period had been posted on Friday, September 1, effective September 3–9. Because the produce head was on vacation and there were only two employees in the department, Herrera was scheduled to work early on September 8 and 9. All the stores' approximately 50 employees either came to work or called in on September 8, except Herrera. All employees who were scheduled to work on September 8 and 9 worked those days, except Herrera. Herrera did not report for work or call in on either September 8 or 9. He never saw Herrera in the store during the strike, nor did he hear from Herrera during the sanctioned period. The first time he heard from Herrera was on Monday, September 11. Born testified:

> It was in the morning about nine o'clock in the morning. He phoned and asked—He said that he just heard the sanction had been lifted and he wanted to know what his schedule was. And I told him that he had been scheduled at 6:00 a.m. the 8th and 9th and being that he didn't show up for those shifts, I took it as a voluntary quit.
>
> Q. What was his response, if any?
>
> A. Not much. He didn't really offer any excuses as to why he did not come in.

About August 20 he talked with Lou Menacho, a business agent for Local 428, while other employees were present. Menacho had been talking with other employees when Cole arrived. Menacho said he had been explaining to the employees that if pickets were not at all doors, they could come to work through doors not being picketed. Menacho said all entrances and exits had to be picketed in order for the picketing to be "bona fide." Menacho also explained that the employees were obligated to check their schedules, and to check every morning for pickets and if no pickets were present the employees were obligated to work. One of the employees asked Menacho whether he could come to work through the back door if no pickets were at that door, and Menacho replied yes.

Menacho testified that he talked alone with Born on one occasion during the strike, but they only discussed "generalities." Menacho testified that he talked with three employees of store 505 the same day:

> Well, they asked me if they were going to get in trouble working in the store and I told them that it was their option. If they came to work and there were no pickets there, it was their option to go to work. We perferred [sic] if they didn't as long as there was a sanctioned picket line out there. As long as they didn't cross a picket line, it wasn't really violating a principle.
>
> Q. Did you say to either Mr. Born, Mr. Windes or Mr. Kitchell that there had to be pickets at every door or the employees had to go to work?
>
> A. No, I didn't.

Menacho denied telling employees that if no pickets were at the back door they could come to work.

Discussion

To the extent there are discrepancies in the testimony of Herrera and Born, Born is credited. Further, Born's recitation of events is credited.

Menacho was not a convincing witness. In view of the questions concerning his reliability in this, and other instances discussed elsewhere, Born, who was a straightforward witness with a convincing demeanor, is credited to the extent that his testimony differs from that of Menacho.

There is no convincing evidence that Respondent personally was antagonistic toward Herrera because of his union or other protected activity, or toward the Union. There is no evidence that Herrera was treated in a disparate or arbitrary manner.

Born credibly explained that Herrera was needed in the produce department on September 8 and 9, and was scheduled for work on the early morning shifts of those days. Herrera testified that he usually worked from 10 a.m. to 7 p.m., or 11 a.m. to 8 p.m., but Herrera amply demonstrated that he was a confused witness, with a poor memory. For instance, he had much difficulty remembering when schedules were posted at the store, and for what days. Even after extensive questioning, he could not recall the scheduled days with accuracy. Nor did he remember who the assistant store manager was, nor the day he reported to work after the sanction was lifted. Born's testimony that Herrera usually worked the early morning hours was logical and is credited.

Herrera did not remember when he returned to work, but Born credibly testified that it was September 11, after Herrera had failed to report to work, without calling in, for 2 days. There is no evidence that Respondent was required to seek out Herrera, or to remind him to come to work. All other of the stores' employees returned to work, or called in, on September 7 and 8. Born was justified in assuming that Herrera did not intend to return to his job. The return of all other employees establishes that Herrera's absence on September 8 was not reasonable. Further, the record is clear that the lifting of the sanction on September 7 was public knowledge.

The legal issue involved in Herrera's discharge for not returning to work after the sanction was lifted is discussed infra.

Kathy Holland: Holland did not testify. Counsel stipulated at trial that Holland was an employee of store 519, and subject to the contract between Local 428 and Respondent, at times material herein; that picketing at store 519 was continuous from August 10–14, 1978; that picketing was sporadic from August 14 until September 1, 1978; that Holland was terminated for not reporting to

work on days she was scheduled to work when no pickets were present at the store, for weeks ending August 19 and August 26, 1978; and that, by letter dated September 8, 1978, signed by Hinshaw, Holland was advised that she had been terminated for her failure to report for work as scheduled.

Mariano Capodiece testified that he was manager of store 519 in August 1978, and one of the store employees was Holland, who was a part-time journeyman clerk and who worked on an irregular schedule. During the week ending August 19 picketing began to be sporadic, with pickets appearing off and on during the day and, on some days, appearing not at all. There were no pickets on Labor Day, and after that, there were no pickets most of the time. He always either prepared work schedules himself, or approved schedules prepared by his assistant. The practice relative to schedules after the strike started was the same as it was prior to the strike. He prepared Holland's termination notice, based on the fact that she did not report for work at any time after August 12, although there were times when she was scheduled to report, when no pickets were present. His knowledge of the absence of pickets and the sporadic nature of picketing was based on personal observation and reports of employees. Based on his knowledge and reports from employees, Holland did not call the store after August 12. During the first week of picketing, Holland crossed the picket line to work. He did not hear from Holland, either after he prepared her termination notice or after the sanction was lifted. He attended the first board of adjustment meeting, at which Holland did not appear. He understood at the meeting, from Claude Fernandez of the Union he believed, that Holland's case was dismissed because she voluntarily quit her job. He was asked if he would accept the quit, and he said yes.

Chris Anderson, the store bookkeeper at times relevant herein, corroborated Capodiece's testimony relative to notices to employees (R. Exh. 7), the sporadic nature of the picketing, the occasional absence of pickets at the rear entrance, and related matters. Anderson was a convincing witness, and her testimony is credited.

Discussion

The principal issue concerning Holland is whether or not she quit her job prior to Respondent's termination of her. Capodiece credibly testified that Holland did not work after August 12, and that she did not thereafter get in touch with anyone at the store. Holland's termination notice states that she "discontinued reporting for work." "Has not reported for scheduled work shifts" during the weeks ending August 19 and 26, 1978, and last worked August 12, 1978. The notice is dated September 20, 1978, effective September 7, 1978. Capodiece credibly testified that he understood from someone at a board of adjustment meeting, probably Fernandez, that Holland's case was dismissed because she voluntarily quit her job. Fernandez, Menacho, Soares, and Wallace, all of whom attended the board of adjustment meeting, all testified, and none of them contradicted Capodiece on this issue.

It is clear, as a factual matter, that Holland quit her job August 12, 1978. The General Counsel did not show otherwise. Stipulations of counsel on this issue are ambiguous, but regardless of their content, the facts show that Holland was not an employee of Respondent from and after August 12, 1978. Whatever happened thereafter does not create a legal issue, so far as Holland is concerned. There is nothing to show that Holland, the Union, or Respondent considered her to be an employee after said date. No legal issue is involved in Holland's case.

Richard Hutson: At times relevant herein Hutson, a member of Local 428, worked on the stock crew at Respondent's store 549, under Store Manager Vincent Spanno and Assistant Store Manager Michael Lamb. Usually, he worked from midnight until 9 a.m., with Sundays off, and had one other day off which varied from week to week. He learned informally, and later by letter from the Union, of the sanction by Local 428 of the Teamsters strike.

Hutson testified that the day after he first learned of the sanction he went to the store, but did not work because of the presence of pickets. Thereafter, he checked for pickets each night he was scheduled to work, except 2 days when he was ill, and each time he checked, pickets were present and he did not work. On one occasion, August 19, no pickets were present and he worked. Approximately 1 month after the strike began and prior to the sanction being lifted, he and some other employees talked with Spanno about returning to work, and Spanno told all of them they had been discharged. No one from management or the Union ever told him he must check his schedule, and check for pickets during his scheduled starts, or that he could be discharged if he failed to work as scheduled when no pickets were present. No one from management ever called him to advise that no pickets were present, or to ask him to come to work. He informed the Union of his discharge and attended two board of adjustment meetings concerning the termination. The first was held a month or so after the discharge, attended by discharged employees, union representatives, and representatives of Respondent. They discussed pickets and what constituted a picket line. The second meeting was held a month or so later, attended by much the same group, plus some witnesses from the store. They discussed the same subjects as before. Prior to the second meeting he, Rendon, and Mitchum visited the NLRB.

On cross-examination, Hutson testified that his termination notice shows him as a voluntary quit rather than as a dischargee. Thereafter, he began working for Fry's, and still later, for Manor Market. He did not discuss the termination notice with Spanno, or ask him about it, because his first reaction was to ask union representatives about it. He did not talk with Spanno when he worked August 19, nor does he remember talking with Spanno about the strike, prior to its inception. He never was told that he was permitted to enter the back door of the store, if there were pickets only at the front door. He was reinstated by Respondent, and thereafter on November 3 or 4 quit his position. When he was reinstated by Respondent, he quit working for another store in order to return to Respondent, and subsequently returned to his pre-reinstatement employer after quitting Respondent.

He attended the second board of adjustment meeting because Respondent improperly considered him a voluntary quit for allegedly not working August 14, 16, 17, 21, 22, and 26. He did not attend the meeting at which Respondent's offer of reinstatement was considered.

Spanno testified that he did not talk with Hutson during the strike, and that he prepared Hutson's termination slip, based on work schedules and timecards.

Lamb testified that he talked with Hutson on Saturday, August 19, and gave him information received from Lou Menacho of the Union, i.e., that if there were no pickets at work scheduled time, employees had to go to work, and further, that employees could go in the back door if no pickets were there. Hutson worked that same night, August 19, when no pickets were present.

Discussion

Hutson appeared to be a confused witness with a rather poor memory. However, his testimony concerning the nature of his departure from the store's employment appeared truthful, was corroborated by Rendon and Mitchum, and is credited. Although Spanno referred to Hutson as a "voluntary quit," it is clear and found that Hutson was discharged.

Hutson testified that he checked for pickets each night, but Spanno testified that Hutson's absences were shown on work schedules and timecards. Hutson testified that he would have worked had there been no pickets, and the record shows that he did work in the absence of pickets on August 19. However, Lamb testified that he had informed Hutson during the day of August 19 that Menacho had told him that employees "had" to work as scheduled, if there were no pickets. As found elsewhere herein, the testimony of Lamb relative to Menacho is credited. In any event, in view of Hutson's generally unconvincing testimony and Spanno's credibility, Spanno's testimony that Hutson did not work when scheduled and when there were no pickets is credited.

It is found that Hutson was discharged by Respondent for not working as scheduled during the strike sanction, in the absence of pickets. The legal issue involved is discussed below.

Jerry Lee Kimber: At times relevant herein Kimber, a member of Local 428, worked for Respondent's store 538, as a member of the night stock crew. His schedule was irregular, and changed each week. The store manager was Larry Stevens, and the assistant store manager was Dave (not otherwise identified).

Kimber testified that he learned informally of Local 428's sanction of the Teamsters strike, and received no formal notification from the Union. He called the store to find out if pickets were present, and learned that they were. Thereafter, he called and drove by the store several times to learn if pickets were present. They were present each time he checked, but on some occasions no one answered the telephone and he was unable to check. On a date he does not remember, but which was "a couple of days" after the strike was over, fellow employee Richard DiMartini called him and said Kimber was scheduled to go to work that night and that Kimber should report for work. Kimber was "totally exhausted," and declined to go to work. He went to the store the following day and talked with Stevens, who said he had been discharged. No one from management or the Union ever told him to check his schedule during the strike, or to check for pickets on work scheduled days, or said he could be discharged for failing to report as scheduled when no pickets were present. No one from management called him during the strike to advise him about pickets or to ask him to come to work. He does not remember how long it was before he talked with Stevens that he learned that the sanction had been lifted, nor does he remember how he learned that fact. He told union representatives about his discharge, and attended two meetings to discuss the discharge. At one of the meetings, union representatives discussed with discharged employees Respondent's offer of reinstatement on former schedules, with benefits but without backpay, provided the employees' acceptance was unanimous.

On cross-examination, Kimber testified that he had been a real estate agent since October 1977, and was working only part-time for Respondent. While working for Respondent, he sold real estate 8 or 9 hours each day. In his pretrial affidavit, he stated that he learned about September 6 that the sanction had been lifted. His discharge conversation with Stevens was approximately September 15. He did not check his schedule during the strike. His pretrial statement was true, wherein he stated:

> I did not call in during the week after sanctions were lifted. I did not report to work during this period, September 7th–September 15th, because I was busy with my job as a realtor.

Kimber was reinstated, and quit in November 1979 to sell real estate.

Stevens did not testify. Kimber's termination notice[27] shows that he was terminated for failure to appear at work September 8 and 9, and that Kimber had not been heard from for "over 6 weeks."

Discussion

Kimber's testimony was confusing and incomplete. He seemed to imply that DiMartini called on behalf of the store, a couple of days after the strike was over, to tell him to come to work. However, DiMartini's position was not described—it is not clear whether DiMartini was a friend, a coworker, a management agent, or something else. In his pretrial affidavit, which he could neither affirm nor deny in his testimony so far as dates were concerned, Kimber said he knew that about September 6 the sanction had been lifted, yet the sanction was not lifted until September 7. He said he could not remember whether he knew about September 6 that the sanction had been lifted. Kimber could not put a date on DiMartini's call, yet he said he said he reported for work the following day, while in his affidavit he said he did not report to work at all between September 7 and 15. Further, he testified that he did not go to the store immediately after DiMartini called because he was "exhausted," yet he stated in his affidavit that he did not go to the

[27] G.C. Exh. 13(r).

store between September 7 and 15, because "I was busy with my job as a realtor." He acknowledged at trial that the affidavit was true.

Under such circumstances, the General Counsel's contention that Kimber was fired because he did not work as scheduled during the sanction is not persuasive. Kimber's testimony is too unreliable to provide a basis for finding that Respondent illegally fired him. By his own testimony, Kimber did not report to the store for at least a week after the sanction was lifted. He did not testify that his reason for not reporting was lack of knowledge that the sanction was lifted, nor was he fired an unreasonably short time after the sanction was lifted. Patently, he was indifferent to his job with Respondent since he was busy with his real estate job. Respondent was fully justified in considering Kimber as having abandoned his job, and in discharging him for that reason.

It is found, as a factual matter, that Kimber was fired because he did not return to work after the sanction was withdrawn. The legal issue involved is discussed below.

Carlos Lopez: Lopez, a member of Local 428, was a part-time clerk apprentice at times relevant herein, working at Respondent's store 508 on an irregular schedule that changed every week. The store manager was Willis Cole and the assistant manager was James Finley.

Lopez testified that he learned from a letter he received from the Union that Local 428 had sanctioned the Teamsters strike. The day before the strike started he talked with Cole and asked what he should do. Cole replied, "Well, there's pickets outside. You're not supposed to come to work. But if there's no pickets you're supposed to be at work." Thereafter, he honored the strike, but he called in every day for 3 weeks to check for pickets. He talked with Cole or whomever answered the telephone. He received a letter from the Union during the morning of September 9 advising that the sanction had been lifted. He called and talked with Finley on the telephone at 10:30 or 11 a.m. and asked about the strike. Finley said he was supposed to have been at work on Friday, and missed again on Saturday, and that as far as he was concerned Lopez was discharged. He then talked with Cole, who told him the same thing. No one had called on Thursday, Friday, or Saturday to tell him the sanction had been lifted and he was supposed to be at work. No one from Respondent's management or the Union ever told him it was his duty to check the work schedule during the strike to check for pickets or that he could be discharged for not working as scheduled when pickets were not present. He informed the Union of his termination, and a few weeks later attended a meeting with other employees who had been discharged, store managers, and others. The discharges were discussed. A few weeks later he attended another meeting at the union hall, and the discharged employee discussed with union representatives Respondent's offer of reinstatement without backpay, provided acceptance of the offer was unanimous. The employees decided to accept the offer, and to pursue their backpay claims through the NLRB.

On cross-examination, Lopez testified that employees "were supposed to call in to get our schedule and I did this." He said his calls to the store were to check on pickets, and to check his schedule. He never went to the store to check for pickets—he only called in on the telephone.

Cole testified that he is familiar with Respondent's policy that employees are supposed to work during a sanctioned strike if no pickets are present. He prepares or approves, and nearly always personally posts, work schedules for the store. Schedule preparation and posting during the strike were done in the same manner as prior to the strike. Lopez usually worked a late afternoon or evening shift. Lopez did not come to work as scheduled on Friday, September 8, and came to the store at approximately 5 p.m. on September 9. He told Lopez that the sanction was lifted Thursday afternoon and he had been scheduled for work the Friday and Saturday but had not reported, hence, he was discharged. Lopez replied that he had been busy working for Tropicana Foods. Matt Erkle, head clerk, and James Finley, grocery department head, tried unsuccessfully to reach Lopez by telephone on Friday and Saturday. The store employed approximately 35 employees, of which 15 or 20 came to the store to work or called in on Thursday. All scheduled employees reported or called in, except three—Lopez, Alvarado, and Alarcon. Cole worked on September 8 and 9 from store opening until closing. Approximately 50 or 60 percent of the employees honored the picket line and did not work during the sanctioned period. Lopez was discharged because he failed to work as scheduled after the sanction was lifted. Cole learned on Thursday about the sanction being lifted, when employees came to work and told him they heard it on the news.

Discussion

To the extent of any discrepancies in the testimony of Lopez and Cole, Cole is credited, and Cole's version of events is credited.

As discussed in the case of Alarcon and Alvarado, there is no convincing evidence that Respondent personally was antagonistic toward Lopez because of his union or other protected activity or toward the Union. Lopez was not treated disparately from other employees similarly situated.

As discussed elsewhere, the nature of the store's business necessitated close and complicated scheduling of employees' work. Cole's testimony that Respondent's policy is to discharge employees for unexcused or unauthorized absences was logical and is credited. Attempts to get in touch with Lopez on two separate days were not successful. Cole's testimony that Lopez said he did not report for work because he had been busy working for another employer was not rebutted and is credited. Lopez did not give any convincing reason in his testimony for his failure to report for work after the sanction was lifted. Regardless of why Lopez failed to report, there is no evidence that it was Respondent's duty to seek him out and ask him to come to work. Lopez did not report for work a reasonable time after the sanction was lifted; such reasonable time is shown by the fact that nearly all other employees returned to work on Thursday and Friday as scheduled. Although discharge may have been somewhat severe as discipline, that matter is

for Respondent's decision. The legal issue involved is discussed below.

Elizabeth Mahon: Mahon, a member of Local 1179, began working in the summer of 1978 at Alpha Beta's store 515, as a part-time apprentice checker. Her store manager was Dewey Mayer. Mahon was on an irregular schedule, which changed every week.

Mahon testified that the day after she was notified by Local 1179 of the fact that the Retail Clerks had sanctioned the Teamsters strike, she talked with Chuck Mattson, a union representative, explained that she had no experience in such a situation, and asked what she should do. Mattson said to call Mayer and find out whether or not the store was being picketed. If there were pickets, she should not enter the store; if there were no pickets, she was "to go in to work." She called Mayer, who said pickets were at the store. She said she could not come in if there were pickets, and he replied, "Would you please come in in plain clothes and work?" She said she would check with Mattson, which she did. Mattson said if she crossed the picket line, she would be subject to a heavy union fine. She called Mayer and said she could not do as he requested. She called Mayer thereafter on each of 3 days after the sanction was in effect, and was advised that pickets were present. On the third day she also called Mattson, asked if she had to call the store each day, and was informed, "I didn't have to call every day, that if they needed me, or the pickets were gone, if I was able to come to work, and I had a schedule, they [the store] would call me." Thereafter, she did not call Mayer or personally check to see if pickets were present at the store. Mahon was in Los Angeles September 4, 5, and 6. She learned from a news broadcast the evening of the day the sanction was lifted that such was the fact, and she also was notified of that fact by letter from the Union. The following morning she asked her husband to call Mayer for her, and was advised she had been discharged. She went to the store that day and talked with Mayer, who gave her a discharge notice and advised her that she had been terminated for failure to report for work on 6 days when she was scheduled to work and there were no pickets present. The termination notice is dated September 20, 1978, effective August 21, 1978. She said Mattson had told her that Mayer would notify her if no pickets were present. No one from Respondent's management or the Union had told her that it was her duty to check her work schedule during the strike, to check for pickets, or that she could be discharged if she did not work when no pickets were present. No one from Respondent's management called her during the strike, nor did she call the store to check her schedule or to check for pickets after the third day of the sanction. She talked with Mattson about her discharge, and on September 25 Mattson told her Respondent refused to rehire her, and that they considered her to be a voluntary quit, however, they would give her a good recommendation. Mattson said there was nothing more he could do for her.

Mayer testified that work schedules which he always approves and posts and sometimes prepares were prepared and posted during the strike in the same manner as before the strike. Mahon was scheduled to work during the strike, on the same basis as prior to the strike. The work schedule for the week of August 13–19[28] shows that Mahon did not report for work on August 15–19, although she was scheduled to work on those days. The schedule for August 20–26[29] shows that Mahon was scheduled to work August 21–25, which was a normal prestrike schedule. Mahon did not come to work on August 21, and she was discharged that day by Mayer. Picketing commenced the afternoon of August 9, on a 24-hour basis, and continued through August 12. No pickets appeared after August 12, and that fact is based on personal observation. On August 13 and 14 he called some employees in order to reactivate the store, but most of the employees had been calling in each day. Mahon did not call in on August 13 or 14, and Mayer tried on three occasions to get in touch with Mahon by telephone. He discharged Mahon on August 21 and so informed her husband, who called the store to find out if any picketers were present. The husband said Mahon was in Los Angeles, and Mayer replied that there were no pickets, and she should be back at work. On September 8 Mahon and her husband came to the store, and Mayer explained that he expected Mahon to come to work after the pickets left, but that she did not, and he could not get in touch with her, therefore he discharged her. Of all the store employees, totaling approximately 45, only Mahon and Curtis McCullom did not return to work after the pickets left, and both employees were discharged. The Union took no action, so far as Mayer knows, other than to call Mayer on the telephone to ask why Mahon was discharged.

Discussion

Mayer's testimony was firm, given without hesitation or uncertainty, and convincing. Mayer is credited. It is found there were no pickets at the store from and after August 13, 1978. There is little discrepancy between Mayer's testimony and that of Mahon. It is clear that Mahon intentionally did not check for pickets after the first 3 days of checking, and that in so doing, she relied solely on Mattson's advice. She never discussed the subject with any member of Respondent's management. However, as discussed supra, Mahon and all other employees had ample and continuous written notice from Respondent that absence from work when no pickets were present could result in disciplinary action.

It is equally clear that Mahon did not report for work as scheduled, for 6 successive days when there were no pickets at the store, and that she was discharged because of those absences.

A subsidiary issue is presented so far as Mahon's reason for absence from work is concerned. There is no showing that Mahon absented herself from work during the 6 days involved because of her sympathy with the Teamsters. It appears that her absence was occasioned solely by her failure to check for pickets, since she testified on cross-examination that when she called the first 3 days of picketing she was prepared to go to work if no pickets were at the store, and the sanction still was effec-

[28] R. Exh. 27.
[29] R. Exh. 28.

tive at that time. The legal issue thus presented is whether or not motive for failure or refusal to work during a sanctioned strike is relevant. That issue is discussed infra.

The principal issue is whether or not Mahon was discharged in violation of the Act. That issue also is discussed infra.

Josie Melendez: Melendez, a member of Local 428, worked at Ralph's Grocery Company store 94, at times relevant herein, as a part-time cashier, on a varying schedule 4 or 5 days, 24 to 32 hours per week. Her manager was Darrell Sniffen, and Sniffen had two assistant managers, Jan Harrington and James Shelton. Melendez was discharged because of failure to report to work as scheduled in the absence of pickets.[30] She attended a board of adjustment meeting concerning her discharge on a date she could not remember, but which she testified was sometime in January or February 1979. She accepted Respondent Ralph's offer of reinstatement with seniority but without backpay conveyed to her by a union representative, and returned to her job in January or February 1979.

Melendez testified that she learned from Local 428's letter of August 9, received and read by her, that the Local had sanctioned the Teamsters strike. She went to work the next day she was scheduled, but did not enter the store because of the picket line that was in effect. She called Sniffen from a telephone booth and told him she could not go to work because of the picket line. He told her to come to work "and look the other way." She replied, "no," and Sniffen gave the telephone to Harrington, who told her to come to work as scheduled, an hour ahead of time, and to call from a telephone booth. Thereafter, she checked for pickets two or three times each week, either by calling the store on the telephone, by going to the store, or by having her niece go to the store. On three or four occasions each week, she called the store and talked with "different people" to tell them she was not going to come to work because of the picket line. On Friday or Saturday of the week she was fired, someone other than Sniffen, but she does not remember who, told her on the telephone that no schedule was posted for the following week and that "it was a day-to-day basis." Thereafter, she did not check to see if there was a schedule until she had her son call on September 6. On the Sunday before she was discharged, Shelton called her on the telephone and asked her to go to work, and she refused, saying that she could not return to work until Local 428 told her to. Prior to that time, no one from the store had called her. On September 6, the day she was fired, she instructed her 13-year old son to call the store for her, and tell them she "wasn't going in." Her son later told her she had been discharged. Later that day she called Sniffen on the telephone and asked why she had been discharged, and he replied that it was because she did not come to work when there was no picket line. She said she "figured the line was still there" and Sniffen replied that "he couldn't be calling all the employees to tell them there was no line." Melendez testified that no one from the Union or store management ever told her that she was required to check for pickets each day she was scheduled, and that if she did not work in the absence of pickets, she could be discharged. She received in the mail a copy of Local 428's letter of September 8, notifying members that the strike sanction had been lifted. She notified the Union the day after her discharge, and attended the board of adjustment meeting referred to above.

On cross-examination, Melendez testified that Respondent's rules are posted on a bulletin board near the timeclock, and she "figured if you don't call in if you're sick or something they'll fire you from any job"; such a conclusion is "common sense." She denied ever having seen the work schedule for the week ending September 2,[31] or the schedule for the week ending September 9.[32]

Sniffen testified that he prepared the work schedules for all employees, and posted them each Friday morning to cover the following week, from Sunday through Saturday. From two to six pickets appeared at the store on August 8, and thereafter picketed 24 hours each day, for approximately 28 consecutive days. There were no pickets at the store from and after Thursday, August 31. His statements relative to pickets were based on personal observations, and on employee reports. Beginning August 31, Sniffen, Harrington, and Shelton began calling employees to come back to work, since there were no pickets at the store. By the following day, September 1, all scheduled employees except Pat O'Brien were back at work. Seven or eight of those employees were called on the telephone, but the remainder, approximately 10, came in voluntarily. However, Melendez did not come to work on Friday, September 1, as scheduled, nor did she work on Saturday, September 2, as scheduled. He had called Melendez on Thursday, Friday, and Saturday, but no one answered the telephone. Harrington also attempted to call Melendez on Saturday, but with no success. Shelton tried without success to call Melendez on Friday, but reached her on Sunday, September 3. Shelton reported that Melendez said she would not return to work until instructed by the Union to do so. Sniffen called Melendez on Thursday morning, September 5, and told her she should return to work, but she refused to do so until the Union told her to return. He told her that if she did not come to work her refusal could become cause for discharge. Melendez replied that in such case she would be terminated. As shown by the schedule, Melendez did not work on September 5 and 6. Sniffen called Respondent's personnel manager Gayle Fahr and explained the Melendez matter, and was told that Melendez should be called once more, and that if she refused to come to work she should be discharged. Sniffen called Melendez again, but could not reach her. His understanding of company rules was that unexcused absences for 3 days was grounds for discharge, and prepared Melendez' proposed discharge, which was the basis of Fahr's notification to Melendez. In October or November Sniffen attended a board of adjustment meeting relative to Melendez, at which time her discharge was discussed. Sniffen testified that other employees regularly

[30] Melendez was not given any documentary notices of discharge.

[31] R. Exh. 22.

[32] R. Exh. 21.

checked schedules during the strike sanction, personally and by telephone, and that some employees, possibly 12 or so, crossed picket lines to check.

Sniffen testified that during the first week of picketing he overheard Union Representatives Herb Sisti and Lillian Sugimoto tell employees that if there were no pickets at the back door employees could come to work, even if there were pickets at the front door, and that "we really don't want to back the Teamsters."

Discussion

Sniffen and Melendez generally agreed on the ultimate facts involved in this issue, but they disagreed on many details. Sniffen was an impressive witness. His answers were prompt and firm, and he gave the impression of a forthright and candid witness. Melendez' testimony was not of equal calibre. She seemed unsure of herself, and was not convincing in her recitation. To the extent that the testimony of Sniffen and Melendez differs, Sniffen is credited, and his version of events involved in this issue is accepted as accurate.

Based on Sniffen's testimony, it is found that there were no pickets at Respondent's store involved herein from and after the first morning shift of pickets on August 31; that Sniffen, Harrington, and Shelton made several unsuccessful attempts to get in touch with Melendez on and after August 31; that Melendez refused to come to work on September 3, 5, and 6 after Sniffen and Shelton got in touch with her and asked her to, and that she said she would not come to work until Local 428 told her to; and that all other employees did work as scheduled from and after August 31. Finally, it is found that Melendez refused to come to work after she was informed that she was scheduled to work and there were no pickets at the store.

Melendez contends that she regularly checked for pickets, personally, by telephone, and through intermediaries. That contention is given little credence, particularly in view of Melendez' position that she would not come to work, regardless of the presence or absence of pickets. The legal issue involved in Melendez' discharge is discussed below.

Carol Mitchum: Mitchum, a member of Local 428, was employed at times relevant herein as a clerk in Respondent's store 549. The store manager was Vincent Spanno and the assistant store manager was Michael Lamb. She worked on a regular schedule, from 6 a.m. to 3 p.m. on Monday, Tuesday, Thursday, Friday, and Saturday. She learned informally on August 9 that the Teamsters strike had been sanctioned by Local 428, and learned of that fact later in the day, by letter from the Union. Counsel stipulated that there was picketing continuously from midnight, around the clock, on August 9–12.

Mitchum testified that she talked with Lamb on the telephone Thursday morning, August 10, after learning that pickets were at the store, and told Lamb she would not report for work that day, to which he replied okay. She talked with Lamb the following day when she went to get her paycheck:

> He told me that I could be considered a no-show because he felt—he said there were no pickets there that morning. And I told him that I did not know that I had to check for picketers. It was a sanctioned strike and all I needed in order not to work was that letter saying it was a sanctioned strike by my Union.
>
> Q. To your knowledge, was Mr. Lamb the person in charge that day?
>
> A. Yes he was.

Lamb did not say that she could be terminated if she did not work when no pickets were present. Later that day she called the Union, and said she felt threatened by what Lamb had said. She was not told by anyone at the Union that she was required to check for pickets, or to work if there were no pickets. Thereafter she did, however, check for pickets each morning she was scheduled to work, prior to her schedule, for approximately 3 weeks, at which time there ceased to be schedules. Pickets always were present when she checked. On the third Friday after picketing commenced, she went to the store and talked with Spanno, and said she was sorry, but she could not cross a picket line. Spanno said he understood, and "that there was definitely no hard feelings." She checked for a schedule that day, and there was none. No one in management or the Union ever told her she should check her schedule while honoring a picket line, or to check for pickets, or that she could be discharged for not working as scheduled when no pickets were present. No one from management ever called her to say there were no pickets or to ask her to come to work. She was notified by union letter that the sanction had been lifted, and went to the store the following day. Spanno notified her and other employees that they had been discharged. She attended a board of adjustment meeting concerning her discharge, approximately the end of September. Discharged employees, union representatives, and Food Employers Council representatives were present. They discussed the discharges and related matters. There was a second meeting, approximately in mid-October, attended by some of the same persons and also by Spanno and Lamb. A third meeting was held the end of October, at the union hall, attended by discharged employees and union representatives. The employees were told that Respondent offered reinstatement with full seniority and the same schedules, but with no backpay, provided the offer unanimously was accepted. The employees protested, and the offer was discussed at length. Terry Rendon advised the employees that the NLRB had informed her, as well as Mitchum, that they should accept the offer and seek backpay through the NLRB. During the meeting, Rendon called NLRB concerning the other employees, and informed them that the NLRB said they should do the same. The employees then voted to accept the offer.

On cross-examination, Mitchum testified that she did not know, of her own knowledge, whether or not she was scheduled to work during the week of August 27. Spanno never told her that schedules had been discontinued. She does not know who told her that.

Spanno testified that Mitchum called him on the telephone August 25 to check for pickets, and stated that she was not going to work because of the strike. He told

her she was obligated to work if no pickets were present, and she said she would not work while there was a strike. He told her no pickets were present the day she called on her scheduled shift. He prepared Mitchum's termination notice, on the basis of the work schedule. The schedule shows there were no pickets at Mitchum's starting time.

Lamb testified that early in the strike he told Mitchum when she came to the store to pick up her paycheck that she must come to the store when scheduled, to check for pickets. She said she would.

Discussion

So far as knowledge of what Respondent expected relative to work when no pickets were present is concerned, it is clear, as discussed elsewhere herein, that Respondent fully notified all employees, by posting notices and mailing notices to employees, that it expected such work. Thus, whether or not Spanno also made such a statement to Mitchum is immaterial.

Spanno was an impressive witness. His testimony concerning events, and that Mitchum did not work as scheduled when pickets were not present, is credited. The legal issue presented by the facts is discussed below.

Norma Myers: Myers, a member of Local 428, worked at times relevant herein, at Respondent's store 509. Jiminez was store manager and Rose was assistant store manager. Myers was a grocery clerk, and her work schedule changed each week. She learned of the strike sanction when she received notice in the mail from the Union. She learned of picketing the first night of such activity, when she was at the store.

Myers testified that she talked with Jiminez at the store a few days after the strike began:

> Well, I talked to Pete and I told him that I really didn't like the whole idea of the picketers being there and I was afraid of what they might do, and that I needed a steady income and a steady income wasn't going to be provided for me by only being able to work when there wasn't picketers there. And that I really had thought about it and felt that if we had sanctioned the strike, then it meant that we were going to uphold the strike as long as the strike lasted, or until we dropped the sanction. That they didn't have to have people on the doors in order for that to be a strike. And I really wasn't going to work through the whole thing, throughout the strike. So I told him about it and he said, he didn't really blame me, because his daughters had gone to work for somebody else during the strike also. And, that it made sense to him. And I said, okay, I'll see you when the strike's over. He said, okay, bye.[33]

After that conversation, Myers did not check for pickets at the store. She had another conversation with Jiminez at a Labor Day picnic, and Jiminez teased her about having a "nice little vacation" from work. She heard about the sanction being lifted on the radio the day it happened and she later received a letter from the Union telling her the sanction had been discontinued. On the day of the lifting she called Jiminez on the telephone and asked about coming to work, and Jiminez told her she had been discharged for failure to report for work when there were no pickets. No one from Respondent's management, or from the Union, had told her she was subject to possible discharge if she failed to work as scheduled when there were no pickets. No one from management called her during the sanction to advise that there were no pickets or to ask her to come to work. She reported the discharge to the Union, and approximately a week later attended a board of adjustment meeting. Also in attendance were other employees who had been discharged, as well as union representatives from the Food Employers Council. The discharges were discussed at the meeting. A week or so later a second meeting was held, attended by much the same group, plus store managers involved in the discharges, including Jiminez. The discharges again were discussed. A few weeks later a third meeting was held at the union hall, attended by the dischargees and by union representatives, who told the employees that the Union had received an offer to reinstate employees to their prior positions, on their former schedules, without backpay, provided the offer unanimously was accepted. The employees were angry, and objected until one employee told the others that NLRB representatives had advised her that the employees should accept the offer, then file a claim with the NLRB for backpay. The offer then was accepted by the employees.

On cross-examination, Myers testified that she was on vacation from August 23 through September 3, during which period of time she worked at a grocery store unrelated to Respondent. On Friday, September 1, she made no effort to ascertain what her schedule was for the following week, nor did she make any such effort thereafter, until she called Jiminez on September 8. After her reinstatement she again was terminated by Respondent for swearing at her supervisor. She did not report for work on September 5, 6, or 7, nor did she check for pickets on those days. She did not receive a termination notice. She worked after the sanction until picketers appeared.

Jiminez testified that Myers was scheduled to work during the week of September 5 when no picketers were present at the store. He had only one conversation with Myers, which was at the store, during the second week of the strike. Myers told him that she was going to "honor the strike," and would not be coming to work. He told her that it was her choice, if no pickets were present, but if there were no pickets, she was obligated to check her schedule, and work if scheduled. She said she would not do that, and he told her that, in such a situation, she would have to suffer the consequences. He did not hear from Myers until the strike was over. He based Myers' termination notice on her work schedule, and talked with her on September 9 when she called on the telephone to get her schedule. He informed Myers that she had been discharged because she had failed to

[33] This testimony is broader and more explicit than Myers' pretrial affidavit.

report for work as scheduled, when no pickets were present, on September 6, 7, and 8. Rose generally corroborated Jiminez.

Discussion

The essential facts involved in Myers' discharge are not in dispute, but the versions of Myers and Jiminez differ somewhat in detail. Although those detailed differences do not control any finding, Myers is credited to the extent that any discrepancy is considered. So far as picketing is concerned, Jiminez is credited, and it is found that Myers was discharged as Jiminez testified, i.e., because she did not work as scheduled, when pickets were not present, on September 6, 7, and 8. The sanction was withdrawn on September 7, but Myers already by then had been terminated, thus, the legality of the termination is in issue, as discussed below.

Jackie Niswonger: Niswonger, a member of Local 428, worked at times relevant herein as a part-time clerk and checker in Respondent's store 523. The store manager was Terry Zink and the assistant store manager was Tony San Fillipo. Often her work schedule was in the evening, from 5 to 10 p.m. or 6 to 11 p.m.

Niswonger testified that shortly before the strike she talked with Zink, and said that, since she never had been involved in a strike, she would like to know what her rights were:

> At that time he told me that the company wouldn't hold it against you if you chose not to cross picket lines. But I would have to let him know, and I would have to stick with my decision because he had a schedule to write; I couldn't work one day, and then decide I didn't want to work the next day because of the schedule; and to let him know. It was my choice. The company wouldn't hold it against you.

She received a letter from the Union advising her that Local 428 had sanctioned the Teamsters strike, and she knew of pickets appearing at the store. She does not remember when pickets appeared, but "we were one of the last stores to get picket lines." She worked during the strike until picket lines appeared and, when pickets first appeared, she called Zink on the telephone and said she did not want to cross the picket line. She called the first week to get her schedule, but did not call thereafter. She drove to the store every day or every other day to check for the presence of pickets, and they were always there when she checked. She heard informally that the sanction had been lifted, and also received a letter to that effect from the Union. Shortly after she first heard, she called Zink on the telephone and asked for her schedule. He said she had been terminated, because she did not work on two or three dates when no pickets were present. No one from management ever told her she had to check her work schedule during the strike, or that she had to check for pickets when she was scheduled to work, or that she could be discharged if she did not work as scheduled when no pickets were present. No one from management called her during the strike to advise that no pickets were at the store, or to ask her to come to work. She advised the Union of her termination, and a couple of weeks later attended a meeting at the Union concerning her discharge. A few weeks later she attended a second meeting at the Union, at which Zink also was present. She testified, "Well, they [later explained as representatives of the Food Employers Council] asked to have a voluntary quit put on my record rather than a termination."

On cross-examination, Niswonger testified that she filed a claim for sick leave taken in August 1978. She would not have worked during the sanction, even if no pickets were present. Claudia Wallace, a union representative, suggested, at the second meeting relative to her discharge, that Niswonger be considered a voluntary quit rather than a dischargee, and Respondent later agreed to that suggestion, by letter. Before going to the meeting, she suggested to the Union that she be considered a voluntary quit, and at the time of the meeting she was employed at a store of an employer other than Respondent. Backpay never was discussed.

Zink testified that pickets first appeared at the store during the week of August 14 or 15, and picketing was continuous thereafter for approximately 2 weeks. After 2 weeks picketing was very sporadic, and on some days no pickets were present. There were no pickets on August 29 and September 5. He worked 12 to 14 hours each day of the strike. Approximately a week before the strike he talked with Niswonger:

> Okay. I explained what I felt were their rights. I told them that if they came to work and there was a picket line out in front of the store, then they would have to make a decision on what they were going to do. But, they were to report to work every day as scheduled. If there was no picket line at the store, they were to come to work and complete their shift. And primarily just explained, basically, what I felt their rights and obligations were.
>
> Q. What was her response?
>
> A. She said that she understood.

Zink denied stating to Niswonger that he would need to know in advance whether she was willing to cross the picket line. He called Niswonger on the telephone August 9 because she was not at work as scheduled, and no pickets were present. Niswonger later called back and said she would not come to work because she could not get a babysitter. He told her she would be discharged if she did not work as scheduled in the future. She worked August 11 and 12, as scheduled, when there were no pickets, but did not work thereafter, as scheduled. She did not work as scheduled on August 29 or September 5, when there were no pickets. She was discharged after not working on September 5, and papers were sent through regular channels for the discharge. No termination notice was sent to Niswonger. He advised her on the telephone, September 9 or 10, that she had been discharged. During the first week of picketing he talked with Lou Menacho of the Union, at which time 10 to 15 employees were present. Several employees asked Menacho questions concerning the definition of a bona fide picket line, and their obligations. Menacho defined a

picket line as not including pickets sitting down in front of the store, and not including pickets present at some entrances but not at others. Further, Menacho stated:

> He said they were obligated to report to work every day that they were scheduled. He said that if there were no pickets, they were obligated to go inside the store and work their shift. He said that if they got inside the store and they were working and pickets showed up, they were obligated to complete their shift. And he said that if they failed to do so, it could result in their termination.

Zink attended a board of adjustment meeting at the union hall on October 3. Also in attendance were representatives from the Union and the FEC, Niswonger, and others. Zink said Menacho stated that he had told employees they were obligated to report to work as scheduled, and if no pickets were present, they were obligated to report for work. Menacho agreed that he had made such a statement. Union representatives asked if Respondent would consider changing Niswonger's discharge to a voluntary quit, and Respondent's representatives agreed to the change. Nothing was said concerning Niswonger's right to refuse to work in the absence of pickets.

The store manager prepared all work schedules, and Zink reviewed and approved them. The store had approximately 50 employees, and some employees were on duty 24 hours each day, on various shifts. Only 2 or 3 employees other than Niswonger honored the picket lines. Absence of pickets was verified by Zink's personal observations, and through reports of employees to Zink. Only one schedule was maintained during the strike. If an employee did not report for work, a replacement was called in. Niswonger was not discharged for refusing to cross a picket line.

Menacho testified that he talked with Zink during the sanction, and that no employees, or anyone else, was present:

> Well, Terry was complaining about the Teamster pickets. They were making noise. He claimed that they were drinking beer and wanted me to talk to them and then he asked me what was a bona fide picket line, so I—We got into a discussion on that. I told him that as long as there was somebody out there with a picket sign either in their hand or near by, that as far as I was concerned, that was a bona fide line.
>
> Q. Do you recall anything else being said?
>
> A. He asked me if there were no pickets out there, did the people have to come to work and I said that it was their option. That if there weren't any pickets there, we preferred that they didn't go to work. It was their option to go to work or not.
>
> Q. Did you tell him that if pickets were sitting down that employees could enter through the back door?
>
> A. No.
>
> Q. Did you tell him that the employees had to go to work if there were no pickets?
>
> A. No.

Menacho testified that at the second board of adjustment meeting Zink "tried to say that I told him that the members were obligated to go to work if there were no pickets at the store," and Menacho said "that wasn't true."

Scott Shields, head clerk of store 523 at times relevant herein, corroborated Zink's testimony concerning the nature and times of picketing. Shields testified that a group of approximately 10 employees talked with Menacho at the store early in the strike. Zink also was present. The employees asked Menacho about their status during the strike, about requirements of a bona fide picket line, and about the possibility of being fined. Menacho replied:

> If there is no picket line, we are obligated to work. In essence, we were supposed to be there. Other people asked questions as well, one to define what a picket line was and to what degree, as far as—he was stating that if there is a picket at the front door and not at the back door you can go in the back door, that would be up to you.

Thereafter, Shields stated, "a lot of the people seized that opportunity to work." Menacho denied that Shields was present when he talked with Zink.

Discussion

Niswonger seemed to have a poor memory, and was not a convincing witness. Zink appeared quite straightforward and impressive, and to the extent that their testimony differs Zink is credited. It is found that Niswonger did not report for work on August 9 and 29, nor on September 5 as scheduled, and that no pickets were present at the store when she was scheduled to work.

Zink did not testify concerning Niswonger's testimony relative to her quitting rather than being discharged, but regardless of that testimony, it is apparent that Niswonger was discharged, and the legal issue is considered below on that basis.

Zink was a more credible witness than Menacho. Zink's testimony concerning Menacho's statement was convincing, and was corroborated by Shields. Zink and Shields are credited on this point. It is further noted that many employees at various stores worked during the sanctioned period, yet were not fined by the Union. The inference is strong that some of them entered through nonpicketed doors, even during picketing at other doors.

The credited testimony of Chris Anderson on this point is revealing. She credibly stated:

> Q. Did you follow any practice with respect to reporting to the store during the strike?
>
> A. Yes, I phoned into my store to talk to either my store manager or the man in charge, to inquire if there were pickets there, or I would drive down there. I live real close to my store. I would drive to the store and see if there were pickets up or not.
>
> Q. Could you explain to the Administrative Law Judge why you did either of those things?
>
> A. Well, I did not want to cross a picket line, but I wanted to work. I wouldn't have worked if there were pickets up. So I wanted to make sure that

they weren't there when I was supposed to go to work.

Q. When you drove to the store, what, if anything, would you do?

A. I usually would just drive right into the parking lot and, if no one was up front, then I would drive around to the back and see if there were pickets in the back, which there weren't—I think we hardly ever had any pickets in the back—and then I'd just park and go to work if there was no one there.

Florence O'Day: At times relevant herein, O'Day, a member of Local 428, worked as a flower woman at Respondent's store 509 on a part-time, regular schedule. The store manager was Peter Jiminez and the assistant store manager was Randy Rose.

O'Day testified that she received a letter from the Union notifying her that Local 428 had sanctioned the Teamsters strike. Thereafter, she had a conversation with Jiminez, and told him she did not want to come to work during the strike because she was afraid of violence. Jiminez said it was her choice, whether or not she came to work. There were pickets at the store that day, and she did not come to work thereafter. She was new in the Union and did not know what she was supposed to do. Her fellow employees told her she should check at the store to see if pickets were present, even if she did not come to work. Thereafter, she checked for pickets each day before she was scheduled to go to work, personally or by telephone, for the first couple of weeks. She then began checking only once or twice each week. Pickets always were present when she checked. No one from Respondent's management or from the Union told her she could be discharged if she did not work as scheduled when no pickets were present. No one called her from the store to tell her no pickets were present or to ask her to come to work. On September 9 she received a letter from the Union dated September 8, 1978, advising that the sanction had been lifted, but she did not report for work the following Saturday, for which she was scheduled. She reported for work as scheduled the following Monday, September 11, and Jiminez told her, "You are terminated on a technicality," but he did not explain. She said she would report the matter to the Union, and he said, "Go ahead. Maybe they'll get your job back for you." She went to a meeting the end of September, attended by several employees, union representatives, and members of the FEC. All the discharges were discussed. She attended a second meeting a week or so later, at which the same general group was present, plus the store managers involved, including Jiminez. Jiminez stated at the meeting that she was discharged August 21 because the picketers were at an 8 o'clock coffeebreak when she was scheduled to work. She attended a third meeting a week or so later, at which the discharged employees and union representatives were present. Respondent's offer to reinstate the employees without backpay, provided the employees unanimously agreed, was discussed and approved. After the meeting Rendon said she was going to seek the assistance of the NLRB, and all the employees decided to do the same.

On cross-examination, O'Day said she does not know who she talked with when she called the store to ask about pickets; she never talked with Jiminez on the telephone. She said she would not have worked when she called in, even if pickets were not there, since it was a sanctioned strike. She did not go to the store on September 6, 8, or 9, which were regularly scheduled days for her, nor did she call the store on those days. There were other days on which she neither went to, nor called, the store.

Jiminez testified that he was on vacation during the beginning of the week of August 12, and when he returned to the store there were no pickets. During the following week, August 14–19, pickets were present most of the time. None were there on Saturday of that week. The following week picketing was sporadic, and no pickets appeared the last 4 days of the week. A few pickets were present early in the week ending September 2, but none were present "towards the end of the week." The following week, beginning September 5, no pickets were present. The department head prepared all work schedules, and Jiminez reviewed and approved them. There was no separate strike schedule; strike replacements were listed on the schedules with regular employees. Schedule patterns were not changed during the strike. Preparing, approving, and posting of schedules were the same during the strike as prior to the strike. O'Day did not report for work during the strike. Randy Rose, the department head, and Ernie Mock, the produce head and O'Day's supervisor, advised Jiminez almost daily that they had not heard from O'Day. Sometime during the course of the week of August 19 he talked with Menacho and Soares of the Union, and Menacho asked Jiminez if anyone had walked through the picket line. Jiminez said no, that no pickets were present when the employees came to work that morning. Menacho said employees were obligated to come to work if they were scheduled and if no pickets were present. Menacho also said that a checker, Claire Barnum, told him she had come through the back door when no pickets were there, and that he told her she could come to work if there were no pickets at the back of the store. Jiminez' knowledge of picketing was based on personal observation, and reports of employees. Jiminez prepared O'Day's termination notice based on her written schedule, and talked with her on September 11. He told her she was terminated because she did not work as scheduled when there were no pickets. O'Day was scheduled to work on September 8 and 9, after the sanction was lifted, but she did not come to the store or call in. Employees could, and regularly did, call on the telephone to get their schedules. Jiminez said on cross-examination that he did not remember talking with O'Day about strike violence, or about anything else. He testified that he may have told O'Day that he really did not want to discharge her, but that he did not remember saying anything about a "technicality" concerning her discharge. He said he attended a board of adjustment meeting concerning O'Day's discharge, and there gave the reason for the discharge. Of the store's 47 employees, approximately 40 worked during the strike. Prior to O'Day's dis-

charge, but after the strike sanction was lifted, District Manager Donald Vadnais had instructed Jiminez that anyone who failed to report as scheduled, when there were no pickets, should be discharged.

Rose testified, and generally corroborated Jiminez.

Menacho testified that he and Soares visited Respondent's store 509 in August 1978 and spoke with Jiminez, who asked Menacho if the Union was going to do anything about an employee named Claire (Barnum). Menacho replied:

> I said if somebody saw her cross a picket line, then it would be up to the individual to cite her to the executive board and then they would take whatever action they deemed as necessary. As far as I was concerned, I didn't see her cross the picket line, so there was nothing I could do to her.
>
> Q. Did you say anything further about her or her working at the store?
>
> A. Not that I recall.

He denied telling Jiminez that if no pickets were present employees were obligated to work, denied asking Jiminez if anyone had crossed the picket line, and denied asking Jiminez if there were any pickets at the back door. He does not know why the sanction was lifted, although part of the reason was that the employees had been out of work for a long time. He thought the striking Teamsters who were doing the picketing "did a fairly good job with the people they had." The lifting of the sanction had an adverse impact on the Teamsters strike, and was a politically charged, highly sensitive action. He told employees that if there were no pickets when they came to work, they could go to work and finish their shift, even if pickets appeared during the shift. Menacho said he knew some union members worked behind picket lines, and a "large number" of them, approximately 100, were fined by the Union for that reason. One of the reasons he visited stores was to ascertain if some union members were working behind picket lines; he checked approximately 20 Alpha Beta stores (all of them) during the sanction period.

Soares, who was secretary-treasurer of Local 428, testified that he was with Menacho when they talked with Jiminez, but that he does not remember the conversation, although Menacho did most of the talking, which was "noncontroversial."

O'Day's termination notice shows that she was discharged for "Discontinued reporting for work" on August 20 to 26, and August 27 to September, when no pickets were on duty.

Discussion

O'Day was terminated for failure to work as scheduled, when no pickets were present. Details of the discharge generally are not in dispute. The legal issue created by the facts is discussed below.

Soares' testimony adds little, if anything, to the testimony of Menacho. Jiminez testified that Menacho told him that if they were scheduled to work and no pickets were present, employees were obligated to come to work during the sanction. Menacho denied Jiminez' testimony on this point. As discussed above, Jiminez' testimony on this point is corroborated by other witnesses, and is credited.

The legal issue raised by the discharge is discussed below.

Linda Parrette: At times relevant herein Parrette, a member of Local 428, worked at Respondent's store 533 as a bookkeeper. She was on a regular schedule, 6 days each week, Monday through Saturday. Her starting times were 12 a.m. Monday, and 4 a.m. Tuesday through Saturday. The store manager was Harvard Holley, and the assistant store manager was Larry Moots.

Parrette testified that she learned informally of the sanction of the Teamsters strike by Local 428 during the evening of the sanction, and later was so advised by a union letter sent to her in the mail. She talked with Moots the following day:

> I told him that we had been notified that the strike had been sanctioned, and that we were told that when we finished our work shift, to leave and honor the pickets. And I told him that since I was going to be off the next day, the weekend and Monday, that I would call him Monday evening and check as to what the status was of the strike.

When she returned home Monday evening, she called the store and told someone, whom she does not remember, that she would not cross a picket line. Thereafter, she refused to cross the picket line until the sanction was lifted. She checked with the store by telephone to see if pickets were there each day or every other day during the sanction, and never was told that no pickets were present. On Friday, after the sanction was lifted the preceding day, she talked with Holley on the telephone and asked for her schedule, and Holley told her that she had been discharged "because I had not come to work during the strike." Holley said nothing about pickets not being present on days she was scheduled to work. No one in management or the Union ever told her she was obligated to check for pickets on scheduled workdays, or that she could be discharged for not working as scheduled when there were no pickets. No one from management called her during the sanction to tell her no pickets were present or to ask her to come to work. She informed the Union of her discharge, and attended a meeting approximately the end of September. Present were three discharged employees and union representatives. She never received a termination notice. She attended a second meeting concerning her discharge in October. Present were discharged employees, union representatives, a member of the FEC, and Holley. They discussed her discharge. A third meeting was held the end of October at the union hall, attended by discharged employees and union representatives. The employees were informed of Respondent's offer of reinstatement with benefits but without backpay, and there was much discussion of the offer, which had to be accepted unanimously, if at all. One employee discussed the possibility of going to the NLRB with the problem of the backpay.

Holley testified that pickets first appeared at the store at approximately noon on Thursday, August 10. Picket-

ing that week was intermittent, the pickets arriving anytime between 8 a.m. and noon, or sometimes not at all. Picketing was less frequent and more sporadic the second and third weeks of the strike. He worked 10 to 14 hours each day. The last day Parrette worked was Thursday, August 10. She was scheduled to work Friday, August 11, but did not do so. She called in and asked about pickets, and he told her that pickets were there, that she was required to report to work as scheduled, and that her schedule would remain posted. Parrette had said she had no intention of working, and would see Holley "when the strike was over," which prompted Holley's remarks. Parrette did not report for work the weeks of August 19 and 26, or for a day she was scheduled during the week ending September 9. He prepared Parrette's termination notice, and when she called in on September 8 he advised her that she had been terminated because she failed to report to work as scheduled when there were no pickets. Another employee, Sue Trujillo, took over Parrette's duties during the strike. Based on his personal knowledge and reports of employees, Parrette did not call the store during the strike, except on two occasions to ask about pickets. Holley's knowledge of the presence of pickets was based on personal observation and reports of employees. All except three of the store's employees refused to cross picket lines. He attended one board of adjustment meeting in late September at which Parrette, union representatives, and a Food Employers Council representative were present. He explained at the meeting that Parrette was terminated because she did not work as scheduled when no pickets were present. Holley denied that he ever said to Parrette, or anyone else, that Parrette was discharged because she failed to work during the strike or refused to cross picket lines.

Discussion

There is little discrepancy between the testimony of Parrette and Holley, but to the extent there is any, Parrette is credited.

Holley's testimony concerning the absence of pickets until 8 o'clock or so in the morning and their sporadic picketing and occasional total absence is consistent with the nature of picketing at all stores involved in this controversy, was corroborated by Trujillo, and is credited. It is clear that Parrette could have reported for work on several occasions at her regular shift time in the absence of pickets. Holley's testimony that Parrette did not work on the days named in the termination notice, and that she could have reported on those days before pickets came on duty, is credited. However, that fact does not control the issue, as discussed below.

Regardless of whether or not Holley told Parrette she had to report to work each morning as scheduled, the fact remains that she did not report on days when no pickets were present at reporting time, and it is that fact which must be considered in settling the legal issue involved, rather than what Holley may have said Parrette must do.

Ralph Ramirez: At times relevant herein, Ramirez, a member of Local 428, was employed at Respondent's store 516, as a part-time courtesy clerk. The store manager was Christopher Parnello and the assistant manager was Gregg Powell. Ramirez received a letter from the Union informing him that Local 428 had sanctioned the Teamsters strike.

Ramirez testified that on the first day he was scheduled to work after the strike was sanctioned he talked with Powell and told him he could not cross the picket line. Powell replied, "Fine, it was all right." Thereafter, he did not work during the strike, but checked the work schedule, as instructed by Powell. Approximately 3 or 3-1/2 weeks after the strike started, Ramirez talked with Parnello and asked for 2 days off to visit relatives, and Parnello said "that'd be all right, be fine." He either went to the store, or called on the telephone, every day he was scheduled to work. On three or four occasions when he went to the store he saw no pickets, but did not report for work because he was "honoring the strike." He talked with Powell 2 or 3 weeks after the strike began:

> He said that if I wanted to work, they could, you know, they could let me in through the back door or I could just walk into the front, that they wouldn't recognize me.
>
> I told him, well, I can't work because I'm honoring the picket line; and he goes, well, all right.

He was informed on a Saturday by letter from the Union that the sanction was lifted, and he reported for work the first day he was scheduled to work thereafter, on a Monday (September 11). Parnello told him he had been discharged for not reporting to work on the preceding Friday, and Parnello did not give him an opportunity to explain that he did not get the letter from the Union until Saturday. No one called from the store to tell him that the sanction had been lifted, or that he was scheduled to work. No one from the Union told him it was his obligation to check for pickets. No one from management or the Union told him he could be discharged for not working as scheduled when no pickets were present. No one from management called him during the strike to advise that no pickets were present, or to ask him to come to work. He informed the Union of his discharge and attended a meeting in October, also attended by another employee, and by Parnello, a lawyer from Respondent, and two union representatives, at which his discharge was discussed. He attended another meeting approximately 2 weeks later at the union hall. Also in attendance were other employees who had been discharged and two union representatives. Respondent's offer of reinstatement without backpay, provided acceptance was unanimous, was discussed. Also discussed was the possibility of seeking backpay through the NLRB.

On cross-examination, Ramirez testified that he left his house on Friday to visit relatives out of town, and prior to leaving, had not heard that the sanction was lifted. His schedule nearly always was posted on Saturday, and he does not remember whether or not he checked his work schedule for the week of September 3, or whether or not he was scheduled to work on Friday or Saturday,

September 8 or 9.[34] In any event, he knows that he was scheduled to work on the Friday (September 1) before he was terminated.

Parnello testified that he usually prepared the store's work schedules, but if someone else prepared them, he always approved them. He posted the schedules himself every Friday. When he returned from vacation August 9 pickets were present at the store. They were there "constantly" for approximately 10 days and, thereafter, picketing was very sporadic. No pickets were present from Thursday afternoon, August 31, until Tuesday, September 5. Thereafter, picketing again was sporadic. Ramirez usually worked on Fridays and Saturdays, and two other days during the week. Another employee, named Greco, told Parnello that Ramirez had agreed to work part of her shift on Saturday, September 2, in addition to working his own shift. (Ramirez denied having made this arrangement.) Ramirez did not report for work on September 2, and no pickets were present on that day. Ramirez was scheduled to work Friday and Saturday, September 8 and 9, but did not report on either day. He called Ramirez on the telephone on Friday, but there was no answer. He called again on Saturday, and was told that Ramirez was out of town. He never talked with Ramirez about the latter taking time off, other than on one occasion prior to the strike. When Ramirez came to work on Monday, September 11, he was discharged for not coming to work on Friday and Saturday, September 8 and 9:

> I was waiting for Ralph at the time clock, because I didn't want him to punch in when he came to work, because I was going to terminate him. I had his termination all prepared. When he came in, I told him that he was terminated. I told him why. He challenged that. I explained to him. He, also, said that he hadn't heard about the sanction being lifted, because he was out of town. I asked him why he was out of town. He said, because I wanted to see my grandparents. And then he said—And then I said, why didn't you show up for work last Saturday? He said, well, I just didn't. He says, I was out of town, then, too. I explained to him that Kathy Greco had said that she was going to work for him and that he had said, okay, and asked him why he changed his mind.
>
> He said, because I decided to go out of town instead. And that was basically the extent of the conversation. I got him to sign the termination and that was it.

When he prepared Ramirez' termination notice, he relied on the work schedules, and he showed the notice to Ramirez, although he did not give him a copy since it was a document for management use. All of the store's regularly scheduled employees, other than Ramirez, returned to work on September 8 and 9. Approximately half of the employees honored the picket line during the strike. Parnello said he talked with Menacho about August 20:

> . . . I approached—Well, he was in the store. I approached him. I was working in the meat department that day. I approached him when I saw him in the store. I started talking to him as normal and I told him about the lousy picketing going on. And asked him about, what is a picket line and he explained to me that if they can't put up a decent picket line and they're not at the door when they first show up for work, then let your folks come to work.
>
> Q. Did he say anything else?
>
> . . . .
>
> THE WITNESS: He said that if there wasn't, what he considered a bonafide picket line, if there weren't pickets at every door, any door that was uncovered would be—For example, we didn't have any pickets at the back door, ever. He said, let your—come through the back door.

On cross-examination, Parnello testified that he discharged Ramirez for not working on September 8 and 9 and on the previous Saturday, September 2.

Menacho testified that he talked with Parnello during the strike, but only in "generalities." He denied telling Parnello that if the Teamsters could not put up decent picket lines, the employees could go to work through the back door.

Discussion

Neither Parnello nor Ramirez was a totally convincing witness, but between the two Parnello appeared more credible than Ramirez. To the extent that their testimony differs, Parnello is credited.

Menacho was not a convincing witness. To the extent that their testimony differs, Parnello is credited over Menacho. The Union's and Menacho's attitude toward the picketing is illustrated by the testimony of Pamela Scott, discussed elsewhere, and the testimony of Chris Anderson, who stated:

> Q. Did you receive any instructions or any information from someone at the union when you called that first time?
>
> A. They told me to call in or report to work to see if I was scheduled to work and that I was expected to work if there were no pickets.
>
> Q. Do you know who you spoke to?
>
> A. No, I don't.

Ramirez was discharged because he did not report for work for 2 days after the sanction was lifted, which would appear to place him in a category different from employees who were discharged because they did not work as scheduled during the sanction in the absence of pickets. However, Parnello testified that Ramirez also was discharged because he did not work as scheduled on September 2. That date was not included in the termination notice, but it is apparent from Parnello's testimony that the date was considered when the discharge was effected. Therefore, Ramirez' discharge must be considered in the same fashion as those employees who were

[34] Ramirez later testified that he did remember checking the schedule, either on Friday or Saturday, September 1 or 2.

discharged for not working during the sanction. The legal issue thus presented is discussed below. Ramirez' testimony that he would not work even in the absence of pickets, while the sanction was in effect, is credited.

Terry Rendon: Rendon first started working for Respondent at store 511 in 1976, and during times relevant herein worked at store 549 as a journeyman clerk under Store Manager Vincent Spanno and Assistant Manager Michael Lamb.

Rendon testified that she learned by letter dated August 9, 1978, which she received from the Union, that Local 428 had sanctioned the Teamsters strike. On August 10 she was informed by a fellow employee that pickets then were present at the store, and that same day she called Lamb and told him she was not coming to work that day because of the presence of pickets. Later the same day she and two fellow employees went to the store to get their paychecks, and talked briefly with Spanno, but did not go to work. Thereafter, Rendon did not work during the sanction of the strike by Local 428. She called the store each Friday to check the schedule, and spoke to "the person in charge." When she called approximately the third week of the strike, she spoke with Mike Alexander, the head clerk, who told her "that there was no schedules, that he only had schedules for the scabs." She checked for pickets when she was scheduled during the strike before her shift or shortly thereafter. She learned of the sanction being lifted on the day it was removed, and she received a letter from the Union advising her of that action. She reported for work the following day and asked Spanno for her schedule, and he said she had been terminated. No one from management or the Union ever told her that she was subject to discharge if she did not work when there were no pickets, and no one from management called her during the sanction and asked her to come to work. She received a notice of discharge. She advised the Union of her discharge, and attended a meeting concerning the discharge, the end of September. Other employees, union representatives, and representatives of Respondent were there. They talked about discharges of several employees, and about the reason for the discharges. She attended a second similar meeting a week or two later, at which those present argued among themselves concerning the presence or absence of pickets and related matters. She attended a third meeting relative to her discharge on October 25, at which only discharged employees and union representatives were present. McLoughlin stated that there was an offer from Respondent to reinstate the employees on their former schedules, with seniority, but with no backpay, but only if there was unanimous agreement among the employees to accept the offer. Rendon already had gone to the NLRB prior to the meeting, and a representative advised her to return to work without backpay if necessary, since she could "keep going on further" with her claim for backpay, through the NLRB. She then filed a charge with the NLRB. A fellow employee, Richard Hutson, was with her at the time. The employees talked and argued among themselves, and Rendon told them about her advice from the NLRB. She then called the NLRB to ask if other employees could follow the same course recommended to her, and the answer was yes. She so informed the other employees, whereupon all of them agreed to accept the offer.

On cross-examination, Rendon testified that she worked on August 9, and that pickets appeared at the store after she began working that day. Thereafter, she checked the store for pickets on each morning she was scheduled to work. She had been told by union representatives that the Union had no objection to her working if there were no pickets.

Spanno testified that pickets first appeared at the store on August 9, and picketing during the second and third week thereafter was very sporadic and inconsistent. The last time pickets were present was the day before Labor Day. He was present at the store 6 days each week during the strike, from 5 or 5:30 a.m. to 6 or 7 p.m. His observation of the irregular hours and days of picketing was confirmed to him by other employees. During the early part of the strike, employees asked about their obligation to work and he replied that, if pickets were not present, they should work their scheduled hours. During the second week of the strike he, Lamb, and Doug Michaelson talked at the store with Lou Menacho, a Local 428 business agent, and George Soares, a Local 428 representative. Lamb asked Menacho what a picket line was, and Menacho replied:

> His remark was that they had to have a picket at each door walking and if there wasn't any in the back door, the boys could come through the backdoor, if there wasn't any in the front they could come through the front. That was his definition.

Spanno asked Menacho about the employees' obligation to come to work, and Menacho replied that they were "responsible for coming to work scheduled shifts if there wasn't any pickets, that they had to go to work." On August 21 he talked with Rendon and another employee, in the office:

> . . . Terry Rendon was in the store with Hammond to pick up her check and I had the checks. I asked them why they hadn't been reporting to work and the remark from Terry Rendon was she wasn't going to cross a picket line. I informed them that at their scheduled times there were no pickets and that they had the responsibility to work those scheduled shifts.
>
> Q. Was there a response to that?
>
> A. Just yes. Terry said she wasn't working because there was a strike and that was it.
>
> Q. Did you say anything more?
>
> A. No, I did not.

On the dates shown on Rendon's discharge slip as work absences, no pickets were present at the scheduled starting times. Spanno attended the board of adjustment meeting during the first week of October, and explained that Rendon was discharged because she failed to report to work when there were no pickets. Rendon and other employees contended that pickets were present at their scheduled starting times. Nothing else was stated in de-

fense of absence from work. In August 1978 the store had from 50 to 55 employees, 45 of which were members of Local 428. Approximately 80 percent of the employees came to work regularly during the strike. Schedules were made up each week on the assumption there was no strike, and if employees did not come to work as scheduled, replacements were called in and their names incorporated with the regular schedule. There was no separate schedule for strike replacements. Rendon never called the store to check for pickets.

Lamb testified that he was a member of Local 428 in August 1978. He prepared work schedules for the store, and Spanno approved them. During the first week of the strike pickets were at the store all the time, 24 hours each day. During the next 2 weeks picketing was sporadic and irregular. Pickets arrived at 8 or 8:30 a.m., well after he arrived, and became fewer in number. Lamb personally observed the hours and irregularity of picketing. Lamb corroborated Spanno's testimony relative to their conversation with Menacho. He never talked with Rendon during the strike, and denied Rendon's testimony that he did. He kept a close watch on the pickets, their absence or presence, and made notes of their activity as instructed by Spanno. The only four employees who did not work in the absence of pickets were Rendon, Mitchum, Hutson, and Hammond.

Menacho denied the statements attributed to him by Spanno and Lamb.

Discussion

Spanno and Lamb were impressive witnesses, and they are credited. It is found that Rendon did not work as scheduled, when pickets were present at the store, and that she was discharged for that reason. The legal issue relative to these facts is discussed below.

So far as the conversation with Menacho is concerned, Spanno and Lamb are credited.

Pamela Scott: Scott, a member of Local 428, worked at Respondent's store 519 during times relevant herein as a checker on an irregular schedule that changed each week. Her store manager was Mariano Capodiece and the assistant manager was George Chatfield.

Scott testified that she learned about the strike while on vacation in Los Angeles, and called Capodiece on the telephone. Capodiece said employees were coming to work through the back door when pickets were at the store. When she returned home she had received a letter advising her that Local 428 had sanctioned the Teamsters strike. She went to the store as scheduled on August 16, but saw picketers and returned home without reporting to work. She did not work thereafter during the sanction. She learned, informally from news media and formally by letter from the Union, that the sanction was lifted. She immediately called Capodiece on the telephone, who said she had been terminated for not coming to work, and who also said no one had heard from her since the first day she called. She replied that she was under the impression it was a sanctioned strike and employees were not supposed to go to work. She received a letter from Richard Hinshaw, Respondent's director of labor relations, northern California division,[35] notifying her of her termination. No one from management or the Union told her that if she did not work as scheduled when there were no pickets she could be discharged. No one from management called her during the strike to advise her that no pickets were present or to ask her to come to work. She attended a board of adjustment meeting in early September, also attended by representatives of the Union and Respondent's management, at which her discharge and surrounding circumstances were discussed. She attended a second meeting of union representatives and employees who had been discharged by Respondent. Those present discussed Respondent's offer of reinstatement with no penalties and no backpay, but with seniority, provided the employees unanimously agreed to return to work. The employees were angry, but decided to accept the offer and pursue their backpay claims through the NLRB.

On cross-examination, Scott said she called the Union from Los Angeles when she heard about the strike, and someone, whom she could not identify, told her "if picketers are there, you are not supposed to report in. If there are no picketers there, you are supposed to report in." Shortly thereafter she called Capodiece, but did not ask about her schedule since she still was on vacation. She later called the Union again, and was told "it was a sanctioned strike." She never went to the store after the first occasion on August 16, but she called the store on one occasion only to see if she was scheduled to work the following day, and was advised that she was. She did not report for work that day as scheduled. She did not know that she was scheduled to work on August 17, 18, and 19.

Capodiece testified that Scott went on vacation in mid-July and was scheduled to work August 16, 17, 18, and 19, but she did not report for work on those days. During those 4 days pickets were present, but on a sporadic basis and not when Scott was scheduled to work. Scott was scheduled thereafter to work the weeks of August 26 and September 2. He prepared Scott's termination notice, and he personally knew no pickets were present on the days shown on the notice, when Scott was scheduled to work. When Scott called and talked with him, he told her she was scheduled to work at 4 p.m. August 16, and that she was supposed to report for work then, if no pickets were present. She did not report as scheduled, or call in. Other employees who were union members reported to work on the same shift Scott was scheduled for, and those employees told Capodiece that no pickets then were present.

Capodiece's testimony relative to the sporadic nature of the picketing, and related matters, credibly was corroborated by Chris Anderson, the store's bookkeepker at the time.

Discussion

Scott and Capodiece agree that Scott did not come to work or report for work on days she was scheduled to work. Capodiece's testimony that no pickets were

[35] G.C. Exh. 12.

present on those days and that other employees who were union members did report to work on those days is credited.

The legal issues involved in Scott's termination are discussed below.

Craig Wroblewski: Wroblewski, a member of Local 428, worked at Respondent's store 517 at times relevant herein on an irregular schedule under Store Manager Martin Falkowski and Assistant Store Manager Frank Perry. Wroblewski testified that he learned that Local 428 had sanctioned the Teamsters' strike by calling the Union the day of the sanction, and by letter received from the Union a couple of days later. He first observed pickets at the store on August 14. He went to the store that day, but did not report for work. Thereafter, he did not work during the sanction. On August 18 he and other employees asked Falkowski why two schedules were posted, and Falkowski replied that one was a strike schedule and one was a nonstrike schedule. The employees asked if they must check their schedules every week, and Falkowski replied that they did not have to come to the store, since the schedules would be the same each week. Wroblewski's schedule was somewhat different on the two posted schedules. He went to the store "most every day," at approximately 7 or 8 a.m. and talked with the picketers from 10 minutes to an hour. Pickets were present each time he checked. The day the sanction was lifted, Falkowski called him on the telephone:

> Well Martin—he said "This is Martin from Alpha Beta." And he asked me if I knew that the sanction had been lifted at four forty-two or something like that today. And I said no, that I didn't.
>
> And he said "Well it doesn't matter anyway because I've terminated you for not showing up for work during the strike." And he said if you have any further questions call Local 428.
>
> Q. Was anything else said?
>
> A. I don't remember.
>
> Q. Did he make any reference to specific days?
>
> A. Oh, yes. He said something like on August 11th and on September 7th or something—I don't remember what days. He gave like three different days that he said I didn't show up for work. And that there were no pickets there.

No one in management or the Union told him that he should check his work schedule during the strike, that he should check for pickets on days he was scheduled to work, or that he could be discharged if he did not work as scheduled if no pickets were present. No one from management called him during the strike to advise that no pickets were present, or to ask him to come to work. He informed the Union of his discharge and a week or two thereafter attended a meeting at which terminated employees, union representatives, and representatives from the Food Employers Council were present. The discharges and attendant circumstances were discussed. Approximately 2 weeks later he attended a second meeting with the same people, plus managers of stores from which employees had been discharged. The same matters were discussed. A week or two thereafter, discharged employees met with union representatives at the union hall. They discussed Respondent's offer of reinstatement without backpay, provided the agreement to return was unanimous. The employees agreed to the offer, and decided to pursue their claim for backpay through the NLRB. Wroblewski already had talked with NLRB representatives on the telephone about the problem. On cross-examination, Wroblewski testified that even though he checked for pickets almost every day he would not have worked during the sanction, even had no pickets been present. He did not check for pickets on September 3. He did not come to the store or call on Friday, September 1. He was told by union representatives that he could work if no pickets were present, if he wanted to.

On redirect examination, Wroblewski testified that he would not have worked even in the absence of pickets, because it was a sanctioned strike. He believed he was "protected" if he did not work in the absence of pickets, because the strike was sanctioned by Local 428. Someone from the Union, whom he cannot identify, told him he would not be fired if he did not check for pickets. He denied receiving any correspondence from Respondent during the strike.

Falkowski testified that he was a store manager during the 1973 meatcutters strike, and the managers were told by Respondent's labor relations representatives prior to the strike that retail clerks were obligated to work in the absence of pickets; if pickets appeared while employees were on their shift, they had the option of finishing the shift, or leaving. Managers were advised in 1978 that the policy of 1973 still was in effect. The first picket in 1978 appeared on August 10, and picketed singly. Organized picketing commenced August 14 at 11 a.m. Thereafter, picketing was around the clock, except for a few days. Wroblewski was scheduled to work Friday, August 11, from 1 to 10 p.m. He punched in at 1 a.m., punched out for lunch at 5 p.m., and never returned to work. Falkwoski worked the entire day, and went home at 6 p.m., as always. No pickets were present during the entire day of August 11. Falkowski testified:

> . . . I called him the following day when I became aware of the fact he didn't return to work. I asked him why he didn't return to work. He said, well, there's a strike. And I informed him that if there are no pickets then he is obligated to work his scheduled shift, and informed him that if pickets showed up while he was working, then yes, he could go home if he felt so inclined. But there were no pickets that day.

Wroblewski was scheduled to work at 10 a.m. on August 14, but did not report for work. Pickets appeared at 11 a.m. Falkowski came to work at 7 a.m. and personally checked for pickets. On August 21 Wroblewski was scheduled for work at 9 a.m. Pickets did not arrive until 10:10 a.m., based on Falkowski's personal observation. Wroblewski arrived at 10:30 a.m. and talked with the picketers. Falkowski asked why he did not report for work, and Wroblewski replied that he was there in the morning and pickets were present. Falkowski said he had been there since 7 a.m. and there were no pickets. Fal-

kowski then said Wroblewski was subject to discharge if he did not report for work as scheduled if no pickets were present. On September 3 Wroblewski was scheduled for 8 a.m., but did not report to work. Pickets appeared at 8:20 a.m. Falkowski attempted, without success, to reach Wroblewski by telephone on September 5. He finally reached Wroblewski on September 6 and told him he was terminated as a voluntary quit because he failed to report to work for 3 days.

On cross-examination, Falkowski testified that his knowledge of the presence of pickets was based on personal observation and verification of employees' reports.[36] Falkowski prepared all regular schedules, and the department head prepared all schedules for replacements during the strike; separate schedules were maintained. The store had approximately 55 employees, of which approximately 25 to 30 continued to report for work even though pickets were present. Three employees other than Wroblewski were discharged for not working as scheduled when no pickets were present. Employees were to be discharged when they failed to report for work on three occasions; store managers were so advised by the district managers. Falkowski prepared Wroblewski's discharge, based on his own notes and work schedules.

Discussion

Falkowski was a firm, straightforward, and convincing witness. Wroblewski was not. To the extent that their testimony differs, Falkowski is credited. It is found that Wroblewski did not report for work as scheduled at times when pickets were not present, and that he was discharged for that reason. The legal issue is discussed below.

So far as past practice of Respondent is concerned (meatcutters strike of 1973), the issue involved is discussed below.

Issues and Discussion

A. *Possible Deferral to Arbitration*

Respondent argues that "Deferral to arbitration of the underlying contractual issues is appropriate."

It is first noted that the NLRB, in the exercise of its jurisdiction to hear and decide unfair labor practice cases, has jurisdiction to resolve questions of contract interpretation, regardless of the fact that some other forum, or an arbitrator, also could hear and decide the same contract issue.[37] The fact that contract interpretation is involved, does not, per se, oust the NLRB from the controversy. Respondent refers to the 8(a)(3) charges as possibly "bogus," but it is clear, as discussed herein, that those charges are not "bogus."

Respondent further argues that deferral of some issues would result in "an unwarranted bifurcation so as to cloud rather than illuminate those issues," and states that the issues easily could be framed for an arbitrator, resulting in an early decision. However, that argument is based on a self-serving conclusion not warranted by the record. First, Respondent apparently concedes that the issues are not limited to contract interpretation; several other matters are presented, including consideration of statutory principles. Second, this case does not involve an arbitrator's award—Respondent asks that the issues first be presented to an arbitrator, rather than to the NLRB. Thus, *Servair*[38] cited by Respondent is not controlling. There, the issue involved an arbitrator's award.

Under such circumstances, the question of deferral to future arbitration must be answered in accordance with principles adhered to by the NLRB. Under the *Collyer*[39] doctrine, as modified by *General American Transportation Corp.*,[40] the Board possibly may defer to contractual arbitration in cases involving alleged violations of Section 8(a)(5) of the Act, but not of Section 8(a)(3), which is involved herein. Further, as in *Amcar*,[41] the charges herein were filed by individual employees, and as in *Amcar*, a question is presented as to whether the position of Locals 428 and 1179 is aligned with that of the charging individuals. That question, involving possible waiver of a statutory right, has been discussed at trial, in briefs of counsel, and in this decision. Finally, as in *Amcar*, a question of statutory interpretation, as well as of contractual interpretation, here is involved.

In view of the foregoing, it is found that this controversy is one which properly should be decided by the NLRB, rather than being deferred for arbitration under the contract between the Union and Respondent.[42]

B. *Discharge of Employees Who Did Not Report for Work as Scheduled During Strike Sanction When Picketers WERE NOT Present*

This group of employees differs from the group of employees who did not report for work after the sanction was lifted. The latter group is discussed below.

Some essential facts are not in dispute, or are clear from the record. First, the Teamsters strike, at times relevant to this discussion, was a lawful, primary strike.[43] Second, picketing by the Teamsters was sporadic and inconsistent; there were times and days when no pickets were present at some stores. Third, Respondent and all of its employees were fully aware of the primary strike, its duration, its sanction by the Union, and Respondent's

[36] Falkowski's testimony was supported by his notes, made contemporaneously with events to which he testified.

[37] *NLRB v. Strong Roofing & Insulation Co.*, 393 U.S. 357 (1969); *NLRB v. C & C Plywood Corp.*, 385 U.S. 421 (1967).

[38] *Servair, Inc. v. NLRB*, 607 F.2d 258 (9th Cir. 1979), rehearing granted 624 F.2d 92 (9th Cir. 1980).

[39] *Collyer Insulated Wire*, 192 NLRB 837 (1971).

[40] 228 NLRB 808 (1977). See also *Roy Robinson Chevrolet*, 228 NLRB 828 (1977).

[41] *ACF Industries*, 247 NLRB 1056 (1980). The deferral portion of the administrative law judge's decision was not disturbed by the Board, although other portions were modified.

[42] As argued by the General Counsel in her posttrial brief, deferral would be improper under *Dubo Mfg. Corp.*, 142 NLRB 431 (1963), to an arbitrator pursuant to agreement of some of the union locals affected by this controversy, but not including Locals 428 and 1179, which said agreement was effected during a recess in these proceedings. Such a deferral would be untimely and, for the reasons discussed above, contrary to Board principles.

[43] Respondent's argument that the strike sanction was converted to a primary strike because some employees involved herein accepted strike benefits is found to be without merit.

contention that employees were expected to work when no pickets were present.

1. Right of employees to engage in sympathy strikes

The NLRB and the courts consistently have held that "[t]he right to strike, including the right to engage in sympathy strikes or refusals to cross other unions' picket lines, is a right guaranteed by the Act."[44] In a case frequently cited for the proposition that sympathy strikers are making common cause with those involved in a primary dispute, Judge Learned Hand listed sympathetic striking as concerted activity constituting mutual aid or protection, and thus falling within the protection of the Act.[45]

The statutory right to honor picket lines and engage in sympathy strikes may be waived,[46] but such waivers will be found only under stringent conditions.[47] Further, collective-bargaining agreements may provide that union members are not required to cross picket lines.[48]

The NLRB repeatedly has held that, since those who honor picket lines are making common cause with primary strikers, sympathy strikers of the same employer have the same status as the primary strikers.[49]

The NLRB and court cases do not draw a clear distinction between refusals to work and refusal to cross picket lines when considering the nature of protected sympathetic activity. For example, in *Lexington Shipbuilding Co.*,[50] the Board affirmed an administrative law judge's decision wherein he discussed staying away from work as a sign of sympathy for the strike, and refusing to cross a picket line, as though the two types of actions were synonomous.[51] In *Texas Foundries*,[52] the Board stated, id. at 1681, inter alia:

> . . . the work of these employees ceased as a consequence of and in connection with the then current labor dispute between the Union and the Respondent. It is further found that these employees, by identifying themselves with the Union and by ceasing to work during the strike, gave aid, support, and assistance to the Union and joined and made common cause with the strike and concerted activities of their fellow union members who were within the bargaining unit.

In finding a violation of, inter alia, Section 8(a)(1) of the Act for discharges of sympathetic nonunit strikers, the Board concluded (101 NLRB at 1683):

> It is no defense to the Respondent that the nonunit employees were not primarily and directly involved in the controversy that gave rise to the strike. Their refusal to come to work while the strike was in progress constituted an act of assistance to the labor organization conducting the strike, within the meaning of Section 7 of the Act.[53]

The basic law on this issue thus is clear. Whether the issue is framed in terms of a statutory right to honor picket lines, or in terms of a broad statutory right sympathetically to refrain from working during a strike whether or not pickets are present, the result is the same. The Board's repeated use of language to the effect that sympathy strikers may refrain from working, and may make common cause with the primary strikers "during the course of a strike" establishes that sympathetic strikers may refuse to work even though pickets actually are not present. The analytical key is the concept that sympathizers are making common cause with primary strikers; that cause would be defeated if the sympathizers were half-hearted, and struck only in the presence of the picket line.

Much trial time was devoted to testimony concerning the motives of employees. The General Counsel introduced testimony to establish that employees regularly checked their schedules and checked for the presence or absence of picketers. Employees and union representatives took the position, at adjustment board hearings and at trial, that picketers always were present, and that employees were fired because they refused to cross picket lines. That testimony was not material or relevant, if the General Counsel's view of the law of the case is correct, since under that view employees would not be concerned with whether pickets were present at the stores. In any event, as found above, it is clear that employees were fired because they did not report for work as scheduled when, as a factual matter, pickets were not present. On the other hand, Respondent introduced testimony to show that some employees failed or refused to work during the strike when pickets were not present for purely personal reasons, unrelated to the strike. The question thus is presented as to whether or not motive is relevant to this issue.

The Board long has held that motive for one's refusal to cross a picket line is not relevant to a determination of whether such refusal is protected activity under the Act. A leading case regarding this issue is *Montag Bros., Inc.*,[54] wherein the Board found that the motives of two nonunit women who refused to cross an unauthorized picket line and return to work were irrelevant (one had expressed fears of reprisal; the other had indicated her support for her husband, a union adherent). In *Texas*

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[44] *Amcar*, supra; *Teamsters Local 79 (Redwing Carriers)*, 137 NLRB 1545 (1962), enfd. 325 F.2d 1011 (D.C. Cir. 1963), cert. denied 377 U.S. 905 (1964); *NLRB v. West Coast Casket Co.*, 205 F.2d 902, 908 (9th Cir. 1953), enfg. 97 NLRB 820 (1951); *Montag Bros.*, 51 NLRB 366 (1943), enfd. 140 F.2d 730 (5th Cir. 1944).

[45] *NLRB v. Kohler Swiss Chocolate Co.*, 130 F.2d 503, 505–506 (2d Cir. 1942).

[46] Waiver principles are discussed below.

[47] *Keller-Crescent Co.*, 217 NLRB 685 (1975), enf. denied 538 F.2d 1291 (7th Cir. 1976).

[48] *NLRB v. Rockaway News Supply Co.*, 345 U.S. 71, 80 (1952). This principle is discussed below.

[49] *Pilot Freight Carriers*, 224 NLRB 341 (1976) (unfair labor practice strikers); *Cooper Thermometer Co.*, 154 NLRB 502 (1965) (economic strikers).

[50] 235 NLRB 578 (1978).

[51] See also, for such failure to distinguish, *Canada Dry Corp.*, 154 NLRB 1763, 1767–70 (1964).

[52] 101 NLRB 1642 (1952), enf. denied on other grounds 211 F.2d 791 (5th Cir. 1954).

[53] Ibid. See also *A. O. Smith Corp.*, 132 NLRB 339, 401 (1961); *Southern Greyhound Lines*, 169 NLRB 627 (1968), enfd. 426 F.2d 1299 (5th Cir. 1970); *Congoleum Industries*, 197 NLRB 534, 537 (1972).

[54] Supra.

Foundries,[55] the Board again rejected the employer's defense to an illegal discharge complaint that the dischargees were not truly sympathetic, but feared for their personal safety should they cross the picket line. "Whether employees engage in concerted or strike activities must be judged by the character of their activity," the Board held.[56]

The case cited most frequently in sympathy striker motive cases is *Cooper Thermometer Co.*,[57] The Board stated in that decision:

> . . . the focal point of inquiry in determining whether Kraucalis' refusal to cross the picket line to perform production work was a protected activity must of course be the nature of the activity itself rather than the employee's motives for engaging in activity.[58]

The *Cooper Thermometer* case was cited and supported by the trial examiner (and sustained by the Board) in *Tenneco Chemicals*,[59] wherein the trial examiner stated "Easton's motives in honoring the picket line are not a legitimate subject matter for inquiry."

While the Fourth Circuit Court of Appeals has held that an employee's refusal to cross a picket line because of fear of physical harm was not protected activity (the court reasoned that such fear was not "common cause" with the primary strikers),[60] the Board specifically has disavowed the Fourth Circuit's view, and continues to find that motive for refusing to cross picket lines is irrelevant.

Based on the foregoing, it is clear that the legality or illegality of discharge of employees who were discharged because they did not work as scheduled in the absence of pickets cannot be decided on the basis of motives of those employees in failing or refusing to work. Unless the right to refuse to work was waived, in one form or another, employees were entitled not to work during the Teamsters strike, regardless of their reason for staying off the job.[61]

2. Possible waive of the right of employees to withhold their services during a sanctioned strike

a. *Contractual provisions*

Basic law on contractual waiver is not in dispute and is of longstanding duration; if such waiver exists, it must be clear and unambiguous; if it exists, sympathy strikers are not protected by the Act and are subject to discipline or discharge.

The contractual provisions here involved, quoted above, are not clear and unambiguous. The phrase principally relied on by Respondent to show unambiguity, i.e., "to pass through any picket line," in fact is not exactly descriptive. Respondent argues that inclusion in the contract of section 17.3 "warrants, if not compels, the conclusion that the parties understood that the broadly based no-strike clause prohibited sympathy strike activity with the exception of those situations specified in Section 17.3." However, that argument avoids the issue. The General Counsel does not contend that section 17.3 does not authorize sympathy strikes. Rather, it is argued that the section does not preclude refusals to work during a sanctioned strike, even though pickets are not present. It is quite clear from the record that even though picketing was sporadic at most stores, that inconsistency was not uniform. Absence of pickets occurred at different times, and on different dates, at various locations; but at some store locations picketing was uniform and consistent. The parties and all employees throughout the store system were fully aware of the Teamsters strike and its sanction by the Retail Clerks. The strike and sanction were given broad coverage in the media, by mail posted by the Union and by Respondent, by personal conversations, and by a union "hot-line." There is no doubt about the awareness of all persons involved, concerning the fact that the strike was in progress, and that the strike was being honored by some Retail Clerks, whether or not every door of every store was being picketed. It may well be that most employees worked at those times, and on those dates, when pickets happened not to appear, but that fact does not alter the continuing nature of the strike and its sanction, nor does it dilute the right of some employees to exercise their statutory right to engage in a sympathy strike. At first blush, it appears possible that Respondent jumped at the opportunity to discharge employees the minute they failed to report to work, and supported their actions on the basis of a technicality, but the record does not support that conclusion. Only a handful of the total employee complement was discharged; there is no evidence that Respondent wanted to rid itself of the employees who were discharged; and it is clear that Respondent took its position as a matter of principle, rather than because of union or employee animus. In any event, this issue did not arise because of a disagreement concerning the basic right of employees to engage in sympathetic action. Rather, it arose because of the mechanics of that action, and the limited nature of the language of section 17.3 of the contract.

The trial examiner stated the law on this issue, as follows, in *Newspaper & Mail Deliverers (Interborough News)*,[62] and that language was affirmed by the Board:

> The significance of a picket line lies in the fact that it serves as notice of a dispute at the place being picketed. But it is not necessary that each and every entrance to struck premises be picketed in order to convey notice that the premises as a whole are strike-bound. In this case the employees delivering newspapers were actually on notice through other means that the Respondent had resolved to picket Interborough's entire Independent Subway System

[55] Supra.
[56] Id. 101 NLRB at 1683.
[57] Supra.
[58] Id. 154 NLRB at 504.
[59] 176 NLRB 611, 613 (1969). See also 31 Ann. Rep. 71-72 (1966) of the NLRB.
[60] *NLRB v. Union Carbide Corp.*, 440 F.2d 54 (1971).
[61] *Congoleum Industries*, supra, 197 NLRB at 547. See also *Pacific Grinding Wheel Co.*, 216 NLRB 529, 531-532 (1972); *Rainbow Coaches*, 241 NLRB 589 (1979).
[62] 90 NLRB 2135, 2150 (1950).

operations, and, though pickets were actually posted at only certain subway entrances, the employees could properly view the remainder of the entrances as likewise out of bounds in the eyes of the striking union.

The same principle underlies the decision in *W-I Canteen Service*.[63]

Respondent diligently has sought, and continues to seek, arbitration of the dispute concerning the meaning of section 17.3 of the contract. Some of the discharged employees have contended continuously since they refused to work that they did not want to work even in the absence of picketers because they felt they had the right to withhold their services. Respondent has taken every opportunity, even in the absence of retort by the Union, to advance its interpretation of the contract. Respondent introduced at trial extrinsic evidence to support its interpretation of the contract. Under such circumstances, it cannot reasonably be concluded that the contract is clear and unambiguous. If a waiver is to be established, it must be through some medium other than the contract of the parties.[64]

b. *Collective-bargaining history*

Not only does the contract of the parties fail to establish the waiver alleged by Respondent, there is no evidence that the bargaining history shows an intent, or attempt, to effect such a waiver.

Section 17.3 of the contract has been in agreements between the Union and food industry employers since the 1940s, but the evidence at trial was limited to post-1970, when those employers first were represented by the Food Employers Council. Respondent introduced no evidence to establish discussion of, or agreement to, the waiver by the Union or employees of their right to refuse to work as scheduled during a sanctioned strike when no pickets are present. Further, no employee was shown to have been discharged or disciplined in the past for refusing to work in such a situation.[65]

c. *Past practice and work policies*

Respondent contends, and the record shows, that the policy of Respondent Alpha Beta and Respondent Ralph's provides that employees may, at the option of the two Respondents, be disciplined in the event of unauthorized or unexcused absences. The two Locals, 428 and 1179, acknowledge that policy, and do not challenge it. The policy has the support of common management sense, as discussed above, in view of the large sales volume and busy nature of the grocery stores involved. However, that policy and its enforcement do not resolve any issue herein.

Respondents notified all employees, both by mail and by formal notices posted in stores at prominent places, that employees were obligated to work as scheduled in the physical absence of pickets.[66] So far as the record shows, no employee challenged that position or complained to the Union about it. Menacho made such a statement to employees, and acknowledged his agreement with the position to store managers. However, neither of those circumstances constituted a waiver of the kind urged by Respondent. Respondent's August 14 letter and the notices posted in stores by Respondent were unilateral statements which, so far as the record shows, never were communicated to the Union, or acquiesced in by the Union. No link was shown by Respondent between the statements contained in that letter, and the contract of the parties, or its bargaining history. There is no basis on which to conclude that Respondent's letter, or any statements made therein, became part of the contract between the parties, or constituted a separate agreement or waiver of employee rights. In view of such facts, the letter not only does not support Respondent's contentions relative to a waiver but constitutes a violation of Section 8(a)(1) of the Act, as alleged by the General Counsel.[67] Menacho's statements to employees and store managers, discussed above, appear to show his agreement with Respondent's position. However, those statements must be assessed in context. Menacho was a lower-echelon representative of the Union, and there is no evidence that he was authorized or directed to make such statements. Menacho was not a contract negotiator of the Union, and there is no evidence that his statements were anything more than his personal opinion. He made the statements only to a few of the thousands of Respondent's employees, and he made them in the stores, in the presence of store managers, and in the heat of battle. Such conditions give little opportunity for reflection, argument, or confirmation with union officials. Under such circumstances, Menacho's statements did not constitute a waiver of employee rights as alleged by Respondent.[68] It is further found that failure of the Union to protest or challenge Respondent's position of waiver during board of adjustment grievance meetings did not constitute agreement with Respondent's position.[69] The Union was not required then to agree or disagree with Respondent. As pointed out above, the Union, at that time, was preoccupied with but one matter—the jobs of the employees, some of whom had worked for Respondent several years. McLoughlin was quite concerned about those

[63] 238 NLRB 609 (1978). As pointed out in the General Counsel's brief, the fact that sympathy strikes are authorized by the contract does not compel the conclusion that employees have waived all their rights inherent in the right to engage in such strikes. Here, the issue involves the method in which employees showed their sympathy, as much as it involves the right under which they proceeded. *Keller-Crescent Co.*, supra.

[64] Whether or not the Union contended prior to trial herein that the employees had a right not to work as scheduled when no pickets were present is irrelevant.

[65] Hinshaw testified that there have been such discharges in the past, but that testimony appeared self-serving and unconvincing, was not supported by any documentation or recitation of facts, and is not credited.

[66] The Union also sent letters to the employees, telling them they were authorized to work if requested to do so in the absence of pickets. Many employees took advantage of that offer, since it relieved them of any worry about possibly being fined for working. However, those letters neither suggested nor stated that employees must work in the absence of pickets, nor did they state, expressly or implicitly, that the Union had waived or would waive the right of employees to refuse such work if they so desired.

[67] *Amcar*, supra.

[68] *Amcar*, supra; *American Cyanamid Co.*, 246 NLRB 87 (1979).

[69] *Keller-Crescent*, supra; *Amcar*, supra.

jobs, and was doing all he could to get the employees back to work as soon as possible. The principal topics of discussion were the facts of discharge and the status of picketing.

Respondent introduced testimony and evidence concerning an agreement reached by the Retail Clerks and FEC during a butchers' strike in 1973, alleging that the agreement showed past practice of the parties herein to waive the right of employees not to work during a sanctioned strike when no pickets are present. In that instance, it was agreed that the stores, which sold both meat and merchandise, would cease selling meat products, and that union members who had been honoring the strike would return to work. However, that agreement does not stand for the proposition urged by Respondent. The agreement did not require that employees must work in the absence of pickets; it merely removed from employees the burden of possible union reprisal in the event they worked when no pickets were present. No waiver of employee statutory rights was involved.[70]

Finally, Respondents contend that a waiver of employee rights is shown by the conversation between Mahon and Chuck Mattson, a union business representative, discussed above in "Findings of Fact." Mattson did not testify, and Mahon's testimony is not credited in its entirety. It is not clear from Mahon's ambiguous statements that Mattson did, as contended by Respondent, agree with Respondent's position relative to a waiver when he talked with Mahon. However, assuming arguendo that he did, such a private statement was an expression of opinion and did not, standing alone, establish that a waiver existed. The statement was not tied in any manner to the Union, or to the contract between the parties. The statement is much the same as those of Menacho, discussed above, and does not establish a waiver for the same reasons Menacho's statement did not.[71]

3. The settlement issue

It is found, above, that neither the Union nor its members ever waived, contractually or otherwise, the statutory right of Respondent's employees to engage in protected sympathetic activity, and that Respondent illegally discharged 15 of their employees (named below) in violation of that right. Those 15 employees were discharged because they failed to report for work during the sanctioned period of the strike. Employees discharged for failure to report after the sanction was withdrawn are considered separately below.

Respondent contends that the settlement agreement of October 25, discussed above in the "Background Summary," was a "final and binding" resolution of all 21 discharges contested herein, and that the settlement agreement should be deferred to.

So far as the group of 15 is concerned, deferral is not warranted because it is clear that the agreement results in deprivation of employees' statutory rights without the consent of the employees or their union. Deferral under *Spielberg*[72] would be improper, since the discharges were not pursued to an impartial tribunal, i.e., to an arbitrator pursuant to provisions of the contract of the parties.[73] The agreement of the parties was a private one, following pre-arbitration board of adjustment meetings.

Deferral to the settlement agreement would be repugnant to the Act, since, as shown above, the 15 discharges were unlawful. Existence of a settlement agreement which perpetuates those unlawful discharges does not preclude Board action to rectify the wrong.[74] The issues discussed herein were not discussed or resolved at the board of adjustment hearings, or otherwise, prior to trial. Further, the employees who were discharged never agreed to accept the offer of Respondent to return to work without backpay, as an abandonment of all their rights under the Act. They immediately talked with the NLRB, and commenced pursuit of backpay under the Act.[75] Local 428's agreement with Respondent may have been "final and binding" so far as those parties were concerned, but their agreement did not preclude the individuals from acting on their own, relative to backpay.

C. *Discharge of Employees Who Did Not Report for Work as Scheduled After the Strike Sanction Was Withdrawn*

The factual situation relative to all 21 employees is discussed in detail, above. So far as Kimber, Alarcon, Alvarado, Lopez, and Herrera are concerned, the record is clear that they were discharged for cause. The importance of dependable work attendance in Respondent's stores is discussed above. Whether or not this group of employees was discharged within a time that the General Counsel may consider "reasonable" after the sanction was withdrawn is irrelevant. The employees were fully aware of the strike and the sanction, and it was incumbent upon them to report for work as scheduled after the sanction no longer protected them in their absences. The General Counsel implies that it was incumbent upon Respondent to get in touch with employees and ask them to return to work, but that was not Respondent's responsibility. Further, it is noted that nearly all employees did report for work on their first shifts after the sanction was lifted.

As previously discussed, the record does not show a personal or union animus on the part of Respondent, nor does it show that Respondent discharged the five employees in retaliation for their actions, or for any reason other than the necessity of having full employee complements on hand for business. Only a few of Respondent's many employees are involved in these proceedings, and at no place in the record is there an indication of pattern reprisal or design. These five employees chose not to comply with normal and reasonable rules relative to work attendance, and they were discharged for that

[70] Cf. *Amcar*, supra.
[71] *Amcar*, supra.
[72] *Spielberg Mfg. Co.*, 112 NLRB 1080 (1955).
[73] *Whirpool Corp.*, 216 NLRB 183 (1975); *Keller-Crescent*, supra. *T & T Industries*, 235 NLRB 517 (1978).
[74] *Roadway Express*, 246 NLRB 174 (1979); *American Cyanamid Co.*, 239 NLRB 440 (1978).
[75] Respondent argues that not all of the 15 discharged employees pursued their cases with the NLRB. That fact is irrelevant, since statutory rights, rather than contractual rights, control the issues.

reason. At the time of discharge, those employees were not under the umbrella of protection afforded the other 15 employees, by the law relative to sympathetic strikers.

The settlement agreement covered these five employees as well as the other 15. There is no basis on which to go behind that agreement, since a violation of the Act is not involved. The agreement was worked out between Respondent and the Union, and covered reinstatement of the five without backpay. If the five employees accepted that agreement and returned to work, that was their choice, and there is no basis on which to hold that the agreement is repugnant to the Act. Section 17.1 of the bargaining agreement is a proscription of strikes or work stoppages, the only exception being provided by section 17.3 relating to sympathy strikes. Section 17.3 is limited to sanctioned sympathy strikes. Once the sanction was withdrawn, the protection of section 17.3 also was withdrawn, and section 17.1 was effective. Under principles normally applied in alleged 8(a)(3) violations, the five were discharged for cause unrelated to the Act.

Kathy Holland: As discussed above, Holland was not discharged. She simply quit working on August 12, and her quit was recorded by Respondent as "Discontinued reporting for work." That quit was not challenged by any union official during trial or otherwise. Holland did not testify, and no credibility resolution relative to her case is necessary. Holland did not attend any board of adjustment hearing, or otherwise indicate any interest in this controversy. She did not call or visit the store after August 12. Until August 12, Holland crossed the picket line to work. The Union dismissed Holland's claim at the first board of adjustment meeting.

Under such circumstances, there is no legal issue upon which to base a recommendation that Holland be reinstated by Respondent. She was not discharged because she did not report for work as scheduled in the absence of pickets. She terminated her own employment soon after picketing commenced, and never thereafter asserted, through herself or the Union, a right to be permitted to return to work.

B. *Validity of the Sanction*

Respondents argue that because the membership of Local 428 did not vote on the issue of whether to sanction the Teamsters strike, the sanction was invalid, and any sympathy strike action taken by alleged discriminatees was unprotected.[76]

The bargaining contract provides that employees may refuse to work while honoring a strike sanctioned by the Retail Clerks Bay Area Council. The Council sanctioned the strike, and whether the Council had authority to impose a sanction under Local 428's constitution and bylaws is irrelevant to the issue of whether the Teamsters strike had been properly sanctioned under the terms of the collective-bargaining agreement. Respondents argue that because Local 428's bylaws require that executive board decisions must be approved by the membership, a failure to submit the board's decision to sanction the Teamsters strike to the membership makes such decision improper. However, the record shows that the membership of Local 428 approved the executive board's action at their regularly scheduled meeting in September 1978. Even had the membership not approved the board's action, McLoughlin credibly testified that authority to sanction another union's strike is vested in the Council rather than in local unions, and that there is no provision in the contract or bylaws requiring the membership to vote on the Council's action. Local 428's bylaws provide that employees can be fined for crossing or working behind a sanctioned picket line established by a union other than the Retail Clerks, if the sanction also is approved by the local's executive board and the local has given notice to the membership affected by the picket line. Such approval and notice were given here. This argument by Respondent is found to be without merit.

[76] There is no contention that the sanction of Local 1179 was invalid.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondents set forth in section III, above, occurring in connection with their operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Having found that Respondents have engaged in certain unfair labor practices, in violation of Section 8(a)(1) and (3) of the Act, I shall recommend that they be ordered to cease and desist therefrom, and take certain affirmative actions designed to effectuate the policies of the Act.

It has been found that Respondents unlawfully discharged the following employees:

Terry Rendon	Craig Wroblewski
Richard Hutson	Ralph Ramirez
Robert Hammond	Alex Avlakeotes
Carol Mitchum	Norma Myers
Linda Parrette	Florence O'Day
Jackie Niswonger	Daniel Gonzalez
Pamela Scott	Josie Melendez
Elizabeth Mahon	

All employees except Mahon were reinstated by Respondents, with seniority and benefits, but without backpay. I will, therefore, recommend that Respondent Alpha Beta offer Mahon her former job or, if that job no longer exists, a substantially equivalent job, without prejudice to her seniority and other rights and privileges. I will recommend that Respondents make whole all the above-named employees for any loss of earnings suffered by reason of the discrimination against them, by payment to them of sums of money equal to that which they normally would have earned, absent the discrimination, less net earnings during such period, with interest thereon to be computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as set forth in *Isis Plumbing Co.*, 138 NLRB 716 (1962), and *Florida*

Steel Corp., 231 NLRB 651 (1977). It will be further recommended that Respondent preserve and make available to the Board, on request, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary and useful to determine the amounts of backpay due and the rights of reinstatement under the terms of these recommendations.

On the basis of the foregoing findings of fact and on the entire record, I make the following

CONCLUSIONS OF LAW

1. Alpha Beta Company and Ralph's Grocery Company are, and at all times material herein have been, employers engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Retail Clerks Union, Local 1179 and Local 428, AFL–CIO are, and each of them is, labor organizations within the meaning of Section 2(5) of the Act.

3. Respondents violated Section 8(a)(1) of the Act by telling their employees in letters that the employees were to report for work as scheduled in the absence of pickets during a sanctioned strike, or risk disciplinary action.

4. Respondents violated Section 8(a)(3) and (1) of the Act by discharging employees because of their protected activity.

5. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

[Recommended Order omitted from publication.]

Kohler Company *and* International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, Local Union 833. Cases 30–CA–7372 and 30–CA–7644

23 January 1985

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS HUNTER AND DENNIS

On 16 April 1984 Administrative Law Judge Walter J. Alprin issued the attached decision. The Union filed exceptions and a supporting brief, and the Respondent filed an answering brief, cross-exceptions, and a supporting brief.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions[1] and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Kohler Company, Kohler, Wisconsin, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

[1] In the absence of exceptions we adopt the judge's conclusion that the Respondent violated Sec. 8(a)(1) of the Act by coercively interrogating employees regarding their support for the bargaining positions taken by the Union.

We adopt the judge's conclusion that the Respondent violated Sec. 8(a)(5) by unilaterally removing the stock clerk position from the bargaining unit. In so doing, we particularly rely on the Respondent's admission that it redefined the stock clerk job description for the purpose of removing that position from the bargaining unit, and we note that such action is not a right granted the Respondent by the contractual management-rights clause.

While we adopt the judge's finding that the Union waived its right to bargain over the Respondent's decision to subcontract certain janitorial work which the unit employees previously had performed, we disavow the judge's discussion based principally on *Westinghouse Electric Corp.*, 150 NLRB 1574 (1965), of the criteria for determining whether unilateral subcontracting violates the Act. See *Otis Elevator Co.*, 269 NLRB 891 (1984) (opinion by Chairman Dotson and Member Hunter and concurring opinion by Member Dennis).

DECISION

STATEMENT OF THE CASE

WALTER J. ALPRIN, Administrative Law Judge. Charges in these cases were filed on October 1, 1982, April 1 and 11, 1983, and May 5, 1983, and complaints issued on December 8, 1982, and May 12, 1983. The cases were consolidated and heard before me at Sheboygan, Wisconsin, on 5 days between September 12 and December 8, 1983. Briefs were filed on behalf of the General Counsel and Respondent on January 17, 1984. The cases involve allegations of threats to remove bargaining unit work from the plant, of threats to refuse to process grievances, of issuing discriminatory oral and written work warnings, of subcontracting unit work, and of removing an employee from the bargaining unit, all in violation of Section 8(a)(1) and (5) and Section 8(d) of the National Labor Relations Act (the Act).

On the entire record, including my observation of the demeanor of the witnesses, and after due consideration of the briefs filed, I make the following

FINDINGS OF FACT

I. JURISDICTION AND BACKGROUND

Kohler Company (Respondent), with principal business facilities at Kohler, Wisconsin, and other facilities elsewhere, including South Carolina and Texas, manufactures and wholesales plumbing products, engines, and generators. It admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

Local Union No. 833, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW (the Union) is a labor organization within the meaning of Section 2(5) of the Act, representing the following unit of Respondent's employees at Kohler, Wisconsin:

> All production and maintenance employees, including all planning and general clerical employees, all production inspection employees, all maintenance employees, all utilities engineering employees (all operations at power house and gas utilities), all iron foundry employees, all casting finishing employees, all mill room employees, all enamel shop employees, all warehouse employees, all brass employees, all pottery employees, all engine employees and all generator employees; but excluding all supervisory and administrative employees, all general office and clerical employees, all draftsmen and engineers, all employees in industrial engineering, all technicians (engine development, generator development, quality assurance and inspection, pottery, iron foundry lab, mill room and gas service), all doctors, nurses, and clerical employees in Medical, all employees in personnel, training, safety and recreation departments, all employees in chemical and physical laboratories, research and development departments, all production planners and schedulers, material control clerks and timekeepers, all employees in real estate division and landscape, all confidential employees, watchmen, gatemen, courtesy vehicle driver, guards and supervisors as defined in the Act.

The Union and Respondent have entered into successive collective-bargaining agreements over the years, the pertinent agreement running from December 23, 1980, through October 1, 1983.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *Threats to Remove Bargaining Unit Work*

1. Facts

In December 1981, Respondent added to its Wisconsin plant the new process of injection molding, on which wage scales were not in effect. In January/February 1982,[1] Respondent sent the Union a wage proposal for those positions of $4.50 per hour. This and other proposals were addressed at a grievance meeting on April 7. Respondent's notes of that meeting state that Kenneth Conger, Respondent's vice president for administration, began the meeting with a statement, inter alia, that:

> Business conditions are very bad . . .
>
> Kohler Co. should freeze c-o-l, impose 10 percent (wage) cut, etc. We're not doing this today but we must try to avoid further problems.
>
> The average Kohler factory employee earns over $20,000/year (on a 40-hour week).
>
> Spartanburg (South Carolina) and Brownwood (Texas) rates considerably lower. When times are tough, $20,000 is too much. It means that when Pottery puts in a new product, we must look at advantages of other locations.
>
> We must now look at: . . .
>
> (IV) Rates for new jobs—and for new businesses. We must be competitive with Sheboygan and Wisconsin.
>
> This must be a joint effort—if we don't get relief, the jobs won't be there.
>
> We'll come back in 2-3 months, if business doesn't improve, to inform you of further necessary moves.

In the discussion following, Conger specifically stated:

> When business improves, we'll face a tight labor market. We'll have to decide where to produce product.

The meeting ended with a statement by management, regarding the new injection molding process, that:

> We're debugging now, this is a new and different operation. $6.50 rate will apply temporarily.

At another grievance meeting, held May 13, the subject of rates arose again. Respondent's notes of this meeting indicate that its representatives made the following statements:

> I understand you won't negotiate *any* new pay standards.
>
> Let's keep the jobs here. $6.50 per hour is $13,000 plus per year. There are many jobs in Sheboygan that don't pay more than $13,000–$15,000.
>
> If you refuse to recognize our need to be competitive, we'll have to tell 4th floor (Board of Directors) to forget it—move the jobs elsewhere.
>
> We're not talking about just four people. We're talking about future—when maybe 200 people could be involved.

Union President Lettre testified that Conger's statements at that meeting were that Respondent was speaking about not only injection molding. Conger testified that he "would recommend to the Board for consideration that injection molding be removed if the union and company could not agree to rates, and the new *processes* not be put in Kohler, Wisconsin if some agreement could not be worked out." (Emphasis added.)

The issue of rates was not settled. On August 2, the Union initiated an action against Respondent in the local Federal district court. Conger addressed a letter to an official of the International Union on August 25, in which he reiterated, "The issue simply is whether jobs of this type will be added in Wisconsin or whether they will have to be assigned to areas where fair, but lower, pay scales are now in existence. . . . Injection Molding currently involves only two employees and is never likely to require a large number of workers, so the impact of this particular operation is not of great significance. But we are talking about a principle which potentially will involve the location of hundreds of new jobs as we expand into new products and new materials."

At the meeting held July 1 on a grievance regarding a reduction in pay rate for casting in the pottery division, Union Steward Klabechek and Local Union President Lettre testified that Respondent's head of industrial engineering, Del Miller, stated the problem involved the reduced pace of the workers and that, as Klabechek reported, "if these people didn't want to increase their pay, to make up the difference in the money they were losing, that they could make the pottery cheaper down in South Carolina and that the cull was less . . . there and if we did not settle these rates, that it would be removed down there."

Conger and Miller testified that no such comment was made. Notes of the meeting made by Respondent do not reflect such a conversation. Notes made by the Union were not produced though, in lieu of issuing a requested subpoena the Union's president was directed by me to produce them if available. His testimony was that the notes were not available. The individual who took the notes for the Union was not produced as a witness.

The contract between Respondent and the Union has no provisions directly limiting transfer of bargaining unit work, whether of new and experimental work or of work which had been done for a long period of time. The management functions provision of article II in fact provides in part:

> It is agreed that the management of the Company and its business and the direction of its working forces is vested exclusively in the Company, and that this includes, but is not limited to the following: to direct and supervise the work of its employees; to hire, promote, transfer or lay off employees; or demote, suspend, discipline or discharge employees for cause; to plan, direct and control operations; *to determine the amount and quality of the work*

[1] All dates are in 1982 unless otherwise specified.

> *needed, by whom it shall be performed and the location where such work shall be performed*; to introduce new or improved methods or facilities, or to change existing manufacturing practices, designs, methods and facilities. . . . The Company's exercise of the foregoing functions shall be limited only by the express provisions of this contract and the Company has all the rights which it had at common law except those expressly bargained away in this agreement and except as limited by statute. This Article shall be liberally construed. [Emphasis added.]

2. Discussion

The complaint alleges two threats to remove bargaining unit work: one by Conger at the meeting of May 13 and one by Miller at the meeting of July 1. Without resolving the direct conflict of testimony as to what statements were made or not made by Miller on July 1, let us first examine Respondent's arguments, which I find prevailing even if the statement were made as alleged.

Respondent argues that since the actions allegedly threatened were themselves not illegal, the alleged uttering of the threats could not themselves have been illegal. On January 25, 1984, the Board on remand reversed its prior holding in *Milwaukee Spring Division*, 265 NLRB 206 (1982), and held that an employer subject to the Act is permitted to move operations from union to nonunion plants in order to avoid higher union wages, unless a collective-bargaining contract specifically prohibited such a move, and providing the employer has satisfied any obligation to bargain with the union regarding the move.

A change in location where specific work is to be done and in the personnel doing it are subjects of mandatory bargaining and, ordinarily, under the precepts of *Milwaukee Spring II*, supra, while management can unilaterally make these changes it must still bargain with the union regarding them. However, where there is a broad management-rights clause in the existing bargaining agreement, as exists here, the Union has already been given its opportunity to bargain and has waived it. Since the proposed changes do not themselves violate the Act, the proposals themselves cannot constitute a violation. Therefore, the proposals to move unit work to other plants if acceptable wage rates could not be negotiated, the Union having waived its right to bargain over such a move, were not "threats in violation of the Act."

B. *Subcontract Cleaning Service*

1. Facts

Cleaning Respondent's facility was accomplished by production sanitation personnel, who are members of the bargaining unit, or by office janitorial personnel, who are not. Respondent and the Union have not always been consistent in applying this differentiation. In the early 1970s, production sanitation personnel cleaned all of building 5N, including offices, while in 1975 newly converted office space in the same building was cleaned by office janitorial personnel as were areas of the plumbing office and the employee safety, benefits and recreation departments. From 1975 to 1978 various changes took place in cleaning offices at the generating plant and in the service parts section, and no clear distinction arose as to which group was assigned to clean restrooms utilized by both production and office workers.

In 1981 Respondent began construction of a new distribution center (the DC) for warehousing, shipping, and receiving operations which had been treated as part of the production rather than the office work, the cleaning of which would normally be done by unit members. Shipping and warehouse production employees, and brass department employees were tranferred to the DC between March 1982 and April 1983.

Cleaning of the DC was at first done by each individual working there, for himself, whether of production or of office area. On a comparison of cleaning costs when the work was done by bargaining unit personnel, by nonunit personnel, or by outside contractor, Respondent contracted the cleaning work in the DC to an outside agency commencing September 8. That agency more or less evenly divides its time between cleaning production areas and office areas. At the time the outside agency began its work a number of unit-member sanitation workers were laid off, purportedly because of a "lack of work."

The Respondent has contracted out work of the bargaining unit in other instances dating from 1973. Such subcontracts have related to work in the plumbing and specialty products division, the pottery division, the sanitation division, and the engine division, and to window cleaning.

2. Discussion

An employer is obligated to bargain on the issue of contracting out work done by members of the bargaining unit. *Fibreboard Corp. v. NLRB*, 379 U.S. 203 (1964). In determining whether unilateral subcontracting violates the Act, the Board examines the following five criteria:[2] Whether it was motivated solely by economic conditions; whether it "comported with the traditional methods" of Respondent's business operations; whether it significantly varied from past practice; whether the union had opportunity to bargain on the changes at general negotiating meetings; and whether it had a demonstrable adverse impact on bargaining unit employees. *General Motors Corp.*, 257 NLRB 820, 823 (1981), and cases cited therein.

The facts stated above show that the Union, in negotiating the current contract with its broad management-rights provision, had an opportunity to bargain the issue. It is also shown that the contracting out was based only on an economic basis, and that though bargaining unit employees were injured by Respondent's action there was no union animus. Finally, there is a history of contracting out certain suboperations and window cleaning as a prior and traditional business practice. In the totality of the evidence it is clear that Respondent retained the right to contract out the janitorial work, and thus the action did not constitute a violation of the Act.

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[2] *Westinghouse Electric Corp.*, 150 NLRB 1574 (1965).

C. *Position Reclassification*

1. Facts

Respondent employs more than 20 stock control clerks (SCCs) throughout its operations, with differing functions. Cassie Stemper was the SCC in the maintenance stores department, within the bargaining unit, until she was discharged in December. When the position became vacant, in the normal course of operations it was reviewed to determine retention and classification. The initial supervisor's evaluation, approved by his superior, was that on the basis of work to be performed by the employee the position should be retained but reclassified out of the bargaining unit. This request for reclassification, also reviewed by the personnel manager, the chief of wage and salary administration, and the vice presidents for technical services and for administration, received final approval in January 1983, and an employee then on layoff was hired to fill the position as a nonmember of the bargaining unit.

Respondent's basis for changing the position classification was that a continuing evolution in position requirements had taken it from a factory clerical post to one which was "office administrative." Respondent had over the years similarly reclassified positions so as to remove them from the bargaining unit, with only few union grievances being filed. The Union was aware that this particular position was being reviewed, and after learning of the reclassification promptly protested by letter of January 28, 1983.

Stemper, the prior employee, testified that the position had become more complex over the years, but only because of the introduction of computers to be operated in accomplishing the same results that had always been achieved. The only change in the position after she left was the utilization of still another computer, the APPO System, referring to accounts payable, purchase order, in collating purchase orders with billings. That computer had been available prior to Stemper's discharge, but was not used as the function was performed through separate and noncomputerized correspondence.

2. Discussion

As a refinement of the concept enunciated in *Fibreboard Corp.*, supra, that unilateral acts in derogation of the bargaining agreement may constitute a violation of the Act, the Board has held that "the reclassification of a position from a bargaining unit job to a nonunit job is a mandatory subject of collective bargaining if the reclassification has an impact on bargaining unit work." *Fry Foods*, 241 NLRB 76, 88 (1979), enfd. 609 F.2d 267 (6th Cir. 1979). The functions of the position involved did not go through any great change prior to its reclassification. In considering those criteria the Board applies to *Fibreboard* situations, as per *Westinghouse Electric Corp.*, supra, we see that in this instance, though the employer's practice followed the history and tradition of its business operations, and though the Union may be said to have concurred through acquiescence to the broad management-rights clause, not only was there an adverse impact on bargaining unit employees but the employer made this unilateral change with no discernible economic foundation. Under the circumstances, the only cause for the change must have been to remove the position from union protection. On that basis, I find the unilateral removal of this position from the bargaining unit to constitute a violation of the Act.

D. *Threatened Refusal to Process Grievances*

1. Facts

The collective-bargaining agreement between the parties provides a five-step grievance procedure. Generally an employee complaint may be settled with his foreman within 2 days; appeal from a foreman's decision may be settled within 2 days by the departmental supervisor; appeal from a departmental supervisor's decision may be settled within 3 days by the divisional superintendent; appeal from a divisional superintendent's decision may be settled within 10 days by the company bargaining committee; and appeal from a decision by the company bargaining committee can be taken to compulsory arbitration.

Between April 7 and July 1, grievance meetings among the company bargaining committee and union representatives covered a number of disputes, including such matters as wage rates on the new injection molding process and on the tank room casting rate, time off for stewards to conduct investigations, and the transfer of employees at lower wage rates to the new distribution center. On August 2, the Union brought suit against Respondent on some or all of these issues in the local Federal district court, and sometime prior thereto requested the local county district attorney to bring criminal charges for an alleged failure to pay union stewards according to the contract.

In mid- to late-August 1983, Respondent's administrative vice president Conger asked Union President Lettre to meet with him in an attempt to settle some of these matters. Lettre testified that Conger said:

> I would have to stop threatening him and his constituents about NLRB charges and Federal Court. He said if I go to the NLRB or Federal Court, he will leave those grievances set on the side; he will not settle any more and they will sit on the side like he did to the (dispute over use of the) Osborn (machines) back in 1977.

Conger testified that in view of the union attempt to file criminal charges and the institution of suit in the Federal court, he "talked tough" at the meeting to the extent of telling Lettre that grievance settlements would not be achieved by coercive union efforts.

2. Discussion

As is immediately apparent, there is no way in which Respondent could refuse to process grievances. If it refused to take action within the prescribed short time period the grievance would be moved by the Union to the next step, and ultimately to mandatory arbitration. Further, it should be noted that the alleged threat to

refuse to process grievances if the Union went to the Board and to the Federal court was supposedly made after the August 2 filing in the district court. I credit the testimony of Conger that on behalf of Respondent he did no more than tell the Union that its activities were not conducive to and would not help the peaceful settlement of grievances and not that he threatened to refuse to process the grievances on which the disputes were based.

E. *Discipline of Employee Klabachek*

1. Facts

In nonserious cases, there is a four-step disciplinary process. An oral warning for a first violation is followed by three written warnings, the last being designated a final warning,[3] and a violation thereafter is cause for discharge. Warnings are not the subject of grievance and arbitration, but a union letter of protest to any warning will be kept in the personnel file. Discharge after final warning can be grieved and arbitrated.

Richard Klabachek is a pottery caster and is also the Union's chief steward in the pottery division. Though there is no record of an oral warning, he was issued a written warning for insubordination taking place January 30, 1982, at which time he allegedly was involved in a dispute with his foreman, Mark Jelenk, and directed obscenities and derogatory statements to Jelenk in the presence of other employees. The Union filed a letter of protest.

On Thursday, October 7, 1982, a routine inspection of pottery castings by two supervisors revealed cracked outlets, and further investigation showed that 6 of the 24 bowls cast by Klabachek in 1 day were defective. Jelenk looked at the rejects and showed a portion to Klabachek, who agreed that there was dust on the outlet areas. This would interfere with a proper joint, and render the ware useless. Klabachek denied responsibility for the defect but Jelenk, having discussed it previously with the supervisors, prepared and issued a written warning for high losses and poor workmanship.

The following Monday, October 11, General Supervisor Massari went to Klabachek's work area to discuss the matter with him. Massari testified that during the conversation Klabachek raised his voice, and made statements to the effect that his foreman "was lying again." Klabachek testified that his statement had been that the foreman had told him he had been ordered to issue the warning by his supervisors, and that such was the basis of the written warning "unless he's lying again." In any event, Massari discontinued the discussion and had Klabachek, with his shop steward, come to his office, where Massari told Klabachek to consider himself given an oral warning for insubordination. Massari and Klabachek also discussed the issue of poor workmanship, and Massari, believing there to be a question of the seriousness of the loss, reduced the written warning to an oral one. However, that Friday, October 15, when the work reached the dry finish department, it was discovered that of Klabachek's 24 pieces a total of 20, not 6, were defective. On that basis Massari had another meeting with Klabachek and reinstated the written warning, though Klabachek insisted that the fault lay not in the workmanship but in the clay.

The same day, October 15, Klabachek complained about the clay to Pottery Superintendent Wirth, who promised to relay the complaints to Massari and to William Conroy, the slip-glaze supervisor, who had the responsibility of preparing proper clay. On Monday, October 18, Conroy went to Klabachek's work area to discuss the matter. Heated words were exchanged by both, and Conroy prepared a written warning for insubordination.

2. Discussion

Though no charge was filed as to the disciplining of Klabachek, there is no restriction against including the allegation in the complaint resulting from an investigation of other charges. However, there is in the record no evidence of a nexus between Klabachek's union membership, office, or duties, on the one hand, and, on the other the warnings issued to him. There is here not even a *Wright Line*[4] issue of requiring a preponderance of the evidence that the employer would have instituted the disciplinary action even absent some protected conduct by the employee. If there were such issues, however, I would find that Respondent successfully carried the shifted burden of proof, and showed that issuance of the one warning for poor workmanship and the two warnings for insubordination would have occurred whether or not Klabachek had engaged in protected activities.[5]

F. *Coercive Interrogation*

1. Facts

Employees in the old distribution center were paid on a piece rate. In early 1982 Respondent proposed that employees tranferred to the new distribution center in June 1983[6] be paid on an hourly wage rate. The Union agreed, but negotiation continued as to the particular rates, and as to the pay grades to be assigned. On March 15, Respondent prepared its final offer of grade classifications and offered it to the Union on March 29. There remained, however, a dispute regarding the "slots," or specific steps within a pay grade, to which individual employees would be assigned. The union demand was that all employees in the new distribution center be placed, at the time of transfer and change in method of compensation, in the top bracket of their respective pay grade.

Respondent agreed only to review individual slot assignments, and on Friday, April 1, decided on a more "liberal" assignment of slots. A typed copy was sent to and received by the Union early Monday morning,

[3] The written agreement between Respondent and the Union makes no provision for an oral warning, and does not specify that a particular number of written warnings issue before a final warning.

[4] *NLRB v. Wright Line*, 662 F.2d 899 (1st Cir. 1981).

[5] The General Counsel's allegation that Klabachek was being "set up" for discharged has no support. If there are further warnings and Klabachek is discharged, the issue can be grieved and arbitrated. See *United Technologies Corp.*, 268 NLRB 557 (1984).

[6] All dates in this section are in 1983 unless otherwise indicated.

April 4. That afternoon the Union rejected the new offer by phone.

Respondent alleges that as a result of numerous employee complaints that they had been misinformed or uninformed by the Union of Respondent's offers, it scheduled a series of seven meetings of distribution center employees, by job classification, starting Tuesday at 7 a.m., to explain their offers. Respondent Representatives Le Mahiew and Ahrens testified that in each meeting employees were told that attendance was voluntary, that they could have union representation if they desired, that they could ask any questions, and what Respondent's proposals were. They testified that union representation, through Chief Steward Strochschoen, was present only during the second, third, and possibly the fifth meeting, while Strochschoen testified that he was present during the second through sixth meeting. Respondent admits that it polled the employees individually during the first two meetings as to whether they would accept Respondent's offer, but discontinued after Strochschoen's objection during the second meeting. Strochschoen testified that, with possibly one exception, they also polled employees in the third through sixth meeting. Respondent claimed that no union representation was requested during the first meeting, but a union employee testified that he requested and had been denied union representation at that meeting. Union members testified that they had been threatened with the loss of two slots in grade if they did not vote to accept Respondent's offer, but Respondent's witnesses testified that employees were merely provided with the information that if an agreement was not entered into their pay would be according to a prior offer, which was two slots less. Union employees also testified that Respondent threatened to "re-canvass the jobs" and fill them with other employees if agreement was not reached, which Respondent's testimony denied.

2. Discussion

The admitted polling of individual employees during the first and second meetings constituted an obvious situation reasonably tending to restrain or interfere with the employees' right[7] to bargain collectively through representatives of their own choosing. It is thus of dubious value to quantify the extent of interference with rights guaranteed by Section 7 of the Act, in violation of Section 8(a)(1) of the Act but, for the sake of settling credibility issues, I find that Strochschoen attended all but two of the meetings and that Respondent polled employees in the first meeting as well as in all but possibly one of the meetings Strochschoen attended. I was impressed with Strochschoen's forthright testimony, I do not believe that if offered union representation only one group of seven would request it. I also find that union representation was requested during the first meeting but rejected, and that the employees were given the clear impression that unless they voted contrary to the position of their authorized bargaining representative they would forfeit two pay slots. As to recanvassing of positions, however, the General Counsel was unable to present a preponderance of the evidence to prove that such a threat was in fact made.

[7] *Florida Ambulance Service*, 255 NLRB 286 fn. 1 (1981).

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) and (5) and Section 8(d) of the Act by unilaterally removing the position of maintenance stores stock control clerk from the bargaining unit, and by coercively interrogating employees as to their support of positions taken by their bargaining representative.

4. These unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent has engaged in unfair labor practices in violation of Section 8(a)(1) and (5) and Section 8(d) of the Act, it will be recommended that Respondent cease and desist therefrom, and take certain affirmative action designed to effectuate the policies of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[8]

ORDER

The Respondent, Kohler Company, Kohler, Wisconsin, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Altering the composition of the bargaining unit by reclassifying a position to remove it from the bargaining unit while the incumbent continues to do bargaining unit work, without first negotiating with the Union.

(b) Coercively interrogating employees as to their support of positions taken by their bargaining representative.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative actions necessary to effectuate the purposes and policies of the Act.

(a) Cease giving effect to the reclassification of the position of maintenance stores stock control clerk from the bargaining unit unless and until Respondent has bargained in good faith with the Union concerning the reclassification.

(b) Post at its offices and places of business at Kohler, Wisconsin, copies of the attached notice marked "Appendix."[9] Copies of the notice, on forms provided by the

[8] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[9] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the Na-

Continued

Regional Director for Region 30, after being signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps Respondent has taken to comply.

IT IS ALSO ORDERED that the complaint be dismissed insofar as it alleges violations of the Act not specifically found.

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tional Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT unilaterally remove positions from the bargaining unit.

WE WILL NOT interrogate our employees under circumstances when such interrogation reasonably tends to restrain or interfere with the employees' exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

KOHLER COMPANY

Hood Industries, Inc., and its Wholly Owned Subsidiary, B & K Transportation, Inc. *and* Teamsters Local 25, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America. Case 1-CA-14624

23 January 1985

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS HUNTER AND DENNIS

On 20 March 1980 the National Labor Relations Board issued a Decision and Order in this proceeding[1] finding that the Respondent violated Section 8(a)(1), (3), and (5) of the National Labor Relations Act. As a remedy for the 8(a)(3) violations the Board ordered the Respondent to reestablish its delivery operation and reinstate and make whole its delivery employees. Thereafter, on 25 April 1980, the Respondent filed a motion to reopen the record asserting that compliance with the Board's order to reestablish B & K Transportation, Inc. (B & K) would increase its monthly costs by about $20,000[2] and thereby endanger the Respondent's continued viability.

On 16 June 1980 the Board granted the Respondent's motion and ordered the hearing reopened to enable "the Board to determine the factual accuracy of Respondent's assertions, and further, if true, whether Respondent's continued viability would be endangered by our remedy."

On 3 December 1981 Administrative Law Judge Peter E. Donnelly issued his decision on order reopening the record. He found that the Respondent failed to demonstrate that the cost of reestablishing the trucking service would endanger the Respondent's economic survival and therefore recommended affirmance of the Board's earlier Order. Thereafter, the Respondent filed exceptions and a supporting brief and moved for reconsideration of the Board's underlying Decision and Order, and the General Counsel filed an answering brief.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent herewith and to modify the Board's Decision and Order reported at 248 NLRB 597.[3]

The Respondent learned in early 1978 that its trucking contractor James Foley had a terminal illness. It thereupon formed B & K to acquire Foley's trucks and equipment and to take over delivery of polyurethane foam products to its customers. B & K began delivery operations in April 1978,[4] and lost $406 and $3200 in its first 2 months. After only 5 or 6 months the Respondent terminated B & K's operations for reasons which have been found to be discriminatory. About November 1978 the Respondent began contracting its delivery work to outside local and long-distance trucking contactors. The Respondent's comptroller Raleigh testified without contradiction that the amount of the Respondent's delivered goods has increased since B & K's cessation of active trucking operations. The Respondent's statement of 1980 operations in evidence reveals that its contracting costs continued to average $30,000 per month through calendar year 1980.

As noted above, the Board ordered this proceeding reopened in order to evaluate the economic impact of the status quo ante remedy on the Respondent. Comptroller Raleigh introduced into evidence Respondent's Exhibit 1, which estimated total costs of $600,966 per year (or $50,080.50 per month) for B & K's resumption of the delivery function. Raleigh testified that he calculated those costs based on the Respondent's need to acquire six used tractors and employ six truckdrivers at $10.93 per hour.[5] In addition, Raleigh figured on the Respondent's hiring a full-time dispatcher, mechanic, and clerical at annual salaries of $15,000, $19,660, and $10,000, respectively. The Respondent's financial statement for 1980 introduced into evidence showed that it lost $146,000 in 1980 and that its liabilities at the time of the hearing exceeded current assets by $360,000. Independent certified public accountant Howard testified that he was familiar with the Respondent's financial condition and that in his professional opinion requiring the Respondent to expend the additional costs (set forth in R. Exh. 1) would adversely affect its continued viability.[6]

[1] 248 NLRB 597 (1980).

[2] The Respondent's motion on its face alleged estimated monthly costs of $51,428. An addition error shows that the monthly figure was understated by $9700 making the alleged monthly costs approximately $60,000 (as compared with an average of $30,000 per month paid to outside delivery contractors from December 1979 through March 1980).

[3] None of the Board Members herein participated in the underlying Decision and Order. The Respondent's motion for reconsideration of that decision is denied because it contains nothing not previously considered.

[4] B & K employed one part-time and four full-time drivers at $5 or $6 per hour. Its dispatching, payroll, and other administrative clerical functions were performed by Hood employees who had other full-time job responsibilities and lacked prior experience in the trucking business.

[5] The source of the estimated hourly wage for truckdrivers is a survey of average hourly wages in the Boston area as of August 1980 conducted by the Bureau of Labor Statistics of the United States Department of Labor (BLS).

Contrary to the judge, we perceive no basis for rejecting projected hourly rates derived from the BLS survey.

[6] Howard specifically noted that the Respondent could not afford a capital outlay of $120,000 for the purchase of six used tractors and would be viewed by lenders as an unattractive borrower of such funds.

The judge found that the Respondent failed to substantiate the above-proposed expenditures. He noted that there were flaws in the Respondent's method of computing some costs and that it did not adduce evidentiary support for employment of additional personnel. The judge further interpreted the Board's remedy as contemplating restoration of the B & K operation as it formerly existed. He concluded that the Respondent's cost figures were excessive and therefore discounted Howard's opinion that requiring such expenditures would endanger the Respondent's continued viability. Contrary to the judge, however, we find that the Respondent has sufficiently proved that reestablishment of the B & K operation would endanger its continued viability.

First, we find that the record evidence[7] supports the cost estimates in Respondent's Exhibit 1 in substantial part. Clear and undisputed evidence that the Respondent's volume of delivered goods has increased since B & K ceased operating supports the asserted need for one additional driver. It also negates the judge's premise that the reestablishment order limits the size of the business to that formerly operated by B & K. This is so notwithstanding alleged flaws or inaccuracies in the Respondent's method of calculating costs as found by the judge. An enlarged delivery function and B & K's former unprofitable operation point up the necessity for at least one full-time employee with knowledge of the trucking business to perform dispatching and other clerical or administrative duties for a reestablished delivery business. In addition, there is no dispute as to the reasonableness of approximately $20,000 for the annual salary of a mechanic. We conclude from the foregoing that the record evidence substantiates most, if not all,[8] of the approximately $20,000 of increased monthly costs which the Respondent projects for reestablishment of its delivery function.

Moreover, we find that requiring the acquisition of six tractors costing more than $100,000 would be especially problematic for the Respondent in its present financial condition. Under all the circumstances, we find that a reestablishment order would be unduly burdensome and is unnecessary to effectuate the policies of the Act.[9] Rather, we conclude that the Respondent's unfair labor practices will be sufficiently remedied by a full make-whole order covering the employees of the discontinued trucking business.

[7] Like the judge, we have used the cost figures adduced at the hearing rather than those contained in the Respondent's prehearing motion. In this regard, we note that Raleigh testified that he performed the calculations for the cost estimates appended to the prehearing motion, but that the only person with knowledge of the underlying data—former Vice President Lundstrom—was no longer in the Respondent's employ.

[8] We agree with the judge that the Respondent has not justified the $10,000 annual salary for a full-time clerical employee and that inaccuracies in the Respondent's method of ascertaining cost estimates from contractor billings could have caused some overstatement in cost figures for fuel consumption or in the precise number of driver-hours required. However, the clerical's salary and the other possibly inflated estimates account for only a relatively small portion of the $20,000-per-month increase in the cost of reestablishing B & K's trucking business. We disagree with the judge's position that the Respondent's selection of a 3-year (rather than a 5-year) period for depreciating tractors is probative evidence of the Respondent's efforts to maximize its cost projections.

AMENDED REMEDY

We shall order the Respondent to make whole the truckdrivers it discriminatorily terminated by paying to each a sum of money equal to the amount he would have earned as wages and other benefits from the date of termination to the date he secures equivalent employment, computed in accordance with the Board's usual formula set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest thereon computed in the manner set forth in *Florida Steel Corp.*, 231 NLRB 651 (1977).[10]

ORDER

It is ordered that the Board's Order in 248 NLRB 597 (1980) is amended by deleting paragraph 2(a) and by substituting the following for paragraph 2(b):

"(b) Make whole John Wharton, Irving Sweetser, Roger Morrison, Nils Swanson, and Paul Brown for any loss of wages and other benefits they may have suffered as a result of our discrimination against them, with interest, in the manner set forth in the "Amended Remedy."

IT IS FURTHER ORDERED that the attached appendix be substituted for that attached to the Board's decision in 248 NLRB 597 (1980).

[9] *Purolator Armored, Inc.*, 268 NLRB 1268 (1984).

[10] See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962).

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT coercively interrogate our employees concerning union activities.

WE WILL NOT threaten our employees that they would be discharged because of their union activity.

WE WILL NOT discharge or otherwise discriminate against any employee because of the union activity of our employees.

WE WILL NOT contract out bargaining unit work because of the union activities of our employees.

WE WILL NOT refuse to recognize and bargain with Teamsters Local 25, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, as the exclusive collective-bargaining representative of our employees in the following unit:

> All full-time and regular part-time chemical drivers, truck drivers and shipper-receivers employed by the Employer at 14 Audubon Road, Wakefield, Massachusetts, but excluding all office clerical employees, production and maintenance employees, managerial employees, professional employees, guards and supervisors as defined in the Act.

WE WILL NOT in any other manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL make whole John Wharton, Irving Sweetser, Roger Morrison, Nils Swanson, and Paul Brown for any loss of wages and other benefits they may have suffered as a result of our discrimination against them, with interest.

WE WILL, on request, recognize and bargain with the Union as the exclusive collective-bargaining representative of our employees in the bargaining unit set forth above with respect to wages, hours, and other terms and conditions of employment; and, if an understanding is reached, WE WILL embody such understanding in a signed agreement.

HOOD INDUSTRIES, INC., AND ITS WHOLLY OWNED SUBSIDIARY, B & K TRANSPORTATION, INC.

DECISION ON ORDER REOPENING RECORD

STATEMENT OF THE CASE AND BACKGROUND

PETER E. DONNELLY, Administrative Law Judge. The original administrative law judge's decision issued on October 17, 1979. As set forth, it appears that Hood Industries, Inc. (Hood or Respondent) employed one James Foley to distribute its products. When Foley became terminally ill, Respondent formed B & K Transportation, Inc. (B & K) to distribute its products. It purchased all of Foley's equipment, trucks, and permits and began its own distribution operation in February 1978.

On April 6, 1979, Teamsters Local 25, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Local 25 or the Union) filed a petition to represent the truckdrivers and platform workers employed by B & K. After an election, the Union was certified as the collective-bargaining representative of the unit employees on May 30, 1978. Shortly thereafter, the Respondent subcontracted the distribution operation being performed by B & K and discharged the drivers. The Union filed 8(a)(1), (3), and (5) charges on June 14, 1978. The judge decided, inter alia, that "Respondent's decision to cease its trucking operation and its actions in selling the equipment and terminating the employees who were members of the Union were motivated by a desire to discourage union membership and not to bargain with the Union." The judge ordered the Respondent to reestablish its trucking operation and reinstate the discharged drivers. In the remedy portion of this decision the judge also concluded that he did "not believe that it would be an undue hardship for Respondent to resume its trucking operation," and that "Respondent has not shown that the economic burden of purchasing trucks and resuming its trucking operations would endanger the continued viability of Respondent," so as to bring this situation within the ambit of the Board's decision in *Great Chinese American Sewing Co.*[1]

The Board, in a Decison and Order affirming the judge dated March 20, 1980 (248 NLRB 597), commented on the *Great Chinese* case, saying: "The Great Chinese case involved a unique situation, and the [Board] majority [Member Fanning, dissenting], rather than forcing the reestablishment of a clearly unprofitable operation, found that the policies of the Act were sufficiently fulfilled by a full make-whole order covering the employees of the terminated plant."

Thereafter, on April 24, 1980, Respondent filed a motion to reopen record to show that the future liability of the Respondent would be endangered by requiring it to reestablish its trucking operation. The motion enumerated various individual specific costs amounting to $51,428 per month which Respondent contends it would cost to reestablish the trucking operation, as compared to an average cost of $30,542 per month for December 1979 and January, February, and March 1980, representing the cost to contract out the trucking operations. Based on these figures, Respondent contends that the cost of reestablishing the trucking operation under the Board's order would increase its costs by in excess of $20,000 per month. This, argues the Respondent, would "endanger the future liability" of Respondent within the meaning of the *Great Chinese* case. This being the case Respondent contends that the remedy for the discriminatory shutdown should be limited to backpay for the discriminatees until they obtain substantially equivalent employment.

By Order dated June 16, 1980, over the General Counsel's opposition, the Board (Member Jenkins dissenting) granted the Respondent's motion to reopen the record in order to afford the Respondent "an opportunity to develop a record which would permit the Board to determine the factual accuracy of Respondent's assertions and further, if true, whether Respondent's continued liability would be endangered by our remedy."

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[1] 227 NLRB 1670 (1977).

A hearing on these issues was held before me on February 25, 26, and 27 and April 6 and 7, all in 1981. Briefs have been timely filed by Respondent and the General Counsel which have been duly considered.[2]

FACTS

I. ESTIMATED COST OF RESUMING THE TRUCKING OPERATION

In support of its position, Respondent, at the hearing, introduced into evidence a document captioned "Proposed Costs to Set Up Trucking Operation" (R. Exh. 1). In totaling the various cost items enumerated therein, a total figure of $600,966 per year is advanced. In its motion to reopen record (G.C. Exh. 2(a)), the annual figure is represented to be $617,136, a discrepancy of some $17,000 per year, disclosing variances in the individual cost items when comparing the two submissions.[3]

The various cost estimates of the Respondent, as set out in Respondent's Exhibit 1, are as follows

A. *Driver's Wages ($148,753)*

To arrive at this figure, Respondent calculated the hours billed by subcontractors in 1980 to arrive at a figure of 5608 for local hauling and estimated the hours worked by subcontractors as to long-distance hauling at 7334 to arrive at a total of 12,942 hours plus 382 hours (8 days) of holiday pay for a total of 13,326 hours since holiday time displaces working time. None of the source documents were introduced to support these figures. Based on these figures Respondent calculated that six drivers were needed[4] 2000 hours per year, per driver, plus 1326 hours of overtime. Respondent assumed an hourly rate of $10.93 per hour, with overtime hours at time and half ($15.40) as derived from Bureau of Labor Statistics for the Boston area as of August 1980.

B. *Layovers ($10,830)*

It is not disputed that Respondent did not pay for layovers while B & K performed the trucking operation. The number of layovers was arrived at by determining which long-distance hauls done by subcontractors in 1980 required layovers and assigning the cost of $30 to each layover.

C. *Clerical ($10,000)*

Respondent contends that a resumption of the trucking operation would require the full-time services of a clerical employee at an annual salary of $10,000 to perform such functions as filling out fuel tax forms, obtaining necessary truck and trailer licenses, making up the payroll, paying vendors, and maintaining the books.

It is not disputed that B & K had not employed a full-time clerical. Those clerical functions incident to the B & K trucking operations had been performed by employees of the Respondent, including the secretary to the president, and Raleigh himself. The record does not show that these functions required 40 hours per week to perform.

D. *Dispatcher ($15,000)*

It is undisputed that B & K did not employ a full-time dispatcher when it performed the trucking operation. The function of the dispatcher was done by Hood Vice President Kenneth Lundstrom and Raleigh, as employees of Hood at no additional cost to B & K. Obviously the Board's Order requires only restoration of the status quo and Hood is not obliged to hire a full-time dispatcher. But Respondent contends that one would be necessary if the trucking operation were to be granted.

E. *Mechanic ($19,660)*

In the cost proposal the figure of $19,660 per year is based on an hourly rate of $9.83 per hour, which again was the hourly rate for mechanics in the Boston area in 1980 as determined by the Bureau of Labor Statistics. With respect to the services of a mechanic, it should be noted B & K had not employed a mechanic and obviously the Board's Order to reestablish the trucking operation would not obligate the Respondent to hire a mechanic.

F. *Blue Cross-Blue Shield ($10,783)*

While B & K performed the trucking operation it paid one-half of the monthly Blue Cross-Blue Shield premiums for employees with less than 1 year of service and all of the premiums for those with more than 1 year of service. Respondent bases its premium cost figure of $10,793 on the assumption that the discriminatees would be reemployed and that a mechanic, dispatcher, and clerical would be employed full time, although this had not been the case when B & K maintained the trucking operation.

G. *Holiday Pay ($10,858)*

Respondent bases this figure on the assumption that six drivers and a mechanic will be hired to resume the trucking operation, and apparently that these employees would be paid 8 hours at regular time in addition to their normal pay for the holiday at their rate of $10.93 per hour. When B & K performed the trucking operation, drivers received only 8 hours' pay for holidays.

H. *Unemployment Compensation; FICA Expense; Workmen's Compensation Expense*

Like the calculations on holiday and vacation pay, Respondent assumes the hiring of six drivers, a mechanic, a dispatcher, and a clerical employee at the wages noted above, in arriving at the cost figures for these items.

I. *Fuel ($160,152)*

In order to arrive at an annual figure for the fuel cost, Respondent divided the estimated total number of miles driven by 4.5 miles per gallon and then multiplied by the

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[2] In the absence of exceptions thereto, Respondent's motion to correct transcript is granted.

[3] The testimony in support of the cost figures in R. Exh. 1 was presented by Douglas Raleigh, Respondent's comptroller.

[4] Only four full-time and one part-time drivers had been employed in the B & K trucking operation prior to its discontinuance, at a rate of $5 per hour.

estimated cost of $1.448 per gallon for fuel. Obviously this calculation depends on an accurate total mileage figure for its validity. The mileage figures were arrived at from bills submitted by the subcontractors of B & K. As to long-distance mileage, B & K was billed at a rate of 60 cents per mile and total long-distance mileage was thus computed. Local hauling was billed differently, at $18 per hour. Respondent translated this to a mileage figure by dividing the total cost of local hauling by a factor of 53 cents per mile. However, the record discloses that there is a considerable discrepancy between the actual local miles driven and the Respondent's mileage figures. In two instances, Respondent's calculations erroneously showed mileage figures twice as great as the actual miles driven.

J. *Depreciation ($48,681)*

Respondent recites depreciation as an expense and put the figure at $48,681 per year for six tractors.[5] Respondent elected to estimate depreciation under IRS rules over 3 years instead of 5 years, as IRS rules would have permitted, with the resulting increased yearly depreciation figure showing as an expense.

II. FINANCIAL CONDITION OF RESPONDENT

The bulk of the testimony concerning the financial condition of the Respondent is derived from the testimony of William Howard, a certified public accountant with the CPA firm of Alexanderia Grant and Company, which firm has audited the Respondent since 1976. Howard was asked to examine the Respondent's exhibits for the purpose of forming an opinion as to whether or not the Respondent's viability would be affected if it were required to resume the trucking operation. Howard testified that, assuming the accuracy of these cost figures, the additional cost would eliminate the stockholders' equity which would "seriously impact the future of the company." He also noted that the current liabilities, those to fall due before January 1, 1982, exceed assets by about $360,000 and Hood would have to look elsewhere to pay those liabilities. In testifying about the Respondent's weak financial condition, Howard also noted the loss of $146,000 in 1980, and testified that these liabilities and losses precluded the use of current assets as a source to fund the resumed trucking operation. Also, that borrowing would be difficult since a firm with a working capital deficit of $365,000 would be unattractive to lenders. Given these considerations, Howard concluded that there was a clear question as to the ability of Respondent to continue operating if it were required to resume the trucking operation.

III. ANALYSIS AND RECOMMENDATION

The first question for which the Board has ordered the record to be reopened was to "determine the factual accuracy of the Respondent's assertions" in its motion to reopen record. (G.C. Exh. 2(a).) However, at the hearing the Respondent introduced a different set of cost figures, differing both in total cost and obviously in several individual cost items (R. Exh. 1). By attempting to prove its case using the figures introduced at the hearing, Respondent has effectively abandoned the cost figures presented to the Board, and on which the Board acted in ordering the hearing to be reopened.[6] Accordingly, I am not able to determine the accuracy of the cost representations made in the Respondent's motion to reopen record. However it seems appropriate to address the accuracy of the cost figures presented at the hearing and I shall do so.

A. *Drivers Wages*

Respondent estimated that it would need six drivers at an hourly rate of $10.93 per hour, despite the fact that B & K, when performing the trucking operation itself, operated with only five drivers at $5 an hour. I am not satisfied that the Respondent has established the need for a sixth driver whether due to an increase in production, sales, or whatever, nor am I satisfied that drivers cannot be retained at less than 119 percent of what they were paid as employees of B & K. Accordingly, I conclude that this cost figure has not been proven and that an accurate cost figure would be considerably less.

B. *Clerical Employee*

While B & K performed its own trucking operation, the insubstantial clerical functions necessary were performed by employees of Hood. Respondent has not shown that a resumption of the trucking operation necessitates a change in this method of operation to the extent of employing a full-time clerical employee. Therefore, without such a showing, this cost figure to perform clerical functions is unsubstantiated.

C. *Dispatcher*

I am not satisified that the full-time services of a dispatcher would be required in order to conform to the Board's Order to reestablish the trucking operation. The dispatcher's function had previously been performed by employees of the Respondent, and I am not satisfied that reestablishment of the trucking operation would require the services of a full-time dispatcher for B & K.

D. *Mechanic Employee*

Obviously, as with the clerical and dispatcher, the Board's Order does not require the hiring of an individual to perform mechanical work. Certainly trucks will need to be maintained, but it would comport fully with the Board's Order to have the work done as it has been done previously. I cannot conclude that the assumption of the trucking operation requires the hiring of a full-time mechanic. Whether or not the yearly salary of $19,660 per year would be adequate for the services of

[5] Respondent presently owns two tractors, a Peterbilt and a Mack. The Mack was retained as a "yard horse," when the B & K equipment was sold in 1978, replacing an older White, which was sold. The Peterbilt apparently was taken out of service on October 6, 1978, but is still owned by Respondent.

[6] The cost figures to restore the trucking operation in the motion to reopen record was $51,428 per month or $617,136 per year. The yearly cost figure in R. Exh. 1 is $600,966 per year or $50,080.50 per month.

outside maintenance on the vehicles, it is not possible to determine without more information.

E. *Blue Cross-Blue Shield*

With respect to the cost estimate for Blue Cross-Blue Shield coverage, the Respondent has included within that cost item coverage for a full-time clerical, mechanic, and dispatcher. As noted earlier, I am not satisfied that the Board's Order to resume the trucking operation requires their hiring, and thus I conclude that Respondent's cost estimate is excessive.

F. *Holidays and Vacations*

Similarly, with respect to the matter of holiday and vacation pay, those amounts are reducible by the amounts attributable to the mechanic, dispatcher, and clerical, whom I conclude that the Respondent is not required to employ. Moreover, Respondent's calculation appears to provide, as to the eight holidays, both regular pay plus 8 hours of holiday pay for each holiday, whereas previously they had been paid for only 8 hours of regular pay on holidays. Additionally, as noted earlier, I am not convinced that drivers would be unavailable to the Respondent at less than $10.93 per hour. All of these factors persuade me that the holiday and vacation cost figures could be substantially less than those advanced by Respondent.

G. *Unemployment Compensation, FICA, Workmen's Compensation*

Likewise, the unemployment compensation, FICA, and workmen's compensation premium expenses to the Respondent are exaggerated to the extent that they include payments for the mechanic, dispatcher, and clerical, the necessity for whose employment has not been shown.

H. *Fuel Costs*

With respect to the largest expense item, fuel, it appears to me to be substantially inaccurate and, as in those instances pointed out by the General Counsel, overstated. The fault lies with the above formula used to determine the number of miles driven locally, which produced seriously flawed mileage figures. In these circumstances, I conclude that the cost figure for fuel is substantially inaccurate, and not a reliable projection of fuel costs. Of course since vehicle maintenance costs depend on the same formula, they too are also flawed to that extent.

I. *Depreciation*

Respondent chose to project depreciation over 3 years rather than 5 years. The effect of this is to show a greater yearly expense than would have appeared if the 5-year depreciation option had been elected. While the Respondent contends that this is a business decision, beyond the scrutiny of the General Counsel, I conclude that it reflects a maximization of expense beyond what is necessary in order to resume the trucking operation under the Board's Order.

J. *Financial Condition of Respondent*

In evaluating the testimony of Howard, it is necessary to bear in mind that he was not responsible for, and apparently took no part in, the preparation of the document showing the proposed cost of resuming the trucking operation, or any of the other cost figures in Respondent's documents in evidence, with the exception of Respondent's financial statement (R. Exh. 7). Any opinion offered by Howard as to the continued viability of Respondent necessarily involves a comparison of the cost to resume the trucking operation with Respondent's financial position. I have concluded that the estimated cost figures to resume the trucking operation are substantially inaccurate and excessive. Accordingly, Howard's opinion, however valid it may have been premised on accurate projected cost figures, is fatally defective in view of Respondent's demonstrably inaccurate cost projections.

In summary, I am not satisfied that the figures advanced by the Respondent adequately reflect the cost of reestablishing the trucking operation. It appears that the real figures would be substantially less, although it is impossible to be definitive as to specifics in this regard, because the date in the record is insufficient. While it appears that some additional expense may be encountered by the reestablishment of the trucking operation, I am not convinced that this record shows that the continued viability of the Respondent has been endangered so as to bring the Respondent within the ambit of the *Great Chinese* case, supra.

In the instant case, Respondent shut down its trucking operation discriminatorily, and discharged the drivers in an effort to discourage union membership, and so violated Section 8(a)(3) of the Act. That is not in dispute in this matter. Respondent's motivation was discriminatory, not economic. In these circumstances, the traditional Board remedy provides, inter alia, for the reestablishment of the operation. However, the Board appears to have chiseled an exception for employers whose continued viability would be endangered by such reestablishment.

But as the Board notes in its original Decision and Order herein, supra, 248 NLRB 597 fn. 3, *Great Chinese* involved a "unique situation" and made its position clear in holding, "We continue to adhere to the well-established principle that, in cases involving discriminatory conduct, the restoration of the *status quo ante* is the proper remedy unless the wrongdoer can demonstrate that the normal remedy would endanger its continued viability. See *Lion Uniform, Jamesville Apparel Division*, 247 NLRB 992 (1980); *R & H Masonry Supply, Inc., supra* [238 NLRB 1044]."

In my opinion, a simple showing that reestablishing the operation would be financially detrimental would not suffice. There must be a showing, with accurate supporting data and financial documentation, that the Respondent's economic survival would be endangered. The Respondent in the instant case has not met this burden. Accordingly, it is my recommendation that the Board's Order in this case be enforced.[7]

[7] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

Jaydon, Inc. *and* International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) and its Local 2137. Case 33–CA–6346

23 January 1985

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS HUNTER AND DENNIS

On 4 April 1984 Administrative Law Judge Walter H. Maloney Jr. issued the attached decision. The Charging Party filed exceptions and a supporting brief, and the Respondent filed cross-exceptions, a supporting brief, and an answering brief.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

[1] We agree with the judge that dismissal of the complaint is warranted under the standards set forth in *Milwaukee Spring Division*, 268 NLRB 601 (1984). Accordingly, we find it unnecessary to consider the Respondent's alternative contentions or the judge's discussion and findings regarding alleged waiver and acquiescence and whether the parties' collective-bargaining agreement affirmatively permitted the changes at issue. Further, because there is no contention that the Respondent violated the Act by failing to notify and bargain in good faith with the Union regarding the proposed decision to relocate, we find it unnecessary to consider the Respondent's motivation for the decision or whether it was a mandatory subject of bargaining.

In the absence of exceptions we adopt pro forma the judge's discussion and findings at sec. II,A of his decision regarding the General Counsel's authority to seek dismissal or withdrawal of the complaint and the role of the Charging Party in the circumstances of this case.

DECISION

STATEMENT OF THE CASE

WALTER H. MALONEY JR., Administrative Law Judge. This case came on for hearing before me at Davenport, Iowa, upon an unfair labor practice complaint[1] issued by the Regional Director for Region 33 of the National Labor Relations Board, which alleges that the Respondent, Jaydon, Inc.,[2] violated Section 8(a)(1), (3), and (5) of the Act. More particularly, the complaint alleges that the Respondent unlawfully transferred bargaining unit work from its organized plant in Rock Island, Illinois, to a new plant in Atlantic, Iowa, during the term of an existing collective-bargaining agreement, contrary to the terms of that agreement and without the prior consent of the Union. It asserts that the Respondent did so, in whole or in part, to avoid paying wage rates and benefits established by contract and in retaliation against the Union for refusing to make or accept midterm contract modifications. The complaint further alleges that, as a result of the relocation of work beginning about October 16, 1982, approximately 67 bargaining unit employees[3] were permanently laid off in violation of Section 8(a)(3) of the Act by telling employees who were to be laid off that they could obtain employment at the Respondent's new facility only by abandoning their rights under the existing collective-bargaining agreement, thereby bringing pressure on them to accept certain midterm contract modifications which the Respondent was seeking. Both the General Counsel and the Respondent, in posttrial motions to dismiss,[4] urge that the complaint be dismissed in light of the Board's recent decision in *Milwaukee Spring Division*, 268 NLRB 601 (1984), which was issued while the case was pending before me awaiting briefs. The Respondent also contends that the Union waived its right to object to a relocation of work to Atlantic, Iowa, and further argues that the complaint is barred by limitations. On these contentions, the issues herein were joined.[5]

FINDINGS OF FACT

I. THE UNFAIR LABOR PRACTICES ALLEGED

For a number of years, Jaydon, Inc. has operated a warehouse and distribution center at Rock Island, Illinois. It began operations in other premises in 1946 as a wholesale supplier of candy, fountain products, and punchboards but later grew into a large service merchandiser for nonfood items. It purchases these items in bulk from manufacturers, breaks them down into smaller orders, and sells and delivers the individualized orders to retail merchants, accompanying the sale with service, retailing advice, and advertising promotions. It now processes about 7000 different nonfood items normally found in grocery and drug stores. Its business exceeds $70 million in annual sales. The Respondent's president and chief executive officer Jay Gellerman estimated that Jaydon, Inc. now ranks sixth or seventh nationally among service merchandisers.

[1] The principal docket entries in this case are as follows:

Charge filed herein by International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) and its Local 2137 (the Union or UAW) against the Respondent on February 9, 1983; complaint issued by the Regional Director against the Respondent on September 15, 1983; the Respondent's answer filed on September 22, 1983; hearing held in Davenport, Iowa, on November 29 and 30, 1983.

[2] The Respondent admits, and I find, that it is an Illinois corporation which maintains its principal place of business in Rock Island, Illinois, where it is engaged in the wholesale distribution of nonfood grocery items to retail merchants. During the preceding calendar year, the Respondent sold and shipped from its Rock Island, Illinois facility directly to points and places located outside the State of Illinois goods valued in excess of $50,000. Accordingly, the Respondent is an employer engaged in commerce within the meaning of Sec. 2(2), (6), and (7) of the Act. The Union is a labor organization within the meaning of Sec. 2(5) of the Act.

[3] The names of these employees are not set forth in the body of the complaint but their identities are fully disclosed in stipulated exhibits and other documents admitted into evidence.

[4] The Charging Party vigorously opposes both motions and insists that the complaint be disposed of by a full decision and in accordance with the General Counsel's original theory of the case.

[5] Certain errors in the transcript have been noted and corrected.

The Respondent employs driver-salesmen and presumably other sales representatives in the 14-state area in which it operates. The dispute in this case involves the Respondent's operations in Iowa, where its major customer is Hy-Vee Food Stores, Inc. (Hy-Vee). Hy-Vee is a large retail chain which provides Jaydon, Inc. with more that $20 million of the Respondent's total gross sales and accounts for about 85 percent of its Iowa business.

The pattern followed by the Respondent in servicing Hy-Vee is that Jaydon driver-salesmen, who are located throughout Iowa, visit Hy-Vee's many retail outlets and solicit orders directly from store managers. These orders are phoned into the Respondent's headquarters in Rock Island and are then prepared in individual shipments destined for each particular store. This is done by a pick line manned by employees who pick the particular items ordered and, in the quantity ordered, assemble the order, and then cause it to be shipped to drop points throughout Iowa. Drop points are unmanned storage locations from which driver-salesmen pick up the orders and then transport them to the particular store which originally placed the order. The gravamen of the dispute in this case is that Iowa orders which were formerly picked and Iowa shipments which were formerly made from the Rock Island warehouse are now being handled from the Respondent's new satellite warehouse, located some 230 miles west of Rock Island in Atlantic, Iowa. As a result of this transfer a bargaining unit in Rock Island formerly consisting of about 230 employees was reduced first to 160 employees and now has only about 95 employees. The latter decline also resulted, in part, from the opening of a second satellite warehouse in Elkhart, Indiana. The facts and circumstances of the relocation to Elkhart are not directly at issue here but, in the original estimation of the General Counsel and the Changing Party, they provide an illuminating insight into what prompted the Respondent's pilot program in Iowa.

In the fall of 1979, the Union herein filed a representation petition, seeking a unit of the Respondent's production and maintenance employees at its Rock Island facility.[6] A so-called stip election agreement was concluded defining the appropriate bargaining unit as "all full-time and regular part-time maintenance and warehouse employees and truck drivers employed by the Employer at its Rock Island, Illinois facility" with the usual exceptions. The Union won the election, which was conducted on December 5, 1979, and was certified soon thereafter. Collective bargaining between the parties resulted in a contract, effective April 1980 through Febuary 28, 1983. (It was later extended until March 9, 1983.) The contract contained a provision describing the bargaining unit in almost the identical language which was used in the election agreement.

In early 1982, the Respondent was approached by Ronald Pearson, executive vice president of Hy-Vee, and was asked whether it could take some measures which would result in lowering the cost of items purchased. Pearson made no specific demands on the Respondent but suggested, among other things, that perhaps the Respondent and Hy-Vee could jointly operate a wholesaling operation in a warehouse at Chariton, Iowa, which Hy-Vee was planning to vacate. Another suggestion was that the cost of items sold to Hy-Vee could be reduced if Jaydon would also reduce the services extended to the 130 Hy-Vee grocery stores and its 18 Drug Town drug stores. Extensive driver-salesmen service, such as rack jobbing, had already been discontinued in 28 of these stores at the request of the store managers and ultimately 46 more stores reduced these services, a move which resulted in the layoff of about 20 Jaydon driver-salesmen.[7] At a meeting between Jaydon and Hy-Vee management on April 12, the Respondent informed Hy-Vee that it was thinking about establishing a satellite building at Atlantic, Iowa. The Respondent told Hy-Vee that it had a 50,200 square foot building lined up and was of the opinion that it could operate a warehouse there for about one-half of the labor cost it was then paying in Rock Island.[8] I credit Pearson's statement that Hy-Vee never demanded that Jaydon establish a warehouse in Iowa.[9] Throughout the period running from April until August 3, negotiations continued between Brady and Portes over the particulars of the lease of the Atlantic warehouse. On that date a lease was signed by the landlord and, on August 6, it was approved by Jaydon.

On July 13, 1982, Gellerman met with Hy-Vee management and informed them that a decision to open a warehouse in Atlantic had been made. On the following day, he met with union representatives but his statement to them on this subject was far more equivocal. The occasion for the second discussion was a routine third-step grievance meeting which took place at the plant between Gellerman, Operations Director Dennis Calvert, Personnel Director Kendall Kelly, UAW International Representative James Maddox, and various stewards and Local 2137 officials who normally attended third-step meetings. After the parties had completed a discussion of the grievances, Gellerman handed Maddox a letter which read:

> We have been notified by our largest customer that unless we are more competitive in our pricing and make major changes in our programs, they will be forced to buy their non-food merchandise direct from the manufacturers. They have officially noti-

[6] At this time, the Respondent had no other facilities. It controls a wholly owned subsidiary in Springfield, Missouri, some 450 miles away, but this subsidiary did not figure in any way in the election or the preelection campaign.

[7] Driver-salesmen are not a part of the bargaining unit in this case and have never been represented by a labor organization.

[8] The building in question is known as the Ebcor Building and was owned by the Kewanee Boiler Corporation. In a letter dated April 14, 1982, Kewanee Attorney Charles A. Brady forwarded to Herbert Portes, one of the Respondent's attorneys, the draft of a lease of these premises, together with an option to buy and an abstract of title opinion. Brady recited in his letter that he was taking this action at the request of Gellerman.

[9] Gellerman's testimony on this point was evasive and misleading. At first he stated that he was forced to offer "this program" at the insistence of Hy-Vee. Later, on cross-examination, he conceded that all that Hy-Vee was interested in was saving money and that the idea of opening a warehouse in Iowa came from Jaydon. Throughout his testimony, Gellerman generally was evasive, argumentative, and internally contradictory. I place little reliance on the testimony he gave, especially when it conflicts with other evidence in the record.

> fied us that in order to remain as their supplier we must fill orders at a location close to their warehouse in Iowa where the goods can be picked up by their trucks on a backhaul basis and delivered to their stores along with groceries they already deliver. They also intend to take over all in-store service and pricing of non-food merchandise.
>
> This particular chain, as well as other independent customers, contends, and they are right, that if we limit our services we can sell merchandise to them at a much lower price
>
> These customers state that if we cannot make the changes immediately, they will establish their own warehouse and eliminate Jaydon as their non-food supplier. To permit this to happen would be a serious blow to Jaydon and all of its employees. We are contemplating compliance with this request. We will have to make a substantial investment in a new warehouse and scale down our Rock Island operation. We could maintain our position and try to replace this lost business.
>
> The changes will result in the elimination of the night shift and approximately 15 to 20 other employees in the bargaining unit.
>
> If you desire to discuss this matter, please notify me as soon as possible. I am delivering a copy of this letter to the president of the local unit.

Maddox and the other union representatives were stunned by this letter and asked to have a brief caucus. When they returned, one of them asked Gellerman who the principal customer was that he referred to in the letter. Gellerman declined to mention a name but simply stated that everyone knew who it was. Gellerman was asked whether the decision to relocate a portion of the Rock Island operation was final and he replied that the decision was not final and that he would be willing to talk about it. He was also asked where the new warehouse would be. He replied that he did not know, saying they were still looking for a place and had not executed a lease, but it would be somewhere in the middle west.[10] I credit Maddox's testimony that he reminded Gellerman of his obligation under the contract to keep working in Rock Island. Maddox began to ask what it would take to keep the Respondent in Rock Island. Gellerman replied that relocating was not something the Company wanted to do but was something its customer was demanding that it do. The parties agreed to meet again on August 3 to discuss the matter further.

Shortly thereafter, the Union sent out a notice to its members, stating that the Respondent was planning to move a part of its operations to another State, perhaps in the early fall. It stated in the notice that the question would be discussed further at an upcoming union meeting on July 18.

On July 15, Maddox replied to Gellerman's letter of the previous day, stating that the Union would be prepared to discuss "this matter" with the Respondent at the meeting already planned for August 3. Maddox stated further, "When you have more detailed information, if you would send it to me, the Union would be in a better position to discuss the details, and offer any suggestions we might have."

On July 19, a newspaper article appeared in The Argus, a daily newspaper circulated in the Rock Island area, which stated:

> Jaydon, Inc., in Rock Island, is considering moving a portion of its operations to Iowa, a move that could cost the city up to 50 jobs.
>
> Jaydon vice president Jay Gellerman said the company notified employees of the possible move last week. "Nothing is a sure thing. We are just trying to give them advance warning on the thing," Gellerman said.
>
> Gellerman said the move was being considered because of "Changing business conditions" and a desire to move operations closer to Jaydon customers in other areas. He said he did not know where in Iowa the company might locate.
>
> The plans will probably be discussed at an August 3 meeting between Gellerman and United Auto Workers Local 2137, which represents Jaydon workers.
>
> The 50 jobs which could be affected include the entire night shift of 35 workers, and 15 to 20 others, according to Gellerman.
>
> Jaydon is a distributing company that delivers non-food items such as health and beauty aids and housewares to supermarkets, grocery stores, and convenience stores. Jaydon currently employs about 220 people at the Rock Island facility.

While Gellerman was in the process of telling the Union and the press that he did not know where the new facility might be located, his attorney was putting the finishing touches on the lease of the Ebcor Building in Atlantic. By letter of July 21, Portes informed the landlord's attorney of his agreement or disagreement with certain minor items contained in the second draft of a proposed lease. Portes' letter to the landlord, dated July 21, recited that some of Jaydon's employees had visited the premises and were concerned that the burglar alarm system be repaired, that certain leaks in the northeast corner of the building be repaired, and that the parking lot be regraveled. By letter of July 29, the landlord agreed to make certain requested repairs and signaled its agreement to most of Portes' other comments. In a further letter, of July 30, Portes told the landlord that he would be in Rock Island on August 3 and 4 and indicated that, if the landlord could get the revised lease to Rock Island prior to that time, Portes could review it and get it signed during his visit. The lease in final form was signed on August 3 by the landlord and on August 6 by Jaydon.

On July 26, 1982, Gellerman wrote another letter to Maddox. Addressing him as "Dear Jim," Gellerman purported to recapitulate the July 14 meeting by saying that he had informed the union representatives on that date that "in order to retain our largest customer it would be

[10] Personnel Director Kendall Kelly testified that he had learned from Operations Director Dennis Calver prior to the July 14 meeting that the relocation was definite.

necessary to change our method of operation and such a change could involve a reduction in personnel in jobs both outside and within the bargaining unit represented by your union." The letter went on to state:

> As you can well understand, it is most difficult to predict the exact number of employees that will be involved. Our best estimate at this time is as follows:
>
> 1. Approximately 20 salesmen-drivers delivering merchandise to these stores will be terminated and there will be additional terminations as a result of the consolidation and restructure of our field operations.
>
> 2. Approximately 8 to 10 sales supervisors will be eliminated and those remaining will be required to undertake substantially increased duties.
>
> 3. All deliveries of health and beauty aids from Rock Island to the drop points serving these stores will be eliminated. Our best estimate at this time is that this will require:
>
> (a) The termination of the night shift operation in the Rock Island warehouse involving approximately 55 employees;
>
> (b) An estimated 3 to 5 truck drivers who, in the past, have delivered merchandise to the drop points serving these stores; and
>
> (c) An estimated 5 to 10 employees on the day shift in the Rock Island warehouse.
>
> You must understand that except with respect to the night shift in the Rock Island warehouse, the exact number of employees in the bargaining unit that will be affected cannot now be stated with certainty.
>
> As I indicated at the meeting we will negotiate with you in connection with the affect [sic] of this change of our operations on the bargaining unit including:
>
> (a) Your right to represent the employees at the new warehouse.
>
> (b) The transfer rights of employees at the Rock Island plant whose employment is terminated.
>
> If you have any specific proposals to present, I would appreciate it if you would send me a copy prior to our scheduled meeting on August 3.

Despite the fact that negotiations for the lease of the Atlantic warehouse were in their final stages, the identity or location of the warehouse had yet to be disclosed to the Union.

At the August 3 meeting, Gellerman used a blackboard to illustrate certain points he wished to get across to the union representatives. He said that the Company's largest customer was demanding that it move and that it would move if it could not change the customer's mind. He told the assembled group that Jaydon's competitors had been using satellite warehouses for years, that Jaydon's competitors were beginning to squeeze it, and that they felt that they could pick up new business if they had a warehouse elsewhere. There is a conflict in the testimony as to whether Gellerman disclosed the situs of the new warehouse at this meeting. Some say he mentioned Atlantic, others say that he was still talking about the possibility of opening a warehouse in Chariton, Iowa, the headquarters of Hy-Vee. There is also disagreement as to whether Gellerman stated at this meeting that the move was definite or still tentative. The Union expressed the desire to represent any employees hired at the new warehouse and to extend the contract to cover them. It also made inquiry as to what benefits would be paid to laid-off employees as part of their termination benefits. At this meeting, a discussion arose about whether concessions in the current contract could induce the Respondent to stay at Rock Island. Gellerman replied that the Company was not talking about concessions. It was telling the Union what was going to happen.[11]

On August 11, Maddox wrote to Gellerman as follows:

> This letter is a follow up of our meeting with you on 3 August 1982 and to list for you items which we should discuss at our meeting on August 25th.
>
> As to our conversation at the August 3rd meeting, the Union is willing to sit down and discuss and work out a reasonable solution, if possible, to prevent such a reduction in the work force at the Rock Island location, and if the decision has been anchored in cement to relocate part of your operation in another state, we feel you have an obligation to the employees affected to work out an orderly transfer of the work and personnel.
>
> Jay, as you stated in your letter dated 26 July 1982, you were willing to negotiate our right to represent the employees at a possible new location and we should work out the necessary details to accomplish that, which would expedite things and the affected bargaining unit employees should be given preference. We also need to work out details to cover affected employee on insurance coverage.
>
> I would hope we could work out a reasonable solution during these troubled times without going into more detailed information that our actuary would require, e.g. financial status, the need for such move based on cost saving, breakdown of labor cost and supervisory and other non labor wages and benefits.

On August 16, 1982, Gellerman replied:

> On the basis of our discussion at the August 3rd meeting, Jaydon signed a lease for a warehouse in Atlantic, Iowa and made and is continuing to make commitments with respect to relocating part of its operations in order to be able to serve its customers.

[11] Some witnesses place this remark at the first meeting in July, but I believe the preponderance of credible evidence establishes that it was made at the August 3 meeting. However, the tenor of the ensuing correspondence between Maddox and Gellerman on August 11 and 16 supports the view, and I find, that Gellerman did not disclose the location of the new operation to the Union until August 16.

In line with your letter of August 11, I wholeheartedly agree that Jaydon has an obligation to the employees affected by the partial change in the manner and method of our operations to negotiate with your Union in a good faith effort to work out the problems raised by that change in our operations.

To repeat our statement at the August 3rd meeting, we will be prepared on August 25th to discuss any and all matters relating to the effects of the change in our operations, including those items listed in your last letter and those previously raised in the August 3rd meeting. In order to facilitate our discussion at the next meeting, I can give you an idea of Jaydon's position with respect to a number of these issues.

First, regarding recognition of your union as the representative of the employees at the new location, it is our belief that we may not do so at this time without violating the law. We have not in the past, and we will not in the future interfere with the right of our employees freely to determine who, if anyone, will represent them in respect to the terms and conditions of their employment. It seems obvious to me that we would interfere with those rights by now recognizing the UAW or any other union for the new bargaining unit without an election. That is particularly true since a full complement of workers has not yet been hired for the new warehouse.

Second, employees at the Rock Island Plant who are to be laid off will have the choice of

1. remaining on the seniority list with right to recall and other rights and obligations as provided in our Agreement, or

2. terminating their employment with Jaydon at the Rock Island Plant which will result in their permanent removal from the Rock Island seniority list. Such termination will constitute a release of all of their rights under our Agreement except those agreed upon for such terminated employees.

3. All employees who do not elect termination in writing will be deemed to have been laid off with continuing seniority and other rights and obligations under our Agreement.

Third, we will offer all terminated employees jobs at the new warehouse if application is made for those jobs within a time to be agreed upon. We plan on starting operations at the new warehouse at the end of September or early in October. The new warehouse will not be automated so some training will be necessary for these terminated employees. Therefore, the employees who apply for jobs at the new warehouse must be prepared to report for work prior to that time. We can discuss and fix that date. The jobs will be at the rates stated in our last meeting.

Fourth, other provisions for terminated employees will be as follows:

1. They will receive prorated

a. vacation pay
b. personal leave time.

2. They will continue to be covered under the insurance plan provided in our agreement for a period of 30 days after the end of the month in which their termination occurs.

3. They can apply for their benefits under the Profit Sharing Plan.

Fifth, the same provisions will apply to Rock Island employees who are laid off during the balance of the transitional period.

On August 25, the parties met again at the Sheraton Hotel in Rock Island. At this meeting, the Union brought up the problem of whether laid-off Rock Island employees would be allowed to transfer to the new warehouse and under what conditions. It also inquired as to what would become of certain fringe benefits accruing under the contract to laid-off employees, namely, excused leave and vacation benefits. Prior to that time, the Union had received a list of the names and classification of 64 Rock Island employees who would be laid off.[12] The Union asked the Respondent to post this list the following day and to give anyone desiring to bump a junior employee an opportunity to do so.

Company Attorney Portes informed the union representatives that employees who were slated for layoff would be given a letter in which they would be given the opportunity either to accept a layoff and retain their right of recall or terminate their employment. Those who elected to resign would receive unused vacation pay and leave time and be continued under the health insurance program until November 30, 1982. Any employee wishing to transfer to Atlantic would first have to resign in order to be considered for a job. Only those employees who elected to resign and not to apply for a job at Atlantic would receive a distribution of their vested interest in the Jaydon profit trust. Presumably any employee who elected to remain subject to recall on the seniority list would receive nothing. Maddox asked Portes for recognition of the Union at the Atlantic plant. Portes declined, telling Maddox that the Company would not recognize the Union at this facility unless it first won a Board election.

After recessing for lunch, Maddox proposed, among other things, that Rock Island employees who were being laid off and who signified an interest in relocating should be put on a preferential hiring list at Atlantic. He also proposed that transferred employees would not have contractual recall rights at Rock Island but would retain their dates of hire in establishing their seniority at Atlantic, and that laid-off employees would be paid accrued personal leave time, vacation time, and a Christmas bonus, as well as a continuation of health insurance for a period of 30 days following the end of the month in which they were laid off. The Union asked for certain information concerning supervisory employees to be transferred and for an outline of the work which would be affected by the transfer. It asked for a moving allow-

[12] The list included 5 general warehouse employees, 50 employees in the catch-all classification of order picker, stocker, return load checker, and console operator, 2 maintenance employees, 7 truckdrivers, and 1 employee classified as a fixture employee.

ance to be paid to any employee who wished to be relocated. Again Maddox asked for recognition as the collective-bargaining representative of the production, maintenance, and truckdriver employees employed at the Atlantic warehouse.

The Respondent agreed that Rock Island employees who wanted to transfer would be put on a preferential hiring list and that those who transferred would not have recall rights at Rock Island. However, it would not agree flatly to transfer anyone who resigned and asked for a transfer. It was noncommittal about letting transferred employees carry with them their original dates of hire for seniority purposes. It refused to provide the Union with an up-to-date list of affected work, reiterated its refusal to recognize the Union as the bargaining agent at Atlantic, and refused the request for a moving allowance for transferred employees. It agreed to give all laid-off employees prorated vacation pay but was not sure about whether they would receive a Christmas bonus. (Later the latter request was denied.) Gellerman informed Maddox that five supervisors would be affected by the transfer, but that four would return to the Rock Island bargaining unit.

The Respondent also informed the Union as to the wage scale at Atlantic. Puller/stockers would receive the minimum wage of $3.35 an hour, forklift drivers would receive about $4 an hour, and truckdrivers would get $5.50 an hour. These amounts were about 40 percent of what employees were receiving at Rock Island under the contract for comparable work.[13]

On the following day, Kelly sent a letter to each employee slated for layoff and told him or her of the options which were open. The letter also informed employees of the Atlantic wage scale. The letter was accompanied by forms to be signed by any employee who elected to forfeit rights under the union agreement and to request a transfer to Atlantic. Not surprisingly, no employee in the Rock Island unit signified any interest in taking a 60-percent wage cut and relocating to a strange city without the assistance of a moving allowance.

On August 27, Portes forwarded to Maddox a lengthy letter containing a draft of a proposed agreement relating to the transfer of work from Rock Island to Alantic. The proposal incorporated most of the transfer procedures and requirements outlined by Portes and Gellerman on August 25 and, in effect, signaled the Union's consent to the move. The proposal was never signed by the Union.

On September 1, the Respondent granted pay increases to the Rock Island unit employees in accordance with the terms of the existing contract. On October 4, the employees designated for layoff were in fact laid off, although one was subsequently recalled. In February 1983 four additional employees were laid off as a result of the transfer.

The Rock Island facility is largely automated while the Atlantic facility is not. About six pieces of machinery at the Rock Island plant were dismantled and trucked to Atlantic, where they were installed. No new equipment was purchased to start up the Atlantic operation, although some new equipment was leased. The estimated cost of the relocation of machinery was $10,000. The Atlantic warehouse began to operate on October 4 with new inventory shipped directly to Atlantic from manufacturers. No inventory was transferred from Rock Island to Atlantic. Originally the Respondent estimated that it would hire about 50–55 employees at Atlantic. In the year which has elapsed since the opening of the warehouse, about 70 have been hired, some of whom are part-time employees. Six truckdrivers were hired to replace the six drivers who were laid off at Rock Island, and warehouse delivery routes were revised with Atlantic as their hub rather than Rock Island. The administrative control and support for the Atlantic warehouse remains in Rock Island. Orders to be filled at that facility are transmitted from Rock Island pursuant to orders which are phoned in by driver salesmen who are on the road.

In December 1982, the Union and the Respondent began negotiations for a new contract at Rock Island. As of December 1983, no contract had been concluded. Both sides insisted on substantial changes in language growing out of their experience with the Atlantic move. In the early spring of 1983, the Respondent notified the Union that it was seriously considering the establishment of a second satellite warehouse at Elkhart, Indiana, and it made no bones about the fact that the motivating factor in this proposed move was a savings in labor costs. In the spring of 1983, this warehouse was established to service accounts in the Indiana-eastern Illinois area. Just before the contract expired on February 28, the parties agreed to an extension until March 9. When the extension expired, the Union struck. The strike was short lived. When unit employees returned to work, it was at substantially reduced wage rates which were unilaterally imposed. Later, in the fall of 1983, when the bargaining unit had been further reduced from the original 230 employees to about 95, the Respondent further cut wages unilaterally to a point where its rates in Rock Island were roughly comparable to what it was paying in Atlantic.

[13] The union contract provided for 16 different classifications of employees and for in-grade raises after 3, 6, and 9 months of service. It also provided for increases in the hourly rates for all employees as of September 1, 1982. These increases were in fact granted as required by the agreement. A comparison between some of the September 1982 hourly wage rates for employees with 9 or more months of service and the new rates in Atlantic is as follows:

Rock Island	
General warehouse	$10.81
Order picker, stocker, loader checker	9.54
Receiving clerk	10.81
Truckdriver	12.88
Atlantic	
Order filler, etc.	$3.35
Forklift operator, receiving/shipping	4.00
Truckdriver	5.50

II. ANALYSIS AND CONCLUSIONS

A. *The Present Posture of the Case*

The events in this case occurred and the complaint in this case was issued at a time when the Board adhered to the doctrine announced in *Milwaukee Spring Division*, 265 NLRB 206 (1982) (*Milwaukee Spring I*), and earlier cases. According to this view of the law, a relocation of unit work during a contract term, without the permission of the collective-bargaining representative, was a violation of Section 8(a)(1) and (5) of the Act. After the hearing in this case was closed but before briefs were filed, the Board reversed *Milwaukee Spring I* at 268 NLRB 601 (1984) (*Milwaukee Spring II*). As discussed in more detail infra, *Milwaukee Spring II* holds that such relocations are not violations of the Act in the absence of contract language expressly forbidding such moves. In light of *Milwaukee Spring II*, both the Respondent and the General Counsel moved to dismiss the complaint over the strenuous objection of the Charging Party. As a result of the change of law, this case is now in the peculiar procedural posture in which the General Counsel and the Respondent find themselves on the same side, while the Charging Party is left to carry on the complaint as it was originally issued.

The duty of the Board and its administrative law judge in the face of this procedural anomaly is governed by the Third Circuit decision in *Leeds & Northrup Co. v. NLRB*, 357 F.2d 527 (3d Cir. 1966), and similar cases. *Leeds & Northrup* recognizes the fact that the General Counsel has plenary power to dismiss an unfair labor practice charge and that, once a charge is dismissed, no power on earth can force him to issue a complaint. However, after a complaint issues, other rules come into play.

> Clearly, once a complaint issues the statutory scheme contemplates Board action. Anything less, such as informal actions of its agents in dismissing such complaint over the objection of the charging party, is arbitrary and capricious. . . .
>
> . . . Once a complaint has issued, the charging party is entitled to an evidentiary hearing upon its objections to the proposed settlement agreement, be it formal or informal. [Id. at 533–534.]

If the settlement of issues raised in a complaint is entitled to full dress treatment, so much more so is an effort to dismiss or withdraw the complaint in its entirety.

> Under the prosecutory phase of Section 3(d) of the Act, the delegation of discretion to issue or not issue a complaint of unfair labor practice is not improper. But once issued, an adjudicatory phase of the administrative process arises necessitating appropriate avenues of review, both administrative and judicial. The Board, by its own regulations, designed to implement the Labor Management Relations Act, cannot thwart review of its actions, or those of its authorized agents. [Id. at 536.]

The Board's own Rules and Regulations do not thwart review of its actions or those of its authorized agents. They make it clear that such actions may not be taken in summary fashion. The Board has also made it clear in its decisional process that summary dismissals of complaints over the objection of the General Counsel or charging party are contrary to its Rules. See *Plumbers Local 195 (Stone & Webster)*, 237 NLRB 931 (1978). In light of its objections to a dismissal or withdrawal of the complaint, the Charging Party has now become the de facto prosecutor of the complaint, so a regular decision must be prepared and issued by me pursuant to Section 102.45 of the Board's Rules and Regulations,[14] just as if no motions had been filed. However, it must perforce be governed by the Board's revised doctrine in *Milwaukee Spring II*.

B. *Waiver and Limitations*

Both the Charging Party and the Respondent have submitted extensive briefs covering a number of issues which were raised at the hearing in this case. Two of these concern whether the Charging Party waived its statutory rights by failing to object to the relocation of the work from Rock Island to Atlantic and whether the complaint in this case is barred by Section 10(b) of the Act. Both of these contentions imply, for their major predicate, that the contract in effect in the summer and fall of 1982 forbade the transfer of unit work during the contract term and so must be resolved in that light.

The essence of the violation alleged in the complaint is that the relocation of unit work violated Section 8(d) of the Act. This section, in discussing the duty to bargain, provides inter alia that:

> . . . the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract.

Its terms place the parties in a considerably different posture than if there was open season for bargaining in August and September 1982 and the question of relocation was then bargainable. The Respondent argues that, by its failure to object to the relocation when the subject was first brought to its attention, the Union waived any right to object at a later date and therefore the General Counsel was precluded by waiver or laches from prosecuting a complaint on the Union's behalf. If the rela-

[14] Sec. 102.45(a) of the Board's Rules provides:

After hearing for the purpose of taking evidence upon a complaint, the administrative law judge shall prepare a decision. Such decision shall contain findings of fact, conclusions, and the reasons or basis therefor, upon all material issues of fact, law, or discretion presented on the record, and shall contain recommendation as to what disposition of the case should be made, which may include, if it be found that the respondent has engaged in or is engaging in the alleged unfair labor practices, a recommendation for such affirmative action by the respondent as will effectuate the policies of the Act. The administrative law judge shall file the original of his decision with the Board and cause a copy thereof to be served on each of the parties. Upon the filing of the decision, the Board shall enter an order transferring the case to the Board and shall serve copies of the order, setting forth the date of such transfer, on all the parties.

tionship of the parties at that time was not controlled by their contract, this argument might have some vitality. However, the thrust of Section 8(d) is that, during a contract term, a party to the contract has no obligation even to respond to overtures for modification. A contracting party is well within its rights simply to stand pat and rely on the provisions of the contract to protect its position.

As a general proposition, the waiver of a right will not be found in the absence of clear and unambiguous evidence to that effect. This venerable doctrine was recently reiterated by the Supreme Court in *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693 (1983). There are many other and earlier Board cases to the same effect. In *Park-Ohio Industries*, 257 NLRB 413 (1981), the Board held that bargaining over severance pay does not constitute a waiver by a union of its right to be consulted in advance about a corporate decision to relocate unit work. In *National Car Rental System*, 252 NLRB 159 (1980), the Board held that it would not imply the waiver of the right to bargain over the effects of work transfer from the failure of a union to request bargaining after the union had learned that the transfer was a fait accompli. See also *Armour Oil Co.*, 253 NLRB 1104 (1981).[15] However, all of these cases start with the initial premise that the right assertedly waived was ripe for bargaining at the time that silence presumably gave consent.

In this case, the law at the time of the events in question made it quite clear that the question of relocation of unit work during the contract term was foreclosed from bargaining, and thus from modification, because it had been preempted by a term of the contract there and then in effect. It is certainly possible to waive the provision of a written contract but such a waiver should be attended by at least the same formality as the execution of the contract itself. Portes presented Maddox with such a written document on August 27 and Maddox refused to sign it. He should not be deemed to have waived a contract provision, if indeed there was one, by bargaining over the effects of the proposed move since he was presented with a fait accompli, namely, information that the move was going to take place and would occur before the contract expired, regardless of what Maddox did or thought about it. Accordingly, I would dismiss any argument that in fact Maddox waived the Union's contract right by any act or omissions which occurred prior to the work relocation on October 4, if indeed the Union had any such right.[16]

Another argument pressed by the Respondent is the contention that the complaint herein is barred by limitations because the charge was not filed by the Union until Febuary 9, 1983, and was not served on the Respondent until February 11. In its view, any violations of the Act on its part occurred before August 11, a date 6 months prior to the service of the charge, because it had notified the Union prior to that date that it was going to move part of the Rock Island work to Atlantic. The factual premise for this argument is highly questionable but it is also irrelevant to the 8(d) violation alleged in the complaint. The violation in this case occurred, if it occurred at all,[17] when the Respondent modified the terms of an existing collective-bargaining agreement during the contract term, and this did not occur, if it occurred at all, until about October 4 when unit work was in fact transferred from Rock Island to Atlantic and 63 employees at Rock Island lost their jobs. This date fell well within the 10(b) period.

C. *Respondent's Motive for Relocating Unit Work to Atlantic*

Respondent went to great lengths, both at the hearing and in its brief, to demonstrate that the purpose for relocating unit work from Rock Island to Atlantic was not to escape Rock Island contract rates, which were more than twice what it is paying in Atlantic, but merely to serve its major Iowa customer, Hy-Vee, who was pressing it for price concessions. Thus, the Respondent argues, the relocation did not even violate *Milwaukee Spring I* or the Board doctrine affirmed in *Los Angeles Marine Hardware Co.*, 235 NLRB 720 (1978), enfd. 602 F.2d 1302 (9th Cir. 1979). According to the Respondent, it was threatened with the loss of a customer who provided two-sevenths of its gross revenue and most of its regular cash flow, so it had to establish a warehouse in western Iowa from which it could reduce its transportation costs and service its needs. In the stated view of the Respondent, its very future depended on relocating unit work to the Atlantic warehouse. Labor savings were at best a questionable and ancillary consideration and played no significant role in the decision to transfer work. The argument is gross hyperbole and depends for its factual basis on the testimony of a witness whose credibility was poor.[18]

For 20 years, Jaydon has been the wholesale supplier of nonfood items for 148 Hy-Vee grocery and drug stores. All that Hy-Vee was asking Jaydon for in the

[15] The cases normally speak in terms of waiver. The doctrine of laches mentioned by the Respondent in its brief does not apply to Board proceedings because the General Counsel does not prosecute a case on behalf of the charging party but on behalf of the general public. *Southeastern Envelope Co.*, 246 NLRB 423 (1979); *Merrell M. Williams*, 265 NLRB 506 (1982).

[16] One of the Respondent's several waiver arguments is that Maddox failed to write the Company a letter objecting to the work relocation, as suggested by the UAW's handbook on plant closings. If Sec. 8(d) means anything, it means that Maddox had no obligation even to speak to the Respondent on this subject prior to the expiration of the contract, at least as to relocations scheduled to take place before the expiration date.

[17] The complaint does not allege, nor are we confronted in this case, with the alternative argument that, even though *Milwaukee Spring II* permits the Respondent to do what it did under the terms of its collective-bargaining agreement, the Respondent still violated Sec. 8(a)(5) by its failure to notify and bargain in good faith with the Union concerning an issue not precluded by contract from ongoing negotiations, namely, work relocation.

[18] Gellerman testified at the hearing that, as of his July 13 meeting with Hy-Vee, the decision to relocate to Atlantic was final. Others in the company hierarchy testified that they had learned of the decision even earlier. On July 14, in his meeting with the Union, Gellerman told the union representatives that the decision was still tentative and that he did not know exactly where the Company might move, if it were to move. Five days later, Gellerman informed the Rock Island Argus newspaper that the decision was still uncertain, as was the site of the new warehouse. At the hearing, Gellerman justified lying to the press on the basis that the question of the relocation of work was none of its business. Doubtless he had similar rationalizations for other untruthful statements made to the Union and to the Board.

spring of 1982 were price concessions of an unspecified amount which could be met in a variety of ways, including a reduction in the type of service rendered to the various Hy-Vee locations and a suggested joint venture in the operation of a warehouse at Chariton, Iowa. At no time did Hy-Vee request or insist that Jaydon open a warehouse in Iowa, nor did Hy-Vee ever threaten to discontinue doing business with Jaydon. Opening the Atlantic warehouse was Jaydon's idea. The Respondent broached this suggestion to Hy-Vee early in its negotiations with the latter and told Hy-Vee that it had found a warehouse in Atlantic which it could operate for one-half the labor cost it was bearing in Rock Island.

In fact, the major cost-savings experienced by Jaydon in the first year of the operation of the Atlantic warehouse was the labor cost savings achieved by paying its newly hired Atlantic employees about 40 percent of the contract rate it was paying in Rock Island. Had Jaydon applied to the Atlantic warehouse the contract rates in effect at Rock Island, the relocation would have cost more in total expenditures than it would have cost the Respondent to continue to service Hy-Vee from Rock Island.

One other facet of this whole operation must be considered in order to place the Atlantic relocation in proper focus. The transfer of about one-third of the Rock Island warehouse work to another warehouse located in the western portion of Jaydon's marketing area did not take place in isolation from other changes in the Respondent's operation which took place within a year from the date the Atlantic warehouse was opened. Shortly after the Atlantic warehouse opened, Jaydon opened another warehouse at the eastern end of its marketing area at Elkhart, Indiana. There is no dispute in the record that a prime consideration for opening the Elkhart warehouse was to escape the wage rates paid at Rock Island. Contemporaneously with the establishment of the Elkart warehouse, the contract at Rock Island expired and the Company began reducing the wage rates at the decimated Rock Island unit by increments. At first, it offered returning strikers at Rock Island 10 percent less than what they were receiving when they walked out. In the summer, as fruitless negotiations continued with a much weakened bargaining representative, wages were further reduced unilaterally in the Rock Island unit. By the fall of 1983, the 95-member unit which was left at Rock Island was offered and was paid a rate which brought it into line with Atlantic and Elkhart rates, and which provided it with about 40 percent of the income which a 230-member unit was earning a year before. While this rapid deterioration in wage rates and union bargaining strength at Rock Island following relocation of work to Atlantic and Elkhart might not be sufficient to suggest a runaway shop 8(a)(3) violation, these events, following hard on the establishment of the two satellite warehouses, make it crystal clear that the opening of the Atlantic facility, at issue in this case, was merely step 1 in a three-step process aimed at escaping the contract wage rates which were in effect at Rock Island from 1980 until the spring of 1983. As such, the facts of this case bring it squarely within the factual bases underlying *Milwaukee Spring I* and *II* and *Los Angeles Marine*.

D. *The Effect of Milwaukee Spring II*

The Charging Party argues in its brief that *Milwaukee Spring II* is an incorrect statement of the law and that the rule contained therein should not be applied retroactively. Unfortunately for the Charging Party, the rule established by *Milwaukee Spring II* and announced by the Board on January 23, 1984, is current Board law and was applied by the Board retroactively in that case. Accordingly, the Charging Party's argument in this regard is simply misdirected. In light of the decision announced in *Milwaukee Spring II*, I have no alternative but to dismiss so much of the complaint that alleges that the Respondent herein violated Section 8(a)(1) and (5) of the Act.

E. *Conditioning Relocation upon Repudiation of Contract Rights*

One final aspect of the complaint must be addressed apart from the *Milwaukee Spring* issue. The complaint alleges that, on August 26, 1983, the Respondent notified bargaining unit employees that they would be allowed to transfer from Rock Island to Atlantic but only on abandoning and repudiating the contractual rights which they enjoyed at Rock Island. In the complaint, the General Counsel alleged that this is a violation of Section 8(a)(1) of the Act, although his later motion to dismiss includes this incidental element in the complaint as well.

The letter in question was actually sent by the Respondent's personnel director and stated as follows:

> We are sorry to notify you that you will be laid off at the end of the Sunday, October 3, 1982, shift. We hope you understand that this was caused by a change in the Company's method of operations that was necessary in order to be able to serve its customers.
>
> You and the other employees being laid off as of October 3, 1982, will have the choice of:
>
> 1. remaining on the seniority list for the Rock Island facility with the right to recall and all other rights and subject to all obligations of employees in the bargaining unit covered by our Collective Bargaining Agreement (Union Agreement) dated April 1, 1980 with the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, and its affiliated Local Union Number 2137 ("Union"), or
>
> 2. electing to forfeit all of your rights of every kind, nature, and description in, to and under the Union Agreement including your removal from the seniority list for Rock Island employees and your right to recall under the Union Agreement.
>
> ONLY employees who elect to forfeit their rights under the Union Agreement as hereinafter provided will
>
> 1. receive the following, all of which will be prorated through October 3, 1982:
>
> a. Unpaid vacation pay.
> b. Unused personal leave time.

2. be continued under the insurance program provided under the Union Agreement for the period ending November 30, 1982, provided that you continue to pay the portion of the insurance cost required to be paid by you under the Union Agreement, and

3. have the right to transfer to a job at the new Jaydon facility in Atlantic, Iowa, at the time and in the manner hereinafter provided.

IF YOU DO NOT ELECT TO FORFEIT YOUR RIGHTS IN WRITING, YOU WILL AUTOMATICALLY BE DEEMED TO HAVE BEEN LAID OFF AND YOU WILL CONTINUE ON THE ROCK ISLAND FACILITY SENIORITY LIST WITH RIGHT OF RECALL UNDER THE UNION AGREEMENT.

If you elect to forfeit your rights as an employee at the Jaydon facility AND you do not exercise your right to transfer to a job at the new Jaydon facility at Atlantic, Iowa, then you can apply for your vested interest in the Jaydon of Illinois Employees' Profit Sharing Trust.

Attached hereto are two (2) copies of the following:

1. Election to FORFEIT Rights under Union Agreement.

2. Request for Transfer to Job at Jaydon Facility at Atlantic, Iowa.

3. Instructions.

If you want to elect to forfeit your rights under the Union Agreement and if you want to request a transfer to a job in Atlantic, Iowa, PLEASE READ THE INSTRUCTIONS, fill out the required forms, sign and date them and turn them into the Personnel Office on or before the time indicated.

The letter in question was sent on the day after these matters were discussed at the negotiating session which took place at the Rock Island Sheraton. The complaint does not allege that the Respondent violated Section 8(a)(5) of the Act by dealing directly with bargaining unit employees or that it unlawfully implemented a change in wages, hours, and conditions of employment before bargaining to impasse. The allegation in question simply states that the contents of the letter contain a condition which violates the Section 7 rights of employees. No pertinent authority was presented to substantiate this contention and I am unable to find any. I know of no legal proposition that states that employees have a statutory right to follow bargaining unit work that is being relocated to another bargaining unit. All that the Respondent did in this letter was to implement the matters discussed and agreed to, albeit in part, at the negotiating session the preceding day. The fact that employees who were about to be laid off were presented with unhappy choices does not mean that they were presented with choices that were illegally imposed. Accordingly, I will recommend that paragraph 6 of the complaint be dismissed.

On the above findings of fact and on the entire record herein considered as a whole, I make the following

CONCLUSIONS OF LAW

1. Respondent Jaydon, Inc. is now, and at all times material herein has been, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. International Union, United Automobile, Aerospace and Agricultural Implement Workers of American (UAW) and its Local 2137 are, respectively, labor organizations within the meaning of Section 2(5) of the Act.

3. The Respondent did not commit the unfair labor practices alleged in the complaint herein.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[19]

ORDER

The complaint is dismissed.

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[19] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules be adopted by the Board and all objections to them shall be deemed waived for all purposes.

The Stroh Brewery Company a/k/a Joseph Schlitz Company *and* Thomas L. Reynolds. Case 11–CA–10906

23 January 1985

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBER HUNTER AND DENNIS

On 20 July 1984 Administrative Law Judge Steven M. Charno issued the attached decision. The Charging Party filed exceptions and a supporting brief, and the Respondent filed an answering brief.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

DECISION

STEVEN M. CHARNO, Administrative Law Judge. In response to a charge filed May 31, 1983, a complaint was issued on August 2, 1983, alleging that The Stroh Brewery Company a/k/a Joseph Schlitz Brewing Company[1] (Respondent) had violated Section 8(a)(1) and (3) of the National Labor Relations Act, by discharging its employee Thomas L. Reynolds. Respondent's answer denies the commission of any unfair labor practice.

A hearing was held before me at Winston-Salem, North Carolina, on October 17, 18, and 19, 1983.[2] Briefs were filed by the General Counsel and Respondent under due date of November 23, 1983. By unopposed motion dated July 2, 1984, Respondent seeks to reopen the record in this case in order to offer into evidence certain relevant documents; that motion will be granted and the documents received in evidence.[3]

FINDINGS OF FACT

I. JURISDICTION

Respondent is a corporation licensed to do business in North Carolina, which is engaged in the production of beer at a facility in Winston-Salem. During the 12 months preceding issuance of the complaint, a representative period, Respondent, in the course and conduct of its business within North Carolina, received goods valued in excess of $50,000 from points outside the State and shipped products valued in excess of $50,000 to points outside the State. It is admitted, and I find, that Respondent is an employer engaged in commerce within the meaning of the Act.

Chauffeurs, Teamsters and Helpers Local Union No. 391, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Union) is admitted to be, and I find is, a labor organization within the meaning of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICE

On November 24, 1982, Reynolds was suspended indefinitely pending a hearing concerning acts of insubordination which he had allegedly committed on that date. After a hearing before the joint labor-management multiplant grievance committee, and a deadlocked decision by that committee, Respondent discharged Reynolds for insubordination and another pending charge—excessive absenteeism. The Union grieved Respondent's action. Pursuant to article VII, section 2, of the collective-bargaining agreement then in effect between Respondent and the Union, the grievance was submitted to binding arbitration. On February 23, 1983, a formal hearing was held before Arbitrator Herbert V. Rollins at which Respondent and the Union were represented by counsel and a formal evidentiary record was compiled.

A. *The Arbitrator's Decision*

On June 2, 1983, the arbitrator issued a decision directed to a single issue: Was there just cause to discharge the grievant for excessive absenteeism and/or insubordination?[4] The findings set forth below were taken from the arbitrator's decision.

Prior to his discharge, Reynolds had been employed for 14 years by Respondent at its Winston-Salem plant as an electrician and had never been faulted for his work in that capacity. In addition to his duties as an electrician, he had at various times, including the period from April 1982 until his discharge, been the Union's chief steward at the plant and had shown himself to be "an extremely able union representative."

The collective-bargaining agreement in effect between Respondent and the Union authorizes stewards to spend "necessary" time performing union duties, which are identified as investigating grievances, conferring with supervisors, and filing formal written grievances. The agreement further authorizes the chief steward to "investigate, present and process grievances on the company property without loss of time or pay during regular working hours."

[1] The Respondent was incorrectly identified in the complaint as "Jos. Schlitz Brewing Company." Pursuant to Respondent's unopposed motion at the hearing, the complaint and caption were amended to reflect Respondent's correct name.

[2] The General Counsel's unopposed motion to correct the transcript is granted; transcript corrections appear in the appendix. [The appendix has been omitted from publication.]

[3] The supplemental award dated May 15, 1984, in *Joseph Schlitz Brewing Co.*, Nos. 1737 WST and 1738 WST, is identified as R. Exh. 10; the opinion and order in *Chauffeurs, Teamsters, and Helpers Local 391 v. The Stroh Brewery Co.*, No. C–83–698–G (M.D.N.C., filed Apr. 11, 1984), as R. Exh. 11. The remaining documents appended to the motion were received in evidence at the hearing as part of R. Exh. 5.

[4] The arbitrator found that, since Respondent had initially treated Reynolds leniently under its program of progressive discipline for absenteeism, it could not thereafter bring him to book for absences it had previously failed to take into account. Accordingly, the arbitrator concluded that discharge constituted excessive discipline for Reynolds' demonstrated absenteeism.

Prior to his discharge, Reynolds and Respondent had "differences" over the amount of time Reynolds was authorized to spend on union business. While it conceded that the collective-bargaining agreement allowed stewards to spend whatever time was necessary to handle grievances, Respondent was dissatisfied with the fact that Reynolds spent over 92 percent of his time on union business and wanted to monitor and control what it considered to be an abuse of union business time. In order to provide "some sort of time spent on union business," Respondent initiated a form, entitled "Shop Steward Report" in October 1982. The form, which was to be filled out by the steward's supervisor, required information concerning who had requested the steward, who was to be seen, the location of the steward's business, the nature of that business, and the approximate time the steward would be gone. On many occasions, Reynolds made known his objections to the form and referred to the procedure as "chicken shit." When called to a problem in the plant, Reynolds continually insisted that he could not and would not "guesstimate" the amount of time that would be involved.

Arguments concerning use of the form and the amount of time required for union business continued, and Reynolds finally met with James Becknell, the acting plant manager, concerning the matter on November 23, 1982. Reynolds asked that use of the form be discontinued, and Becknell responded that he would discuss it with the then absent plant manager. The following day there was another meeting about the problem between Becknell, Reynolds, and Reynolds' steward, Eddie Hale. At that time, Becknell informed Reynolds that the latter would still be required to furnish the information needed to complete the form.

Shortly after the meeting, Reynolds and Hale were observed working on union business by Reynolds' supervisor, Ted Holcomb. When Holcomb stated that Reynolds' authorized release time of 30 minutes had expired and that he should return to work immediately, Reynolds refused. Holcomb then apprised Harold Mann,[5] the assistant manager of engineering, of the situation. Mann approached Reynolds and asked if the latter was refusing to return to work. Reynolds replied that he would return when he finished his union business, which consisted of writing up notes of the meeting with Becknell. Reynolds eventually returned to the shop but stated that he would have to leave again to conduct further union business. When Reynolds was asked how long he would require to check the grievance box and see stewards, he replied that he did not know who had to be seen or the length of time he would be gone. Because Reynolds would not provide the information required to complete the shop steward form, Holcomb refused to release him. Reynolds called over Hale, and Mann thereafter joined the three in Holcomb's office.

After further discussion about Reynolds' refusal to furnish the information required on the shop steward form, Mann again told Reynolds to return to work. Reynolds replied that he was not refusing to return to work but needed to continue his union business. Reynolds, who was considerably taller and heavier than Mann, became angry, threw his safety glasses on Holcomb's desk, advanced toward Mann "in a belligerent manner" with clenched fists, and stated, "I'm tired of this shit" and "I'm going to do my job as a union representative." Mann, who was concerned with being struck, stepped back and pointed to the timeclock, a sign to punch out. Although it was clear that Mann had raised his hand without any intention of hitting Reynolds, the latter responded, "[D]on't you raise your hands at me or I'll knock you on your ass—you son of a bitch, I'll pop you."

Mann then explained to Reynolds that he was suspended indefinitely and told him to punch out. The order was confirmed with Hale and Reynolds responded that, although he was suspended as an employee, he was a union official and was not going to leave. Mann replied, "Tom, you either leave, or we will get you out of here." Reynolds stated, "[Y]ou better get a bunch, because I'm not leaving." The police were called and, in their presence, Mann repeated his order to leave and Reynolds, his refusal. Finally, the police persuaded Reynolds to leave. As he walked out, Reynolds said, "I'm not leaving because you told me to, I'm leaving because the officers asked me to."

Ultimately, the arbitrator found that (1) Reynolds' refusal to return to work after the meeting with Becknell when ordered to do so by Holcomb was "an intentional act of insubordination," (2) Reynolds' threat to Mann was "a serious act of insubordination," and (3) Reynolds' "misconduct during the meeting constituted further acts of insubordination."[6] Based on these findings, the arbitrator sustained Reynolds' discharge. Because Reynolds has never been faulted for his work as an electrician, because his "major fault was his total disregard for the orderly operation of the plant and his insubordinate conduct while he conducted Union business"[7] and because Reynolds has high blood pressure directly related to his work as a steward, the arbitrator added a proviso that Reynolds be permitted to return to work if he gave up his activities as a steward.[8]

[5] Due to an error by the reporter who prepared the transcript of the arbitration hearing, Mann's name was transcribed as "Mahan."

[6] While noting that he was not required to rule on the question of whether the collective-bargaining agreement had been violated by Respondent's restrictions on the time used by stewards for union business, the institution of the shop steward form, or the requirement that stewards supply information relating to union business, the arbitrator noted that the Union should have grieved the issues if it felt that Respondent was in error—"there was no need to constantly bicker about it."

[7] The arbitrator further described this conduct as numerous "hostile and disruptive" confrontations between Reynolds and Respondent's management in which Reynolds indulged a "propensity to engage in sarcasm, use foul language in a threatening tone of voice, threaten supervisors with physical assault, and refuse reasonable orders."

[8] The ordering paragraph was as follows:

> The company's orders of discharge are sustained *with the proviso* that the grievant shall have the option, if he so elects, to return to his job solely as an electrician by giving written notice delivered to the company, within 15 days of the date of this award, requesting return to his job *solely* as an electrician. If grievant elects to exercise this option he shall be reinstated and while so reemployed be permanently enjoined from engaging in any union business or activities of any type in any of the plants, properties, or business locations of the employer or its associated or successor companies. He will not be

Continued

B. *The Arbitrator's Supplemental Award*

On June 14 and 17, 1983, Reynolds attempted to notify Respondent that he wished to return to work, but he did not accept the condition imposed by the arbitrator and agree to give up his union post. Respondent rejected both attempts. On June 21, counsel for Respondent wrote the arbitrator and requested that he reconsider his initial award and sustain the discharge without a proviso offering Reynolds an opportunity to return to work. On June 30 counsel for the Union wrote the arbitrator requesting reformation of the initial award to reinstate Reynolds with full backpay and no restriction on union activity. On July 8 the arbitrator replied to both counsel in a letter which contained the following statement:

> At the hearing before me the record clearly established that Mr. Reynolds had been guilty of misconduct, sufficiently serious to warrant his discharge. Accordingly, I sustain the discharge.

The letter also stated that, in view of Reynolds' position that he would not comply with the award as originally framed (which was described as an attempt to "circumvent my findings and award"), the discharge would be sustained without a proviso allowing Reynolds to return to work. The letter concluded with the following disclaimer: "My decisions were not made with reference to any matter related to the National Labor Relations Act or any provisions thereof."

The Union subsequently brought suit pursuant to Section 301 of the Act in the United States District Court for the Middle District of North Carolina. In that proceeding, the Union sought severance of the portion of the proviso barring Reynolds from engaging in further union activities. In an April 11, 1984 opinion and order, the arbitrator's initial award was found by the district court to be invalid and unenforceable, and it was remanded to the arbitrator "for further proceedings not inconsistent with this Order"; the "second" award in the letter July 8, 1983, was held to be beyond the arbitrator's jurisdiction. On May 15, 1984, the arbitrator issued a supplemental award which sustained Reynolds' discharge without including a proviso permitting his reemployment.

C. *Discussion*

At the outset of the hearing, Respondent moved that the Board defer to the arbitrator's award. After hearing argument, I denied the motion because "the arbitrator did not specifically consider the conduct which is alleged to be an unfair labor practice." See *Raytheon Co.*, 140 NLRB 888 (1963), enf. denied 326 F.2d 471 (1st Cir. 1964). The question of deferral to the arbitrator's decision was again raised on brief by both Respondent and the General Counsel. Because of intervening decisions by the Board, I believe it appropriate for me to reconsider my earlier ruling and to address the question of deferral at this time.

In *Spielberg Mfg. Co.*, 112 NLRB 1080 (1955), the Board held that it would defer to an arbitration award where the proceedings appeared to have been fair and regular, all parties had agreed to be bound by the award, and the decision of the arbitrator was not "clearly repugnant" to the purposes and policies of the Act. No question has been raised as to the fairness or regularity of the proceedings before the arbitrator, and the collective-bargaining agreement between Respondent and the Union provides that both parties are bound by the award. Accordingly, it must be determined whether the arbitrator's decision, as modified by the supplemental award,[9] is "clearly repugnant" to the Act.

The Board recently clarified the standard for deferral to arbitration awards in *Olin Corp.*, 268 NLRB 573 (1984), where it held:

> We would find that an arbitrator has adequately considered the unfair labor practice if (1) the contractual issue is factually parallel to the unfair labor practice issue, and (2) the arbitrator was presented generally with the facts relevant to resolving the unfair labor practice. In this respect, differences, if any, between the contractual and statutory standards of review should be weighed by the Board as part of its determination under the *Spielberg* standards of whether an award is "clearly repugnant" to the Act. And, with regard to the inquiry into the "clearly repugnant" standard, we would not require an arbitrator's award to be totally consistent with Board precedent. Unless the award is "palpably wrong," i.e., unless the arbitrator's decision is not susceptible to an interpretation consistent with Act, we will defer.

Employing these guidelines, I am forced to conclude that the arbitrator adequately considered the unfair labor practice alleged in the complaint, notwithstanding his explicit disclaimer of reliance upon the National Labor Relations Act. The contractual issue before the arbitrator was the ultimate issue before the Board in this proceeding, that is, was Reynolds properly discharged for insubordination? The arbitrator had before him all relevant evidence relating to Reynolds' union activities, including evidence of the fact that Reynolds' insubordination occurred while he was transacting union business. Notwithstanding that evidence, the arbitrator found that Reynolds was insubordinate in threatening Mann without provocation and in refusing to obey repeated orders to return to work and, subsequently, to leave the premises. Given the issue before the arbitrator, the scope of the evidence he considered and the decision he ultimately reached, I cannot conclude that the amended award is "palpably wrong."

barred from filing and pursuing any grievance on his own behalf for problems in which he may personally become involved after his return to work.

[9] Obviously, had the arbitrator's initial award not been modified pursuant to the mandate of the district court, the conditional restraint on Reynolds' union activity would have directly contravened the principles underlying the Act. See *Cessna Aircraft Co.*, 220 NLRB 873, 875 (1975). This conclusion holds true even though insertion of the offending proviso in the initial award appears to have been motivated by the arbitrator's compassion for Reynolds as an individual.

On brief, the General Counsel argues that the award is repugnant to the Act because the arbitrator "ignored the longheld Board principle that, absent opprobrious conduct, any discharge based in whole or in part on the conduct of an employee during a grievance meeting would be a discharge for protected concerted activities and therefore a violation of the Act." The relevant cases cited by the General Counsel in support of this argument all involve situations in which an employee was provoked into insubordinate conduct by an employer's unfair labor practices.[10] I find such authority less than persuasive here, where it is not alleged that Respondent committed any unfair labor practice other than Reynolds' discharge. Indeed, Reynolds' repeated refusals to obey his supervisors' orders, his longstanding method of comporting himself while conducting union business, the obscene and physical nature of his threat to Mann, the absence of any provocation by Respondent, and the lack of formality surrounding Reynolds' concurrent protected activity support the arbitrator's explicit conclusion that Reynolds had crossed the line which separates acceptable and unacceptable behavior. Such a conclusion is not repugnant to the Act. See *Atlantic Steel Co.*, 245 NLRB 814, 816 (1979).

[10] See *NLRB v. M & B Headwear Co.*, 349 F.2d 170 (4th Cir. 1965); *E. I. du Pont de Nemours*, 263 NLRB 159 (1982); *Sea-Land Service*, 240 NLRB 1146 (1979).

For the foregoing reasons, I find that the arbitrator's decision is not repugnant to the Act. Accordingly, I conclude that it will effectuate the purposes of the Act to give conclusive effect to the grievance award, and I shall therefore dismiss the complaint in its entirety.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent did not, as alleged, violate Section 8(a)(1) and (3) of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[11]

ORDER

1. Respondent's motion dated July 2, 1984, is granted, the record reopened, Respondent's Exhibits 10 and 11 are received, and the record is closed.

2. The complaint is dismissed in its entirety.

[11] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

Certified Grocers of Illinois, Inc. *and* **Timothy Cybulski.** Case 13–CA–23281

24 January 1985

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS HUNTER AND DENNIS

Upon a charge filed by Timothy Cybulski, an Individual, on 19 May 1983, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 13, issued a complaint on 23 June 1983 against Respondent Certified Grocers of Illinois, Inc. The complaint alleges that the Respondent is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

On 18 November 1983 all parties to the proceeding entered into a stipulation of facts and thereafter filed a motion to transfer proceeding to the National Labor Relations Board. The parties agreed therein to waive a hearing before or decision by an administrative law judge and to submit the case directly to the Board for findings of fact, conclusions of law, and an order based on a stipulated record consisting of the complaint and answer, other formal Board documents, and stipulation of facts with attached exhibits.

On 13 February 1984 the Board approved the parties' stipulation and ordered that the proceedings be transferred to the Board. The General Counsel, the Charging Party, and the Respondent filed briefs.

On the basis of the stipulation of facts, the briefs, and the entire record in this proceeding, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent is an Illinois corporation with offices and places of business in Chicago and Hodgkins, Illinois, where it is engaged in the wholesale grocery business. During the year preceding issuance of the complaint, the Respondent purchased and received at its Illinois facilities goods and materials valued in excess of $50,000 directly from points outside the State of Illinois. The complaint alleges, the Respondent's answer admits, and we find that the Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The complaint alleges, the Respondent's answer admits, and we find that Grocery and Food Products, Processors, Canneries, Frozen Food Plants, Sugar Processors, Confectionery and Candy Manufacturers and Distributors, Coffee Vending, Miscellaneous Drivers and Salesmen, Warehousemen and Related Office Employees Union, Local 738, an affiliate of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Facts*

The Respondent and the Union have had a collective-bargaining relationship for many years. The Union represents the Respondent's employees at both its Chicago headquarters and at its Hodgkins warehouse. At all relevant times there was a collective-bargaining agreement in effect between the Respondent and the Union which contained, inter alia, a grievance procedure leading to binding arbitration and a no-strike clause.

On 7 March 1983 the Respondent instituted new production standards covering the so-called "order pickers" at the Hodgkins warehouse. The new standards included a five-step progressive disciplinary program for employees who failed to meet the standards. Thereafter, several of the order pickers filed a "group" grievance with the Union protesting the implementation of the production standards and its disciplinary provisions. This grievance was processed through the contractual grievance procedure and, by 17 May 1984 and the commencement of the picketing discussed infra, was pending arbitration.[1]

Subsequently, between 9 and 17 May 1983, approximately 24 employees at the warehouse were either terminated or notified that their termination was pending for failure to meet the new production standards. Grievances over these terminations were filed by the employees with the Union which, as of 17 May 1983, the Union was also pursuing through the contractual grievance procedure.

On their termination, several of the employees chose to retain their own attorney. In a letter dated 16 May 1983, this attorney informed the Respondent that she had "been retained by a group of employees of Certified . . . relating to their labor dispute with Certified over recent changes in their working conditions and resulting in disciplinary action." The letter further advised the Respondent that "in conjunction with the above labor dispute, the Certified employees may prospectively engage in picketing" and that the Respondent should con-

[1] The Union requested arbitration of the grievance by letter dated 4 April 1983.

tact her office if it contemplated "any action" which might "interfere with the rights of the employees to picket or air their grievances . . . ."

The following day, 17 May 1983, 16 of the terminated employees commenced picketing in front of the Respondent's Chicago headquarters. The pickets carried signs stating "Certified Grocers Unfair to Workers"; "Five Years Loyalty—now fired"; "Immediate reinstatement until arbitration"; "Unfair work standards"; and "Cindy Saver isn't doing any good."[2] Three of the pickets' signs also stated "informational picket" in small print in the lower corners of the signs.[3]

Shortly after it began, the picketing attracted local news coverage and publicity. In a news article dated 20 May 1983, picket Ray Ulrich was quoted saying that "this is strictly an informational picket; we are not encouraging anyone to stop working, we are just trying to let people know what is going on here." Ulrich was also quoted in the article saying that he and the other pickets had hired their own attorney because "we haven't been satisfied with the Union's actions so far."[4]

Immediately upon the commencement of the picketing, the Respondent sent a mailgram to the Union informing it that picketing "by individuals on whose behalf you have filed grievances" had begun. The mailgram advised the Union that the Respondent intended to hold the Union responsible for all damages occasioned by the picketing "until such time there is affirmative action on your part to advise the pickets . . . that the picketing is not condoned by your Union." The mailgram further advised the Union that unless the pickets ceased picketing immediately, "even if their grievances were sustained, their unlawful picketing and violation of the contract" would be "independent grounds for termination which would result in a forfeiture of any right to reemployment." The same day the Respondent also sent mailgrams to each of the 16 pickets advising them that their conduct was unlawful and a violation of the contract, that "the matter of your termination is presently being pursued through the contractual grievance machinery," and that "unless you immediately cease picketing, even if that grievance is sustained, your actions would be independent cause for your termination and would result in a forfeiture of any right you have to reemployment."

The following day, 18 May 1983, the Union notified the Respondent that the Union had not authorized the picketing and had told its members to absolve themselves of any connection with the picketing. Nevertheless, the picketing continued for several days thereafter until 20 May 1983.

No employee was subsequently disciplined by the Respondent for picketing, but were all reinstated on 23 May 1983 pursuant to an interim settlement agreement between the Respondent and the Union pending the resolution of the grievances. The Respondent and the Union reached a final settlement agreement on all grievances on 31 October 1983, which also provided for reinstatement of all the pickets.

B. *Contentions of the Parties*

The General Counsel and the Charging Party contend that the Respondent's 17 May 1983 mailgrams in which it threatened to deny reemployment to its discharged employees unless they ceased picketing violated Section 8(a)(1) of the Act.

The Respondent contends that the picketing was unprotected activity because its purpose was to obtain direct negotiations with the Respondent over the discharges in contravention of the contractual grievance arbitration procedure, relying on *Emporium Capwell Co. v. Western Addition Community Organization*, 420 U.S. 50 (1975).[5] Accordingly, the Respondent argues, its threat to deny the pickets reemployment did not violate the Act.

C. *Analysis and Conclusions*

In *Emporium Capwell Co.*, supra, the Supreme Court held that the exclusivity principle of Section 9(a) of the Act proscribes attempts by a minority of employees to engage in separate bargaining with their employer. The Court relied on the following facts in concluding that the picketing employees in that case were attempting to engage in separate bargaining: The union had invoked the contractual grievance procedure on behalf of the employees to resolve their charges of racial discrimination. Several of the employees expressed their view that the contract procedures were inadequate to deal with such charges and suggested that the union instead begin picketing the employer. The union refused to do so. Thereafter, several of these employees refused to participate in the grievance procedure, announced their desire to deal directly with management over minority employment conditions, and began picketing the employer. The union at that

[2] "Cindy Saver" is the Respondent's logo girl.

[3] The parties stipulated that this small printing could not be seen from the street and could only be read by someone close to the person carrying the sign.

[4] The parties stipulated that Ulrich was accurately quoted.

[5] The Respondent alternatively contends that the picketing was unprotected because it violated the contractual no-strike clause. In light of our finding, infra, that the picketing was unprotected under the rationale of *Emporium Capwell*, supra, we need not address the merits of whether it was unprotected on this basis as well.

time again requested that they rely on the grievance process. The pickets, however, continued to press their demand to deal directly with the company.

In agreement with the Respondent, we find that the facts in the instant case compel the conclusion that the pickets were attempting to deal directly with the Respondent over their grievances. We conclude this even though the parties stipulated that the pickets never made a request to the Respondent to meet with the pickets or their representatives. As outlined above, the Union had filed both a "group" grievance on behalf of the employees protesting the new production standard, and individual grievances over the subsequent discharges. Nevertheless, several of the employees subsequently hired their own attorney in conjunction with this dispute. It was this independently hired attorney, not the Union, who then notified the Respondent that the employees might picket over the dispute. The attorney also indicated to the Respondent that it should deal *with her* (not the Union) with respect to any action it proposed that might "restrain" the employees' ability to picket or air their grievances.

Thereafter, the employees did indeed begin picketing, but they did so at the Respondent's Chicago headquarters facility. The employees never picketed at their own place of employment. We infer that the choice of location was an attempt to influence the Respondent's higher authority to reinstate them. That this was the main purpose in the picketing is clear from the language of certain of the signs which indicated, "Immediate reinstatement until arbitration" and "Five Years Loyalty—now fired." The language on these signs was in large bold print that could be read from a distance. In contrast, the wording "informational picket" was carried on only a few of the signs in small print in the lower corners of the signs. This printing could not be seen from the street and could only be read if someone was close to the person carrying the sign.

Further, the Respondent immediately protested the picketing to the Union and was subsequently assured by the Union that it had not authorized the picketing and, in fact, had told its members to absolve themselves of any connection with the picketing. Nonetheless, the picketing continued after the time the Union indicated it had given its admonition to the pickets to cease picketing.

Undoubtedly the General Counsel is correct in the assertion that one purpose of the picketing was informational, as evidenced, for example, by picket Ulrich's quoted description of the picketing in the local newspaper. We find, however, that the above confluence of factors clearly indicates that an additional purpose of the picketing was to seek and obtain direct negotiations with the Respondent. This conclusion is underscored by picket Ulrich's additional quoted statement that the employees had hired their own attorney who would "look after the employees' interests" because they "haven't been satisfied with the Union's action so far." Accordingly, under *Emporium Capwell* the picketing was unprotected.[6]

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. The Respondent did not violate the Act by threatening to deny reemployment to its discharged employees unless they ceased picketing.

ORDER

The complaint is dismissed.

[6] See also *United Parcel Service*, 205 NLRB 991, 997–998 (1973). Cases cited by the General Counsel in which no such proscribed purpose was found are distinguishable. In *Colonial Stores*, 248 NLRB 1187 (1980), the picketing was found to be in support of the union's actions. Similarly, in *Roadway Express*, 241 NLRB 397 (1979), there was no evidence that the union objected to the conduct of the pickets. Finally, in *Dreis & Krump Mfg.*, 221 NLRB 309 (1975), the employee did not picket the employer, but merely distributed leaflets to fellow employees advising them of his grievance with the employer.

United Food Management Services, Inc., Alabama *and* Hotel Employees & Restaurant Employees International Union, AFL–CIO, CLC, Local 719. Case 10–CA–19939

24 January 1985

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS HUNTER AND DENNIS

On 12 September 1984 Administrative Law Judge Howard I. Grossman issued the attached decision. The Respondent filed exceptions and a supporting brief.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

The complaint alleges that the Respondent violated Section 8(a)(5) and (1) by refusing to honor union-security provisions of a collective-bargaining agreement it has with the Charging Party. More particularly, the complaint alleges that the Respondent violated Section 8(a)(5) and (1) by denying the Union's request that it inform bargaining unit employees they are required to join the Union or be subject to termination pursuant to the union-security clause provisions.

At the hearing, the Respondent denied it had violated Section 8(a)(5) and (1) as alleged, and argued that the dispute herein is cognizable under the grievance-arbitration provisions of the parties' collective-bargaining agreement to which the Board should defer. The judge refused to defer this dispute to the parties' grievance procedure and found that the Respondent violated Section 8(a)(5) and (1) of the Act. In refusing to defer, the judge noted that the Respondent had "ignored" a grievance accusing it of having violated those provisions of its contract which pertain to union membership and that the Union had not pursued the alleged contract violation to arbitration. The judge found that the record herein does not "demonstrate full acceptance by the parties of the grievance and arbitration route to the resolution of disputes." *United Technologies Corp.*, 268 NLRB 557 at 560 fn. 21 (1984). We disagree. Accordingly, we do not adopt the judge's recommendations.

The parties' current collective-bargaining agreement is effective from December 1982 until December 1985. On 17 February 1983 the local union presented the Respondent with a statement alleging that it was violating the parties' contract by failing to notify employees of the requirement that they become members of the Union after 45 days.[1] Thereafter, a representative of the International Union repeated the Union's claim of a contractual violation to the Respondent's manager of labor relations. By letter dated 15 April 1983, the Respondent denied the Union's claim and asserted that it was not obligated under the contract to enforce or inform employees of union requirements.[2] The Union did not pursue arbitration of the dispute, electing instead to file the charge herein.

The facts of the instant case make it well suited for deferral. The dispute involves whether the Respondent has a contractual duty under article 13 of its collective-bargaining agreement with the Union to inform employees they will be subject to discharge for failure to join the Union 45 days after hire. The Respondent's refusal so to inform its employees is alleged to be violative of Section 8(a)(5) and (1). The issue appears to be one of contract interpretation as there apparently is no express provision requiring notification. Further, the Respondent has expressed its willingness to arbitrate the dispute. The Union by initiating its grievance action clearly viewed the dispute as being cognizable under the contract's grievance-arbitration procedure;[3] the fact that it later elected not to process its grievance to arbitration does not affect our decision to defer. *United Technologies*, supra. Contrary to the judge we find the record demonstrates that the parties have accepted and utilized their grievance-arbitration procedure for the resolution of disputes. Thus, the record reveals that the parties discussed the issue herein in December 1983 while participating in the arbitration of another grievance. Moreover, there is no record evidence to suggest that the use of the contractual grievance

[1] The dispute herein centers on art. 13 of the current collective-bargaining agreement which is, verbatim, as follows:

> All employees currently in the bargaining unit and all new employees shall become members of the Union after forty-five (45) days following last date of hire; and shall maintain their membership in the Union in good standing for the duration of this Agreement as a condition of employment.
>
> The provisions of this Article shall be effective with respect to the employees as defined in Article I, providing such provisions are in accordance with and consistent with appropriate Federal and State Laws.
>
> The Union agrees to accept all employees as members.

The Union has not requested the discharge of any employee; rather it has only requested that the Respondent notify the employees that they must, as a condition of employment, become members of the Union within 45 days of employment.

[2] The Respondent's position throughout has been that art. 13 is subject to the Alabama right-to-work statute.

[3] The record does not contain a complete copy of the parties' collective-bargaining agreement or the portion of that agreement setting forth the terms of the grievance-arbitration provisions. However, the record clearly demonstrates that such provisions exist and were invoked by the Union in this matter. Accordingly, in view of the circumstances here, it is unnecessary to rely on the actual language of that provision, and the Respondent's motion to reopen the record for the limited purpose of receiving the entire collective-bargaining agreement is denied.

procedure to resolve the dispute herein would be "unpromising or futile." *United Aircraft Corp.*, 204 NLRB 879 (1973).

We also find that the issue whether the Respondent could tell its employees they would not be terminated if they refused to join the Union is also amenable to resolution through use of the grievance procedure. This matter, although not alleged as unlawful in the complaint, was found by the judge to have been fully litigated and to have been an 8(a)(1) violation. The employees' obligation to join the Union as a condition of employment is a matter of interpretation of article 13 of the bargaining agreement, and its resolution will determine whether the Respondent's statements to employees was contrary to the contractual provisions. This matter is the proper subject for the grievance-arbitration procedure.

In view of the foregoing, we believe it would best effectuate the purposes and policies of the Act to defer this case to the arbitral forum. Accordingly, we conclude that the issues raised by the complaint should be deferred to the grievance-arbitration provisions of the parties' collective-bargaining agreement, and we shall so order.[4]

ORDER

The complaint is dismissed, provided that

Jurisdiction of this proceeding is retained for the limited purpose of entertaining an appropriate and timely motion for further consideration on a proper showing that either (a) the dispute has not, with reasonable promptness after the issuance of this Decision and Order, either been resolved by amicable settlement in the grievance procedure or submitted promptly to arbitration, or (b) the grievance or arbitration procedures have not been fair and regular or have reached a result which is repugnant to the Act.

[4] The Respondent must, of course, waive any timeliness provisions of the grievance-arbitration clauses of the collective-bargaining agreement so that the Union's grievance may be processed in accordance with the following Order.

DECISION

STATEMENT OF THE CASE

HOWARD I. GROSSMAN, Administrative Law Judge. The charge was filed on January 24, 1984, by Hotel Employees & Restaurant Employees International Union, AFL–CIO, CLC, Local 719 (the Union), and complaint issued on March 1, 1984. As later amended, the complaint alleges that the Union and United Food Management Services, Inc., Alabama (Respondent),[1] are parties to a collective-bargaining agreement containing a union-security clause, which required union membership as a condition of employment after 45 days following the last date of hire. Further, the complaint alleges that the Union notified seven named employees[2] that they had to join the Union or be subject to discharge, pursuant to the collective-bargaining agreement, but all seven employees refused to join. Thereafter, the complaint further alleges the Union asked Respondent to abide by the collective-bargaining agreement by informing said employees that they had to join the Union or be subject to termination, and that Respondent refused to do so. According to the complaint, this constituted a refusal to continue in full force and effect the terms of the collective-bargaining agreement, and thereby violated Section 8(a)(5) and (1) of the National Labor Relations Act (the Act).

A hearing on this matter was held before me in Huntsville, Alabama, on April 6, 1984. On the entire record, including a brief filed by Respondent and a memorandum to supplement oral argument filed by the General Counsel, and on my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

The pleadings, as amended at the hearing, establish that Respondent is an Alabama corporation with an office and place of business located at Huntsville, Alabama, where it is engaged in providing food service.[3] Respondent received gross revenues in excess of $500,000 during 1983, and purchased and received goods valued in excess of $50,000 from suppliers who in turn purchased and received same from suppliers located outside the State of Alabama. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

Marshall Race, a representative of the International Union, testified that it is affiliated with various locals to whom it gives consultation and advice. The name of the International was recently changed from the former name, Hotel and Restaurant Employees and Bartenders International Union, and the name of Local 719 was similarly changed. It is evident from the record that the Union has entered into a collective-bargaining agreement with Respondent whereby it represents certain of the latter's employees, and that it has engaged in other activities on behalf of said employees. I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

[1] Respondent's name appears as amended at the hearing.

[2] Edith Marie Word, Linda Guess, Judy Williams, Daniel McAnally, Patricia Ennis, Sharon Hale, and Wilburn Duskin.

[3] The pleadings and a current collective-bargaining agreement establish that Respondent's facility is located in Huntsville, Alabama, at the George C. Marshall Space Flight Center, NASA (National Aeronautics and Space Administration). G.C. Exhs. 3, 1(c) par. 6, 1(e) par. 7. I take judicial notice of the fact that the Center is owned and controlled by the Federal Government.

III. THE ALLEGED UNFAIR LABOR PRACTICE

A. *Background*

The Union had a collective-bargaining agreement with Respondent's predecessor at the Space Center, ARA Services. The agreement expired in December 1982. Respondent's district manager George A. Carlye[4] stated that Respondent "assumed" the predecessor's contract in 1979. This was corroborated by Union Representative Race. Article XIII of this agreement, entitled "Union Shop," reads as follows:

> All employees currently in the bargaining unit and all new employees shall become members of the Union after forty-five (45) days following last date of hire; and shall maintain their membership in the Union in good standing for the duration of this Agreement as a condition of employment.
>
> The provisions of this Article shall be effective with respect to the employees as defined in Article I,[5] providing such provisions are in accordance with and consistent with appropriate Federal and State Laws.
>
> The Union agrees to accept all employees as members [G.C. Exh. 3].

Race credibly testified that the predecessor, ARA, agreed to inform employees that it was necessary for them to join the Union after the probationary period. I infer that it did so.

B. *The Bargaining for a New Agreement*

Union Representative Race stated that article XIII of the old agreement was simply renewed in the new contract.

Company Counsel McCauley testified that there were three bargaining sessions. At the first session, on November 16, 1982, Respondent proposed to delete article XIII. The Company thought that the Union should go out and persuade employees to join the Union. Further, there was "no need for that Article . . . considering the Alabama State right-to-work law." Race's response was that article XIII required every employee to be a member of the Union.

A few days later, on November 21, McCauley wrote a letter to Race, with two attachments purporting to represent the positions of the parties at the first session. Respondent's proposed changes included a proposal to "delete or rewrite to eliminate the confusion and conflict between paragraphs one and two" of article XIII, the union shop provision. The handwritten letters "O.C". appear next to this proposal, and there are other markings. McCauley said that he did not write them (R. Exh. 6).

At the next session, on January 4, 1983, McCauley said that the Company was ready to include article XIII in a new agreement. "Mr. Race," he told the union representative, "we are agreeing on the basis that we are including applicable federal and state law." "We live by the law," Race responded. The parties reached agreement on remaining issues on January 19, 1983, and the contract was signed in March 1983. It contains article XIII in the same language as indicated above. The opening sentence of the contract describes it as an "agreement made as of this 13th day of December 1982" (G.C. Exh. 3).

C. *Union Attempts to Enforce the Agreement*

In December 1982, Union President Bennie Ratliff discovered that some employees were not members of the Union. He called International Representative Race, about February, for advice. The latter told Ratliff to give each employee a copy of a letter which Race would compose for Ratliff, and a membership card. Accordingly, Race prepared and Ratliff distributed to the nonmembers a letter which invites them to join the Union, recites the agreement between the parties (art. XIII), and states that an employee who refuses to join would be "subject to discharge." The initiation fees and first month's dues are stated. The letter is cordial in tone. Although there is a space for a due date, no date is indicated (G.C. Exh. 6).

Race also suggested that Ratliff file a grievance. On February 17, 1983, Ratliff handed Unit Manager Shelby Beddingfield [6] a document stating that the Company was "violating government agreement and our contract . . . that is, when some one is hired, they become a member of the Union after 45 days. New employees are to be notified of this agreement."[7] Ratliff gave Beddingfield a list of employees "who [had] not been notified of this agreement" (G.C. Exh. 7).[8]

Ratliff testified that he told Beddingfield that the Union would be asking for termination of these employees. Beddingfield asked whether the Union wanted the Company to go out and "twist their arm" and make them join. Ratliff replied that the Union merely wanted the Company to tell the employees what was in the contract.

The Union received no reply from the Company, and the employees failed to join the Union. Ratliff said the Union had no intention to go to arbitration.

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[4] The parties stipulated that Carlye was a supervisor within the meaning of the Act.

[5] In art. I of the current agreement, the Employer recognizes the Union as "the sole bargaining agent with respect to wages, hours and working conditions for all food service employees on the payroll of its food service operation at George C. Marshall Space Flight Center, NASA, Huntsville, Alabama. Specifically excluded from the bargaining unit are all office clerical employees, guards and watchpersons, professional employees, chef managers, and supervisors as defined in the Act as amended as well as other employees of the Employer in any of the Employer's other divisions, branches, or units" (G.C. Exh. 3).

[6] The parties stipulated that Beddingfield was a supervisor within the meaning of the Act.

[7] Respondent attempted to impeach Ratliff's credibility by introducing two documents (Ratliff's affidavit and a letter to a nonmember) both of which Ratliff said he signed (R. Exhs. 3(a), 4). Respondent contends that the signatures are not the same, but did not introduce expert testimony on the issue. Ratliff said that he was standing while signing one document, and sitting while signing the other. Further, he used different pens. I accept this explanation.

[8] Several but not all of the employees named in the complaint are listed in this memorandum, and employees not named in the complaint *are* listed.

Meanwhile, International Representative Race called District Manager Carlye, who did not agree that the contract required employees to join the Union. The district manager also acknowledged several conversations with Union President Ratliff in which the latter said the Company should "force" the employees to join. Carlye did not agree.

In late March, Race called Company Counsel McCauley and argued that the Union *could* enforce a union-shop agreement in a "federal enclave" located within a right-to-work State, citing *Lord v. Electrical Workers IBEW Local 2088*, 646 F.2d 1057 (5th Cir. 1981).

McCauley responded by letter dated April 15, 1983. He acknowledged receiving a copy of the document given to Beddingfield, and said that he had read the *Lord v. IBEW* case. However, McCauley denied that the contract required Respondent to "enforce or inform employees of union requirements. The Employer has no wish or right to intrude upon internal union affairs." Respondent was not required to "take a position" on the question, the letter continued, and would not "indiscriminately fire employees at anyone's suggestion." The Union had an obligation "to fairly represent its members," and had to meet certain "requirements" before attempting to terminate an employee under a union-security agreement. "Therefore," McCauley concluded, "if the Union believes that it has justifiable and legal recourse to initiate firing of a current employee, the Union must take its own action, honestly and aboveboard" (G.C. Exh. 4).

Race replied on April 21. He recited what he stated was the contract requirement that all employees must become members of the Union as a condition of employment. He further stated that Respondent's "unit manager" (Beddingfield) had been notified by the Union that certain employees had not been informed of this requirement.

The last three paragraphs of substance in Race's letter read as follows:

> We respectfully submit that compliance with all of the terms and provisions of our labor agreement is necessary and important. We must insist that they all receive equal concern from both the Employer and the Union.
>
> I will reserve other comments on the contents of your letter of April 15th, since it appears that you have attempted to answer questions or respond to requests not yet asked or made.
>
> Both the Local Union Officers, and the undersigned, would sincerely appreciate it if you would reconsider your refusal to comply with the Union Shop provision of our NASA unit Agreement [R. Exh. 2].

Race had another conversation with McCauley in which the latter said that the *Lord v. IBEW* case did not apply to the NASA unit at Huntsville.

The Union filed two unfair labor practice charges against the Company in 1983 but withdrew them. According to Race, he was not satisfied with the sufficiency of the Union's notice to the employees. Accordingly, in late October and early November 1983, Ratliff and union member Joann Williams sent duplicate letters by certified mail to the seven employees named in the complaint. This was in accordance with advice from a Board agent. Williams identified one of Respondent's exhibits as a "sample letter" (R. Exh. 3(a)). It is addressed to Marie Word, is identical to the original letter personally delivered to Word (G.C. Exh. 6), and contains the figure of $13.56 as the first month's dues and initiation fees. The certified mail receipts of the letters are in evidence and show delivery in late October and early November (G.C. Exhs. 8(a), 8(b)).

One of the employees (Wilburn Duskin) did not claim his letter. However, Williams testified that she was present when Ratliff personally delivered the first letter to Duskin. The latter testified and acknowledged receiving the letter in late 1983.

D. *The Final Meeting of the Parties*

The parties met in late 1983 at an arbitration proceeding not related to this case. Company Counsel McCauley placed the date as December 9. According to Race, after the arbitration proceeding had concluded, he brought up what he called "the continuing violation of the Union shop provision" of the contract. He quoted the provision and said that it was clear that an employee would have to join the Union after the grace period as a condition of employment. McCauley said that he was not going to give the Union any "legal advice," and Race replied that he was not asking for it. According to District Manager Carlye, Race said that he was going back to the NLRB.

McCauley testified at length about this meeting, but his testimony is not entirely clear. He asserted that Race would never admit that there was a second paragraph to article XIII, but agreed that the Union had signed the contract. McCauley denied that he had ever received a request from the Union to discharge a specific employee but said that he knew some of the employees were not union members. The parties stipulated that every union member was on checkoff. McCauley's final version of Race's demand was: "We want the Company to enforce Article XIII and require the employees to become members." McCauley's position was: "We are refusing to honor the Union's position because . . . it was not the negotiated position."

E. *Respondent's Responses to the Union Efforts at Enforcement*

Union member Joann Williams testified that she overheard a conversation in the cafeteria between one of the employees, who had received the Union's letter, and Supervisor Beddingfield. The employee asked about the letter and Beddingfield replied, "The union don't sign your paycheck, does it? Does Bennie Ratliff sign your paycheck?" When the employee answered "No," Beddingfield asked, "Well, isn't that a good enough answer for you?"[9] Marie Word, one of the seven employees,

[9] Williams placed this conversation before February 16, when the "first letter was wrote up." This could not have been the correct date. The letter was not yet in existence, and I conclude that this was an inadvertent error in Williams' testimony.

told Williams that she was not joining the Union because Beddingfield said she was not required to join. I credit Williams.

Beddingfield testified and acknowledged telling employees that they did not have to join the Union as a condition of employment, and that the Company would not fire them if they refused to join.

F. *Withdrawal from the Union*

Union finance secretary Mary E. Hines testified she sent a notice to Respondent in the fall of 1983 informing it that employee Georgia Duskin had withdrawn from the Union. Duskin was still working at Respondent's facility.

G. *Legal Analysis and Conclusions*

1. The 14(b) issue

The first proviso to Section 8(a)(3) of the Act allows an employer, under certain circumstances, to make an agreement with a labor organization requiring as a condition of employment membership in the labor organization on or after the 30th day following the beginning of employment, or the "effective date" of the agreement, whichever is later. However, Section 14(b) affirms that this language shall not be construed to authorize the execution or application of collective-bargaining agreements requiring membership in a labor organization as a condition of employment, where this is prohibited by state or territorial law.

I take judicial notice of the fact that Alabama law provides that every person shall be free to join or refrain from joining a labor organization, that the right to work shall not be denied because of membership or nonmembership in such an organization, that an agreement requiring such membership is illegal, and that such membership shall not be required as a condition of employment.[10] However, Federal law has preempted Alabama law in the field of labor relations except in a few cases which are only of "peripheral" concern to Federal labor law.[11]

As already indicated, the alleged unfair labor practice took place on property owned and controlled by the Federal Government. Such property has been designated as a Federal enclave, and, in *Lord v. IBEW*, supra, the court held that jurisdiction by the Federal Government over such enclaves is exclusive unless the deed of cession provides to the contrary or unless the cession is not accepted in the manner required by law. There is nothing in the record to indicate any such defect in the deed of cession involving the George C. Marshall Space Flight Center.[12] The court held that the fact that the right-to-work law was enacted before the cession was not determinative. Regardless of the chronology of enactment of the law as compared to the date of cession, "states retain no such power with regard to federal enclaves even though they are physically located within their territory," Ibid., 646 F.2d at 1062.

Respondent argues that, because the collective-bargaining agreement states that the union-security clause must be in accordance with appropriate Federal *and* state laws, the clause is therefore invalid. This is erroneous, because it is impossible for both state and Federal law to be applicable. State law has been preempted by Federal law.

The fact that the union-security clause provided only a grace period of 45 days from date of last hire, but does not set forth an alternative ending date of the effective date of agreement, whichever is later, does not invalidate the agreement.[13] Respondent refused to honor the Union's request more than 45 days after the effective date of the agreement.

I, therefore, conclude that the union-security clause is valid and enforceable.

2. The Union's fiduciary duty

It is established law that, before seeking enforcement of a union-security clause, the union has a fiduciary duty to inform the employee of his or her obligations, to furnish a statement of the precise amount of dues owed, as well as an explanation of the methods used to compute the amount, and to provide a reasonable opportunity to make payment. *Kaiser Foundation Hospitals*, 258 NLRB 29, 30 (1981). In the case at bar, the Union first delivered letters by hand to the employees named in the complaint, and later mailed them certified letters. Williams testified that the one letter in evidence was a "sample" letter (G.C. Exh. 6; R. Exh. 3(a)). The letters were all the same, being form letters prepared by Race. They state the sum of $13.56 due as the initiation fee and first month's dues. I infer from Williams' testimony that the other letters contained the same amount. No due date was indicated, and the demand was therefore not unreasonable. I conclude that the Union thereby fulfilled its fiduciary responsibilities to the employees.

3. Interpretation of the contract

We thus arrive at the real issue in this case. What is the obligation of an employer who agrees that all employees, as a "condition of employment," shall become members of the union after a specified date? Respondent's position is that the employer has no obligation whatever until the Union has fulfilled its fiduciary duties, and has demanded the discharge of a named employee. I do not agree with the latter prerequisite.

What is a "condition of employment?" It is no more or less than a company rule which the employee must obey or suffer discipline. In the case of the usual union-security provision, as here, the specified discipline is that of

[10] Code of Alabama, Title 25, secs. 7-6, 7-30, et seq.

[11] *Universal Communications Corp. v. Burns*, 449 F.2d 691, 693 (5th Cir. 1971).

[12] In the *Lord v. IBEW* case, the court considered the applicability of Florida's right-to-work law to the enforceability of collective-bargaining agreements at Cape Canaveral Air Force Station and Patrick Air Force Base. The case at bar involves the George C. Marshall Flight Center.

[13] *Television & Radio Employees Local 804 (Triangle Publications)*, 135 NLRB 612 (1962), enfd. 315 F.2d 398 (3d Cir. 1963); *American Seating Co.*, 98 NLRB 800 (1952).

discharge. In other words, the Company has agreed to adopt and implement a rule requiring union membership, with discharge as the penalty for failure to observe the rule.

It is unconscionable, however, to permit enforcement of a company rule without prior notification of the rule to the employees. An employer who, faced with an allegation of a discriminatory discharge, argues that he was merely enforcing a rule which he had never communicated to his employees, would be found to have advanced a pretext—employees cannot be expected to obey rules about which they have not been informed.

It is not the responsibility of a union to inform employees about an employer's rules—it is the function of the employer. Here, the Union did all that it could do—it informed the employees that they would be "subject to discharge" if they did not become members. It then asked the Company to tell the same thing to its employees, and the Company refused. Its reason—that the Union first had to request the discharge of named employees—ignores the Company's obligation to abide by the collective-bargaining agreement. It agreed to enforce a rule requiring union membership. Implied in that undertaking was an obligation to inform its employees of the rule.

Respondent's position—that the Union must first request discharge—would be inimical to the principles of collective bargaining. The Union here did not really want to cause the employees to be discharged—it wanted them to join the Union and keep their jobs. Having the employer support this position by announcing the agreed-upon rule to the employees is far more conducive to labor peace than letting matters proceed to the confrontation of a union demand for discharge.

The Board has found that an employer violated Section 8(a)(5) and (1) of the Act by refusing to honor a union-security clause without any clear evidence that the union specifically demanded discharge of employees. Thus, in ruling upon a Motion for Summary Judgment, "the Union gave Respondent written notice that 9 of approximately 22 unit employees had failed . . . to tender the dues and initiation fees necessary to acquire or maintain union membership. *Since that date, Respondent has steadfastly refused to honor the Union's request to terminate the employment of those nine delinquent employees*" [emphasis added]. *King Electrical Mfg. Co.*, 229 NLRB 615, 616 (1977).

Although Respondent argues that such demands could not lawfully be made between the expiration of the old contract and the date that the new one was signed in March 1983, it is obvious that the Union made additional demands after the signing of the agreement—the last one being made in December 1983.

The Company knew what the Union wanted—to have the Company inform the employees of their obligation. It also knew the name of every employee who was not a member of the Union. Since all union members were on checkoff, every employee not on checkoff was not a union member, and the Company obviously knew the names of the employees whose dues it was remitting to the Union. The fact that the Union may have omitted the name of an employee who was not a member of the Union did not detract from its request to the Company.

I, therefore, conclude that by repeatedly refusing to honor the Union's request to inform employees about their obligations under the union-security provision of the collective-bargaining agreement, Respondent thereby violated Section 8(a)(5) and (1) of the Act.

This conclusion is buttressed by the fact that Supervisor Beddingfield admitted telling employees that they did not have to join the Union as a condition of employment, and that Respondent would not discharge them for refusing to do so. These statements were inconsistent with the Company's obligation under the collective-bargaining agreement. They "offend basic working of the collective bargaining process," and are independently violative of Section 8(a)(1) of the Act. *House of Fabrics*, 234 NLRB 1024, 1025–1026 (1978). Although such statements by Beddingfield were not alleged in the complaint, the matter was thoroughly litigated, and a separate finding is therefore warranted under applicable Board law.

Respondent argues that this case should be deferred to the grievance-arbitration provisions in the contract. However, although it appears from the record that there are such provisions, only two pages of the current agreement are in evidence, and they do not include the grievance-arbitration provisions. See *United Technologies Corp.*, 268 NLRB 557, 559 (1984). In light of the fact that the Union did not proceed to arbitration, and the matter was ignored by the Company, it cannot be said that the record "demonstrates full acceptance by the parties of the grievance and arbitration route to the resolution of disputes." *United Technologies Corp.*, id., at 559 fn. 21.

In accordance with my findings above, I make the following

CONCLUSIONS OF LAW

1. United Food Management Services, Inc., Alabama, is an employer engaged in commerce within the meaning of the Act.

2. Hotel Employees & Restaurant Employees International Union, AFL–CIO, CLC, Local 719, is a labor organization within the meaning of Section 2(5) of the Act.

3. All food service employees at Respondent's food service operation at George C. Marshall Space Flight Center, NASA, Huntsville, Alabama, excluding all office clerical employees, guards and watchpersons, professional employees, chef managers, supervisors as defined in the Act, and Respondent's employees employed at any other division, branch, or unit, constitute a unit appropriate for collective bargaining within the meaning of Section 9(a) of the Act.

4. At all times material herein, the above-named labor organization has been the exclusive bargaining representative of all the employees in the aforesaid appropriate unit for the purposes of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing in mid-April 1983, and thereafter, to inform its employees of their obligation to become union members pursuant to the union-security provisions of a collective-bargaining agreement entered into with the

above-named labor organization as the exclusive bargaining representative of all the employees of Respondent in the appropriate unit, Respondent has failed to honor that agreement and has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

6. By informing employees that they did not have to join the Union as a condition of employment, and that they would not be terminated even if they refused to join the Union, Respondent violated Section 8(a)(1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

It having been found that Respondent has engaged in certain unfair labor practices, it is recommended that it be ordered to cease and desist therefrom and take certain affirmative action designed to effectuate the purposes of the Act.

It having been found that Respondent refused the Union's request to inform its employees of their obligation to become union members pursuant to the collective-bargaining agreement, and told employees that they did not have to join the Union as a condition of employment, and that it would not discharge them for refusing to do so, it will be recommended that Respondent cease and desist therefrom and take appropriate action designed to effectuate the purposes of the Act.

[Recommended Order omitted from publication.]

Coastside Scavenger Company *and* Sanitary Truck Drivers and Helpers Local 350, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. Case 20–CA–17305

25 January 1985

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS HUNTER AND DENNIS

On 24 June 1983 Administrative Law Judge Harold A. Kennedy issued the attached decision. The Charging Party filed exceptions and a supporting brief, and the Respondent filed a brief in response as well as cross-exceptions and a supporting brief.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

[1] The Charging Party has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

DECISION

HAROLD A. KENNEDY, Administrative Law Judge. Based on a charge filed on August 9, 1982, by the Sanitary Truck Drivers and Helpers Local 350, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Local 350 or the Union) the Regional Director for Region 20 of the National Labor Relations Board issued a complaint on September 24, 1982, charging Coastside Scavenger Company (Coastside or the Company) with violating Section 8(a)(5), (3), and (1) of the National Labor Relations Act (the Act). The trial took place in San Francisco, California, on November 10, 11, and 12 and December 15, 1982.[1]

A number of matters were established by the pleadings, including the following:

1. The Union is a labor organization within the meaning of Section 2(5) of the Act.

2. Coastside has a place of business in Pacifica, California, and is a California corporation engaged in the business of providing garbage pickup services.

3. Coastside is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. It grossed over $50,000 last year and in the same time period purchased and received goods and materials valued in excess of $5,000 directly from outside the State of California.

4. The president and vice president of Coastside are, respectively, Mario Torrigino and Louis Picardo, and each is a supervisor and an agent of the Company as those terms are defined in the Act.

5. Since 1970 the Union has been the exclusive collective-bargaining representative of a unit of Coastside employees described as follows:

> All drivers, helpers, and mechanics employed by [Coastside] at its Pacifica, California facility excluding office clerical employees, supervisors and guards as defined in the Act.

6. Coastside and the Union have signed successive agreements, the last one being effective for the period August 1, 1979, to July 31, 1982.

7. About June 3, 1982, the Union, by letter, requested Coastside to bargain with respect to terms and conditions of employment. The Union and the Company met at various times in June, July, August, and September 1982 for the purpose of negotiating a new agreement for the unit described above.

8. Certain Coastside employees represented by the Union went on strike on August 2, 1982.[2]

In addition to the facts established by the pleadings referred to above, the following matters are not in dispute.

The Union has been recognized as the exclusive bargaining representative of Coastside's drivers, helpers, and mechanics for 12 years. Collective-bargaining contracts were negotiated with the Union during the 1970s by one of Coastside's two owners, either President Mario Torrigino—referred to during the trial as Owner Torrigino, Torrigino Senior, and as Mario—or Vice President Louis (Lou) Picardo, without a strike. Robert Morales, secretary-treasurer of the Union, represented the Union in negotiating all of such agreements.

Negotiations for a new contract commenced on June 17, 1982. Mario Michael Torrigino, the son of Owner Torrigino and referred to during the trial as Attorney Torrigino, Michael, or as Mike, was the Company's chief spokesman during the 1982 negotiations. Morales, who attended all of the 1982 bargaining sessions except the first one, which was attended by Union Business Repre-

[1] In numbering the pages of the transcript, the reporter went from p. 233 to 224 (instead of 234) so that the numbers 224–233 appear twice. The first set of such numbers are renumbered 224A–233A, and the second set of such numbers are renumbered 224B–233B.

[2] Attorney Michael Torrigino, company spokesman during the 1982 negotiations and son of Mario Torrigino, testified that Respondent is "run by the two owners," Mario Torrigino and Louis Picardo, and has 7 trucks and about 15 employees. Merced Ramirez, an employee of Respondent who went on strike, identified six employees as "strikebreakers"—i.e., persons who continued to work for the Company after onset of the strike. The names and addresses of 10 employees who went on strike are listed in G.C. Exh. 26. Attorney Torrigino indicated that he believed that all of the strikers had been replaced by some time in September 1982.

Unless otherwise stated all dates refer to 1982.

sentative James Payton, was the chief spokesman for the Union. Bargaining sessions were held about the following dates: June 17 and 29, July 12, 21, 26 and 28, August 3, 6, 20 and 24, and September 7.[3]

Specifically, the complaint alleges Respondent violated Section 8(a)(5) and (1):

(a) By failing "to delegate sufficient authority to its bargaining representative [Michael Torrigino] to bind Respondent to the proposals agreed upon during negotiations, thus hindering bargaining, and fail[ing] to bargain with the intent to reach an agreement."

(b) By dealing "directly with its employees in the unit . . . by giving the employees its final contract proposal before such proposal was offered to the Union."

(c) By demanding about August 21 and August 24 that the Union agree to waive striking employees' rights to reinstatement, allegedly "an unlawful condition of bargaining."

(d) By refusing "to agree to terms of a collective-bargaining agreement which had been negotiated on August 20 and August 24, 1982."[4]

The complaint also alleges that Coastside "caused and prolonged" the strike that began on August 2 by "unfair labor practices."

Further, the complaint alleges Coastside violated Section 8(a)(3) and (1) of the Act by refusing to reinstate strikers after the Union made unconditional offers on their behalf to return to work.[5]

Finally, the General Counsel and the Charging Party Union assert that there has been a continuing refusal to reinstate strikers and that Respondent further violated Section 8(a)(3) and (1) of the Act by hiring new employees in the fall of 1982 (November and December), after commencement of the trial, without recalling any of the strikers.

It must be determined whether Coastside violated the Act in the respects alleged above. Also, consideration must be given to whether the investigation conducted by Region 20 of the Board prior to issuance of the complaint was "so unfair and biased as to constitute a denial of due process of law," as Respondent asserts.

Seven witnesses were called. A summary of their testimony follows.

Leopoldo Perez identified himself as an employee driver of Respondent until he went out on strike at the end of July 1982. Perez said he was on the picket line thereafter "every day." On his last day of work, July 30, Owner Picardo asked Perez "for the key of the truck and for the keys of the route." Picardo then gave him (as well as other employees) an envelope containing a one-page document (G.C. Exh. 16) purporting to be a copy of the Company's "final offer." Perez took the document with him to a union meeting held that afternoon. Union official Morales spoke at the meeting and explained, in Spanish and in English, that the document "was not the final offer" the Union had received from the Company. Morales then stated to those at the meeting that "we go on strike because of Unfair Labor Practices."

On August 23, Perez said he was "punched in the nose" while leafletting in a post office by an employee of Coastside. Perez said he thereafter received treatment at a nearby hospital.[6] Perez testified that he was on the picket line shortly after the punching incident and observed Owner Torrigino, accompanied by two workers. According to Perez, Owner Torrigino commented, "He doesn't look that bad," and added, laughingly, "Oh, they got the wrong guy."[7]

Merced Ramirez testified that he had worked for Coastside Scavenger for about 17 years before going on strike and that he had been shop steward since 1970. He said he was a truckdriver for Respondent and had held a "captain's" position.

Ramirez stated that on Friday, July 30, as he left work, Owner Lou Picardo gave him "and some other employees" a copy of General Counsel Exhibit 16, and then stated:

> . . . "I got this for you guys. That's a final proposal. That's all I can do for you guys because I don't have enough money to support all the amount that you are asking for." And, of course, I—you know—and then he says, "Many business, they are closing here in Pacifica. We don't get enough money to pay you guys whatever you want."

[3] The General Counsel, the Charging Party, and Respondent agree that bargaining sessions were held on these dates. The Union and the General Counsel claim that a negotiating session was also held on July 16 which Respondent disputes. Whether such session took place or not is not "critical," as the General Counsel states, but I am not persuaded that it did take place. The supposedly "more precise testimony" of Morales on this point is relied on by the Charging Party as being more credible than that of Michael Torrigino, who said he could not remember a meeting on that date. Michael conceded during cross-examination that he was in error in previously testifying that he had discussed with Morales on August 20 possible withdrawal of certain litigation instituted by the Union (as the matter was not filed until later), and that a letter he sent on September 7 misstated the understanding reached on sick leave. He also acknowledged that there were events, or their timing, about which he could not be certain. Such concessions by Michael do not cause me to consider his testimony as unreliable. I specifically reject the contention that Morales' testimony "must be credited" over Michael's on the basis of demeanor, recall, or general memory. Actually, Morales' testimony about what happened on specific dates was not so precise. See, for example, Tr. 183 ("On July 16, we had a meeting, to the best of my ability—I am confused between two days . . .") and 284–292. I believe the Charging Party's reference in its brief on p. 5 to a bargaining session being held on July 30 is a typographical error as it is not otherwise referred to in its brief.

[4] Par. 12 of the complaint, which is in part duplicative of par. 11 (quoted in (d) above), alleges that the Union and the Company reached agreement on August 24, 1982, that the Union requested execution of a written contract on that date, and since that date through oral notification by its agent, has failed and refused to execute a written contract embodying the agreement described above."

[5] Par. 17 of the complaint alleges that the Union advised the Employer's agent of the offer to return by phone about August 21 and in a bargaining session about August 24 and that on such dates the Respondent failed to reinstate such employees.

[6] Marcella Barton, who works in the Emergency Admissions Office of Mary's Help Hospital, testified that Perez came to the hospital for treatment on August 23. The hospital report (G.C. Exh. 36) which she helped prepare indicates that Perez reported he had been "hit by a scab" while delivering papers to persons entering a post office. The report indicates that he complained of a nose injury and a cut lip. Barton said she called Coastside to inquire whether the injury resulted from an industrial accident and was told by "a gentleman" that Perez was on strike and no longer in the Company's employ.

[7] The General Counsel's attorney stated that "We are not alleging that the Employer is responsible for the attack."

Ramirez said he went home that afternoon and, before going to the meeting of Coastside employees and union members scheduled to begin at the Royal Inn in South San Francisco at 4 p.m., he called union official Morales and advised him that a company proposal had been distributed to Coastside employees.

Ramirez furnished Morales a copy of General Counsel Exhibit 16 at the start of the meeting. Morales returned it soon thereafter, explaining that he had received a copy of it from someone "about 3:15" that afternoon. Ramirez stated that Morales then spoke to employees during the meeting and that another union official, Jim Payton, stated "the same thing" to them in English.[8] Ramirez stated that he worked on the following day, Saturday, July 31, an "overtime day." When he finished his work that day he was told by Picardo:

> I am waiting for you guys in here Monday morning with that picket sign. I am bringing one for me, too.

Ramirez stated on cross-examination that Morales explained that the union office had received on the afternoon of July 30, around 3 or 3:15, a proposal from the Company "which was longer than the one-page proposal." Also, on cross-examination Ramirez recalled that on the first day of the strike (Monday, August 2) there was a sign at the company yard which stated: "We are seeking permanent replacements for striking employees." Ramirez acknowledged that some Coastside employees did not go on strike, among them: J. Moylett, Allan Bernard (nephew of Picardo), Jose Castellanos, Miguel Castellanos, Ramon Castellanos, and Victor or Valentino Fornesi.

It was brought out during cross-examination that Ramirez was discharged on February 2 but returned to work about 6 weeks later pursuant to an arbitration award that had converted the termination to a 10-day disciplinary suspension, along with some backpay (paid shortly prior to the start of the trial of this proceeding). Ramirez claimed at first that Owner Torrigino did not speak to him after his return in the spring of 1982 pursuant to the arbitrator's award, but he later asserted that Mario Torrigino had said to him, "You are responsible for bringing the Union in this Company."

Ramirez said he was told by the Company when terminated in February 1982 that it was because he "broke the truck on purpose and a lot of that bulls—."

Robert Morales testified that he had served as business representative of Local 350 from 1973 to 1976 and since that time as the Union's secretary-treasurer. He said he had negotiated for his Union a collective-bargaining agreement with Torrigino Senior around 1973 and an agreement with Lou Picardo in 1979. He stated that in 1982 he participated in arbitrations involving Merced and Victor Ramirez.[9]

Morales also testified that the Union and Coastside had agreed to settle a grievance of Aurelio Navarro, following the filing of a lawsuit by the Union, on terms that provided for Navarro's reinstatement and payment of a $4000 "damage award" (not yet accepted by the employee).

Morales testified that, prior to the first bargaining session held on June 17, the Union had prepared proposals (G.C. Exh. 2, dated June 3) for Business Representative James Payton to present to the Company. Morales said he decided to become "directly" involved in the negotiations after conversing with Payton about what happened at the first bargaining session.

Morales stated that he asked Mario Torrigino[10] at the second session whether Michael had the power to act for the Company, "and he says, 'Definitely.'" Morales said he continued to inquire about Michael's authority to act "like a broken record" at every meeting.

Morales said he had received a copy of company proposals set forth in Michael's June 21 letter (G.C. Exh. 4) before the June 29 meeting. At the meeting he said he "kept insisting" that the Company respond to "economic issues," while Michael "kept insisting" that "we get the contract language out of the way." Morales disagreed with the way Michael classified "economic" and "language" issues, contending that Michael proposed "economic changes" in the form of only changing language. Morales referred to Michael's initial proposals with respect to health and welfare matters, pensions and the change of workweek (so Sunday, normally not worked by Coastside employees, and Saturday would not require payment of any overtime) as illustrations of Michael's confusing classification.[11] Morales indicated these items

[8] Ramirez said his "first language" is Spanish but that he could read "a little bit" of English. Ramirez indicated nothing was said at the meeting that day about a strike.

[9] G.C. Exh. 28 is an arbitrator's "interim award" dated June 2 reinstating Merced Ramirez. G.C. Exh. 29 is the arbitrator's "opinion and award," dated June 18, finding Merced Ramirez deserving of "disciplinary suspension" of 10 days rather than discharge for being "in the wrong" plus backpay (estimated at $8000 by Morales). G.C. Exh. 30 is of the arbitrator's "opinion and award," dated June 18, disciplining Victor Ramirez, in the form of a 10-day suspension, but providing for his reinstatement and backpay. G.C. Exh. 31 is a "supplementary award" of arbitrator dated October 27 in favor of Victor Ramirez. Morales testified that Coastside had satisfied Merced Ramirez' backpay award, but he was not aware that Victor Ramirez' had been paid. G.C. Exh. 31 indicates, however, that the Company had paid Victor Ramirez $6284.12.

[10] Morales testified that Michael told his father to "shut up" at two or three bargaining sessions, but he appeared to be uncertain which meetings the father did attend. Morales indicated he thought the father was present at the second bargaining session on June 29 and stated, "I want to be able to fire people without union intervention." Such comment, Morales said, prompted Michael to say, "Shut up, Mario." Morales later acknowledged on cross-examination that Torrigino Senior attended bargaining sessions on June 17 (Morales not present), June 29, July 26, and July 28.

[11] Morales sought to denigrate Michael's labor relations expertise and enlarge on his own. Morales indicated that he educated Attorney Torrigino about such things as trust funds and maintenance of benefit concepts—for which Michael supposedly expressed appreciation. Morales did not persuade me, however, that Michael sought to put through substantive changes in the guise of changing language as a stratagem or ruse. Morales indicated, by his own testimony, that Michael explained that the Company's health and welfare plan, irrespective of whether it provided for maintenance of benefits, would involve a "lesser price" for the Company, that the Company proposed cutting pension contribution from 70 cents to 25 cents per hour and that a change in the workweek would reduce the amount of overtime Coastside would have to pay. Testifying under questioning of the Union's counsel, Morales indicated he had considerable labor relations experience having negotiated as many as 30 agreements. On cross-examination Morales denied "lecturing" to Michael about any Sunday work but did acknowledge that the old contract covered any work performed on Sunday. Morales also indicated that the Union had proposed a change that would preclude the Company employ-

Continued

were discussed at the June 29 meeting as were other issues—the number of holidays and the effective date of the new contract and lack of any proposed wage increase from the Company. Morales said he objected to the Company's health and welfare proposal, which provided for no maintenance of benefits, to the reduced pension contribution (from 70 cents to 25 cents) and the change of workweek so that Saturday and Sunday would be "regular days," and the proposed effective date of the new contract, January 1, 1983, instead of August 1, 1982 (affording no holiday between August 1, 1982, and January 1983, according to Morales).[12]

At the July 12 meeting the "Witnesseth" clause was discussed, with Morales suggesting appropriate language (set forth on G.C. Exh. 8), along with the pension contribution (Michael still proposing to "reduc[e] it by 45 cents") and a supposedly "better" company health plan. Morales said the Union made a concession with respect to Saturday overtime (accepting a guarantee of 6 rather than 8 hours), and Michael added two more sick days "with pay-off" and an additional holiday, "Cinco de Mayo" (May 5, the Mexican Independence Day). Morales indicated that he thought agreement was reached at that point and he asked about Michael's authority to act, "not seeing his father there." Michael assured him of his authority, Morales said, with Michael saying, "I can guarantee you." Even though Morales indicated he thought agreement was reached, he said he accused Michael of "playing games" with his "nonsense language" and not wanting "to discuss a complete economic package." Morales said he volunteered to meet anytime as the contract was about to expire.

The fourth (Morales' third) bargaining session took place, according to Morales, at the union hall on July 16, starting late around 10:45 a.m. It was to have taken place at the Chamber of Commerce building in Pacifica, Morales said, but Michael had gone instead to the Royal Inn. Morales indicated at one point in his testimony that the meeting at the union hall took place "in the middle of the month of July and I had asked for [Michael's] father and he said that he was on vacation." After commenting that neither of the owners was present at the meeting Morales said he again asked Michael if he had "intentions to negotiate a contract and to finalize it," and Michael again assured him that he had the power to represent the Company.

Morales said he kept questioning Michael's authority, citing various reasons:

> I was very concerned, and I came down with the impression that, number one, because of his inability to understand the contract, that we were running out of time, and that everytime that we discussed, well, he would say, "want to check this out" . . . . You know, he gave me the impression that he did not want—he did not want to settle the agreement. . . .

Morales said Michael made the Company's first wage proposal when the parties met at the union hall which he described as follows:

> [Michael] says, "I know you are going to be upset, but I am going to give you our proposal on wages." And I said, "Go ahead, we've got to get it sometime or another." And he gave me a proposal of 10 cents per hour the first year, five cents per hour the second year, and five cents per hour the third year, with no cost of living index, which he said his father was against it, and that he would never agree to a cost of living clause.

Morales indicated during his testimony that he thought there were bargaining sessions on both July 16 and 21 and that the arbitrations that the Union sought on behalf of Navarro and the two Ramirezes were discussed at each. Michael had proposed use of the language that would eliminate the need for warning letters and allow terminations "for just cause," noting that his father was very upset over the cost of the "two arbitrations and a court case" that sought an arbitration. Morales said he explained to Michael that his (Michael's) proposal was "very dangerous" and suggested an alternative—keeping the employees on the payroll pending the outcome of their grievances—which Michael thought "would be acceptable" and "satisfy" his father.[13]

On July 21, according to Morales, the parties agreed on "equipment" benefits—after Morales "explained" matters of safety and security to Attorney Torrigino—with Michael agreeing that the Company would increase shoe allowances from $35 to $45 (with a maximum of two pairs each year) and no assessment to employees for garbage cans (supposedly in accord with the law but contrary to Owner Torrigino's desires).[14]

Initially, Morales thought two Federal mediators, as well as Michael's father, attended the bargaining session held on July 26.[15] Morales was uncertain how long it

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ing a worker on "straight time" on the weekend. Attorney Torrigino testified that only one employee normally works on Saturday, but "about everybody worked" on the first Saturday of each month.

[12] Morales identified a letter, G.C. Exh. 7, that he said he hand delivered at the June 29 bargaining session. It asks for a response to the Union's initial proposals and also questions Michael's classification of issues. Morales testified that at this meeting the Company wanted to be paid a fee for deducting dues for the Union, considered to be a noneconomic item by Michael, and that he and Michael disagreed on the proper classification of a number of items discussed that day.

[13] Morales stated that the language he proposed, which he said Michael accepted on July 16, was later typed out and shown to Michael on August 3. Under questioning by Charging Party's counsel, Morales said he also explained to Michael on July 16 that he should not attempt to change sec. 24, "Public Authorities and Agreement," as Michael was proposing, stating that it would open up "a can of worms." The Company had "given up" on this item, he said, by "July 12th and/or 16th."

[14] On cross-examination Morales stated that Pedro Navarro had filed a grievance over efforts of the Company to collect payment for damage to garbage cans. Morales said the Union proposed a change in sec. 16 "because of the experience of the grievances." Morales maintained that on that day the Union insisted on an increased pension contribution and that the health and welfare plan was discussed. He claimed that "all the issues were outstanding" up to that date and even on August 2, when the strike began, "because they had not bargained in good faith." On redirect, however, he mentioned agreement was reached on vacations and maintenance of benefits.

[15] Morales later indicated he thought the two Federal mediators came only to the July 28 meeting.

lasted, but it was his recollection that the duration of the new contract and Coastside's plan to obtain an increase of rates from Pacifica's city council in January 1983 were discussed. Michael wanted, Morales stated, a 3-year contract that would not commence until January 1983, the earliest time the Company supposedly could offer any wage increase.[16]

Morales testified that he and his union colleague, Jim Payton, walked out of the July 28 bargaining session "out of desperation" after discussing certain subjects—what the date of the contract should be; sick leave, a matter Morales said he thought had been previously agreed on (i.e., 12 days); and wages, a subject opened up by Morales, who explained that the Union was asking for only "parity for the area," resulting in a response of "no way" from Mario. Morales said the union officials walked out because the "conduct" of the company representatives indicated they did not want to finalize any agreement with the Union but wanted it to agree to allow the Company to discharge employees. Quoting Morales:

> [T]hey gave the impression that I should have the authority to say to them, "Yes, you can fire Victor Ramirez. You can fire Merced Ramirez. You can fire Aurelio Navarro. You can fire Pedro Navarro. And there will be no problem."

Morales stated during cross-examination that he did not have "a clear recollection" of the July 28 bargaining session but stated it "started like any other negotiating meeting." He indicated later that a Federal mediator attended the session as did Torrigino Senior, who was "there sitting silently." Morales maintained that it was a "nonsense affair of negotiations," but added:

> And I will say this: That I am not critical that, in the case of Michael, he did it with intention; it's just that he didn't know, like me trying to fix your car and I am not a mechanic.[17]

Morales agreed on cross-examination that at the July 28 session additional subjects were discussed—pensions (with the Union proposing a lesser increase); vacations (previously "agreed to that already," according to Morales, except that the Union continued to press for 4 weeks' vacations for employees with 7 years with the Company); discharge and suspension language (a "settled issue," Morales maintained, although he agreed that he had not yet submitted in writing the language previously suggested that was reportedly acceptable to the Company); "Item 16" (supposedly resolved previously but "settled" again that day); sick leave (previously settled but reopened by the Company as to the "payoff"); and grievance and arbitration provision. Morales maintained that the last item, referred to as item 23, had been previously settled, but he conceded that discussion of it that day "could have" triggered the walkout by him and union official Payton.

After the union officials walked out, Morales instructed Payton to get in touch with Owner Lou Picardo in an effort to get him involved in the negotiations. Morales said Payton then did two things, at Morales' direction: (1) called Picardo and offered to sit down and negotiate immediately "with somebody who had real power and real desire to negotiate" and then (2) confirmed such offer by telegram. The response Picardo gave was not promising. Said Morales:

> My indication from Mr. Payton was that Lou Picardo again told him just to strike their "f" with an "ing" asses. "They deserve it, they got it coming, and I am going on vacation. I don't care."[18]

July 30 was an eventful day, although no bargaining session was held. Around 3 p.m. a messenger hand delivered to Morales at his office a 4-page letter from Attorney Torrigino containing several company proposals (G.C. Exh. 17). Morales said he learned earlier, around 12 noon or 1 p.m. when Merced Ramirez telephoned him, that "a final proposal" of the Company (G.C. Exh. 16) had also been distributed to employees that day. Morales stated that he received a copy of the latter document, signed by "Mario Torrigino" and "Louie Picardo," at the Royal Inn at South San Francisco around 4 p.m., about the time a union meeting was due to begin. Morales stated that he had called the meeting "to give the men an up-to-date report" on the status of the negotiations with Coastside. Morales spoke to the "membership" in English and in Spanish, and Payton also offered some comments. Morales said he explained that the Company had sent out "two different sets of documents," one from the officers of the Company and another, described as "outrageous" and indicative of "contempt for the Union," from the Company's attorney, and that he (Morales) was calling a strike. Morales said he also told the men at the meeting:

> I had learned that the Company again had committed another Unfair Labor Practice by going directly to the employees without my knowledge and prior to giving the Union what was considered in their mind a final proposal.

Morales testified that after the strike began (on August 2) he attended additional bargaining sessions on August 3 and 20. The August 3 meeting took place, Morales said,

[16] Morales said he expressed concern over the fact that there would be no agreement between August 1982 and January 1983, but he acknowledged that Michael had offered a "Letter of Understanding" covering such period.

[17] Morales stated later that he "felt that the company was not dealing in good faith" because it had sent "the kid [who] didn't have any experience in regards to a labor contract." Morales stated that Attorney Torrigino had "always been very polite with us."

[18] Morales said he had sought Picardo's held earlier in the month, telephoning him on two occasions about the time of the July 16 meeting when Mario was on vacation. Morales said he explained to Picardo in the first conversation that the contract was about to expire and that the parties were making no headway in the negotiations due to Michael's lack of knowledge. Morales said Picardo's response was:

> "Bob," he said, "it is my opinion," he said, "that you should get your 'f' signs and strike their asses because they don't want to listen to me." Also, he said, "I want you to know," he said, "that beginning August 1st," he said, "I am going on a one-month vacation and I don't give a shit."

at the Royal Inn at "South City" and was attended by Attorney Torrigino, Payton, himself, and a Federal mediator. Morales said he hand delivered a letter (G.C. Exh. 18) containing certain union proposals at that meeting. Morales stated that Michael agreed to a union proposal, set forth on another typewritten document (G.C. Exh. 33, displayed but returned to "my briefcase," he later explained because Michael "was backing away") that pertained to discharges and suspensions (identified as sec. 12 and providing for an employee to remain on the job if discharged). According to Morales, Michael stated the Union's proposal was "good" and "I accept this."

With respect to the August 20 meeting, Morales said the parties first met in the morning, and then in the afternoon he and Michael concluded an agreement in a private meeting. Initially the parties discussed "amnesty" for Respondent's "loyal employees" (replacements) and Respondent's recall of strikers. Morales said he "proceeded to explain" to Michael what amnesty meant and that as secretary-treasurer of the Union he could not give it; also that he (Morales) must demand that everyone on the picket line be allowed to return to work. Michael indicated that his father would not consider taking back five of the strikers, initially identified by Morales and confirmed by Michael to be the following: Merced Ramirez, Victor Ramirez, Pedro Navarro, Aurelio Navarro, and Leopold Perez. Navarro had filed "various" grievances against the Company, Morales said, including one which objected to Coastside's attempt to charge Navarro for the cost of a garbage can and another over the failure of the Company to pay overtime for washing equipment (trucks).[19] Morales testified that he took the lead that afternoon to settle the strike and requested, through the Federal mediator that was present, a private meeting with Michael—after asking and getting Michael's assurance that he had the power to act.

According to Morales, all of the outstanding issues were discussed in the private meeting,[20] including wages (Michael accepted one of two offers made by Morales "$1.55, and 55 and 55"), cost of living (dropped by Morales), washing of truck (dropped by Morales), pensions ("three nickels divided into three years"), and income protection (raised from $40 to $60) and dental plan (90 percent of the usual and customary fees), and they emerged from the meeting telling the mediator that was present that day: "It is over, and we cannot give you any specifics."

Before coming out of the meeting Morales said the two shook hands, Michael expressed his thanks, and Morales expressed his willingness to "help the company with the City Council politically and see that you get your raises, whatever you got coming." Michael then wrote his home phone number on the back of a business card and told Morales:

> Bob, I want you to call me tomorrow at 10:30 a.m. and I will tell you the time when your men should return to work.

Morales said he telephoned the following morning, a Saturday, as Michael had suggested and had a telephone conversation which he described as follows:

> At 10:30 a.m. in the morning I phoned him and I said . . . I am calling to definitely obtain the times when you want my men to go back to work. And he went silent and took, like, a few seconds. And I said, "What's wrong?" And he said, "My father did not buy it." And I said, "Jesus Christ, you mean to tell me that you are going to come back with the same bullshit all over again? You gave me to understand that you had power to act, that you had intentions of finalizing the contract, that you had the intention and that it will be over after we shook hands, that I was going to help the Company." "And now," I said, "you come out with this bullshit." And he said, "Bob," he said, "I apologize. I don't blame you for being upset." He said, "But, believe it or not, my father did not buy it." And I said, "You know, man, for being a lawyer you have no ethics." And I said, "You should not enter into any agreements ever to which you have no right on entering. But I told you we had an agreement on behalf of the Union." I told him, "I took the responsibility that I was going to live by my agreement, and what you are doing to me," I said, "you know, you have no class." And I hung up on the man.

Morales said he was very upset by his telephone conversation with Michael and on the following day, Sunday, August 21, called "my lawyer Bert Boltuch" to ask him to telephone Michael. To vouch for the fact that Boltuch did so, and declaring it as "not hearsay," Morales referred to a letter (R. Exh. 5) that Boltuch had sent to Michael.

Another bargaining session was thereafter held at the Royal Inn in South San Francisco on August 24. Morales said he requested the meeting, through Federal Mediator Glenn Bergerson, who attended the session, along with Morales, Jim Payton, and Attorney Torrigino. Again, Morales said he asked Michael whether he had power to act and Michael responded:

> I definitely have the power to act on behalf of the Company. I definitely have the power to sign a contract. I definitely have the power to finalize the existing situation that we have.

Attorney Torrigino proceeded to outline a company proposal or "settlement offer" which called for an increase in wages (70 cents effective August 1, 1982, 70 cents the second year, and 70 cents the third year), nothing on pensions; withdrawal of Cinco de Mayo holiday (denied on cross-examination, however); elimination of the "pay-off" for the 2 extra days of sick pay if not used; withdrawal of income protection plan (i.e., no increase); the 90-percent dental plan; 4 weeks' leave of absence for

[19] Michael testified that the Company might take "some" strikers back but that only one vacancy existed at the time.

[20] Morales indicated matters previously agreed upon were also discussed, including these: sick leave, "Section 12" language, shoe allowances, holiday and vacation benefits, and the effective date of the contract.

funerals; and acceptance of the Union's section 12 (discharge and suspension) language, said to have been agreed to "on August 3rd and again on August 20." Michael also indicated there was no problem "on anything else that we had already agreed to," according to Morales who then asked the "main question: Will my men go back to work immediately?" In response Michael said that the Company did not want the men back, and Morales asked Michael if he were "making this as a condition of your package?" "Yes," he said, "My father does not want these people back." Morales testified that he then told Michael, "You are involving yourself in another unfair labor practice because you are making it as a condition of your offer." Morales indicated Michael changed his position at this point and extended an offer that would permit the strikers to return to work.[21] Quoting from Morales' direct examination:

> "Look, Bob," he said, "I tell you what I am going to do." He said, "If you stay within the scope of my economical offer that I am giving you, that will be no problem."

Morales indicated he summarized Michael's offer and once more asked if the Company would reinstate the strikers. And he said, "If you stay within these amounts," he said, "yes, we will take them back." Morales indicated in response that there was agreement but asked Michael if he would allow him "a few minutes with Jim Payton" to "play with the figures." Michael agreed, saying there was no more money to be had but that as long as the Union stayed "within the scope of the $2.10" (i.e., the "70, 70, and 70" wage offer), "you've got yourself a deal." Morales said he gave Michael his word, in front of Payton and the mediator, he would stay within the $2.10 and excused himself and Payton.[22] Morales said he worked out an arrangement in about 7 minutes staying within the $2.10, but was never given an opportunity to present it.[23] Morales said he called the mediator and Michael together and stated, "Okay, Michael, we got it." Before he was able to give him the sheet of paper showing Morales' figures, however, Michael announced that his father would not agree. Morales said he then told Michael, "You've got to be shitting me again . . . I can't believe it," and Michael said, "I apologize."

James Payton, business representative of the Charging Party Union, testified that he went to Respondent's premises a little after 4 p.m. on September 8 and, after seeing the employees on strike there (listed in G.C. Exh. 26), spoke to Lou Picardo, part owner of Respondent. Payton said he told Picardo that "we have a contract" and added: "The men are here, they're willing, they're ready and able to go to work."

Picardo said he would have to speak with "his attorney" and went back into the office. Five minutes later Picardo returned and stated that there was no contract. Payton said he asked Picardo if he were refusing to let the men return to work, and Picardo replied, "Yes, that's right." Payton said he then put up a picket line with signs that contained the words "unfair," "Coastside," and "strike."

Payton was later recalled by Respondent and was asked if the union membership voted on the Company's "final proposal" at the July 30 union meeting. Payton stated that no vote was taken, adding that in his opinion the Company had engaged in an unfair labor practice in giving out "2 different sets of proposals" that day. He confirmed that both he and Morales spoke at the meeting that day and that employees were told they were not properly informed as the proposal handed out to employees that day (G.C. Exh. 16) did not explain the "language proposals" that were contained in the final proposal that was sent to the Union (G.C. Exh. 17). Payton said that the employees did vote unanimously before July 30 to go out on strike.

Payton also testified that during the negotiations Morales had made an oral proposal concerning discharges which would allow a worker to remain on the job pending outcome of a grievance procedure. Attorney Torrigino did not like it at first but later accepted it. Payton said Morales showed the company attorney a typed proposal later, on August 3, and then put the paper back in his (Morales') briefcase.

Mario, Michael Torrigino, referred to during the trial as "Attorney Torrigino," "Michael" or simply as "Mike," said he was retained by Respondent's owners, his father and Lou Picardo, to represent them in negotiating a contract with Local 350 in 1982. He had had no prior experience in labor negotiations. Michael said he was authorized in early June by the owners to present "their terms" to the Union, agree to such terms, and reach compromises.

Michael stated that he conferred with the owners before the negotiations began on June 17, explained what he hoped to accomplished during the negotiations, and obtained "full authority to go after the goals that I stated." He said he reviewed with the owners a draft document with proposed language changes. Michael also indicated that he would confer with the owners after bargaining sessions and reduce to writing matters that had been agreed to (referring specifically to G.C. Exhs. 9, 10, 11, and 14).

According to Michael, at the first bargaining session, which was held at his office on June 17, he read the Union's initial proposal (G.C. Exh. 2) and asked union official Payton questions about it. (The Company's initial proposal, dated June 21 and received in evidence as G.C. Exh. 4, was being typed that day and was mailed later to

[21] Responding to questions of the General Counsel on redirect concerning the August 24 meeting, Morales testified that Michael indicated that day that the Company would take back one striker. Morales said he rejected the offer and "told him that my condition will be that the company will have to take everyone back to work" because of the Company's unfair labor practices. Thereafter, Michael offered to take all of the men back if the Union would accept his money terms—i.e., "As long as you stay within the money wage offer, there'll be no problem"—but thereafter withdrew the offer after Morales conferred with Business Agent Payton "in the room alone." Morales stated later (on recross) that he wanted all of the strikers back "at that particular time because of the violence . . . at the picket line."

[22] Morales testified he "took five cents out of the second year and five cents out of the third year, borrowed ten cents from the two pennies" to increase the income protection plan, pension and payoff on the sick leave.

[23] On cross-examination Morales agreed that, as stated in his affidavit, before conferring with Payton privately on the figures he told Michael "to make phone calls, if he had to."

the Union, Michael said.) Michael said he asked if the Union was proposing a wage increase. Payton acknowledged that the Union's initial proposal overlooked such issue, and Payton indicated, as Michael recalled, that the Union would be requesting a $2 hourly raise.

Michael stated that his father accompanied him to the June 29 bargaining session. Morales joined Payton in representing the Union at this meeting and handed Michael General Counsel's Exhibit 7, the Union's ("We do not understand your position") response to the Company's initial proposal. Morales did not want to deal with "non-economic" or "language" issues, as Michael had proposed, and, after accusing the Company of not wanting an agreement, walked out of the room into a hallway, taking Payton with him. The union officials returned, however, after Michael asked whether they were refusing to bargain, and the parties then began to discuss the Company's initial proposal, item by item. The meeting ultimately adjourned with each side requesting written responses to the initial proposals of the other. Michael said he prepared a response (G.C. Exh. 11) on July 5 for the Union and received the Union's response (G.C. Exh. 13) at the next bargaining session held on July 12.[24]

Using notes to refresh his recollection, Michael indicated he thought an agreement was reached on certain matters at the July 12 meeting, including union security (secs. 2(a) and 2(b)); section 6(b), so "missed pickups" would be handled without extra compensation when occurring due to a crew's fault; and funeral leave (actually agreed to in Michael's July 5 letter). Other subjects were discussed, including the witnesseth clause (agreed to on July 21, he said) and the discharge and suspension and grievance and arbitration provisions.[25] Michael initially testified that he offered an additional holiday (making it 12 in all) on July 21, and that Morales responded, "Thank you. Let us go to the next point." Later he indicated that he made the offer on July 28 when Federal Mediator Glen Bergerson was in attendance. In any event, Michael claimed that Morales never said he would drop the demand for additional holidays.

Michael testified that the Company had wanted to revise the grievance and arbitration language so as to make it clear who should give notice and when. Michael indicated the subject had been pursued earlier, but on July 28 Morales "stormed out" of the bargaining session that day while the topic was being discussed. According to Michael, Morales maintained the Company was not bargaining in good faith, that it was changing positions and "he was going to call a strike."[26] Michael stated that he then undertook to prepare the Company's "last, best, and final offer" (G.C. Exh. 17) and submitted it on July 30 to Federal Mediator Bergerson. Michael said he asked the mediator to call Morales and try to arrange a meeting that day, but none took place.[27]

Michael testified that he was made aware of the Union's July 29 telegram that was sent to the Company's office indicating to him, he said, that the Union was willing to negotiate with Picardo.

The parties met again on Tuesday, August 3, the day after the Union went out on strike. Certain issues were resolved, including dental, holidays, shoe allowance (equipment), and truck washing (guaranteed hours) that day, but several issues remained unresolved—i.e., income protection, pension, vacations, discharge and suspension, garbage cans, wages, and sick leave.[28]

Michael stated that during the August 6 bargaining session he handed Morales a letter (G.C. Exh. 20) which withdrew all offers because "the rules of the game" had changed: employees had gone on strike and put the Company to inconvenience and expense. Michael said he did not present the letter at the beginning of the meeting but did so after giving the Union another chance to accept the Company's final offer of July 30.

Michael recalled meeting with the Union and a Federal mediator on August 20, but he did not believe that amnesty was discussed first (as Morales had testified). Michael said he had a private caucus that day with the mediator and during such meeting spoke by telephone with the Company's counsel, "John" Harper. According to Michael, Morales had insisted that "all my men have to go back to work immediately," and the response Michael gave was to the effect that:

> . . . the company was not willing to fire people that we had hired to permanently replace the strikers; that we would place them on a preferential hiring list and call them back as vacancies occurred.

[24] Testifying on cross-examination, Michael stated that the "ranting and raving" by Morales at the June 29 meeting caused him to believe that Morales had not read the Company's initial proposal. Michael said Morales "was ranting and raving and insulting me at virtually every instance" during the negotiations. Michael agreed that he had drawn a distinction between language and economic proposals, but he denied that he had insisted that his language changes must be first accepted. Michael also denied that he had maintained that the Company's initial proposal to reduce holidays and pension contributions involved only language changes. He said he had explained that a change in discharge and suspension language "would be worth X amount of money," but he acknowledged that the language changes he sought would have resulted only in minimal savings to the Company.

[25] Michael said the discharge and suspension language was a recurring issue during the negotiations. He said Morales never submitted language on the subject before the strike, although Morales later showed him a written proposal (G.C. Exh. 33) on August 3 and asked Michael to sign it. Michael said he told Morales at that time he would sign it "right now" if it would settle the strike, but Morales balked, saying the Union wanted more money and there were other issues. Michael said he never agreed to the Union's proposal that a discharged employee could stay on the payroll "until a discharge was decided."

[26] On cross-examination Michael agreed, after reviewing his negotiating notes and the letter he wrote on July 28, that there were a number of issues outstanding when the parties convened that day. Michael denied agreement had been reached on sec. 12, discharges and suspensions (or apparently on sec. 23, settlement of disputes, either for that matter) as Morales had maintained.

[27] Michael also explained on cross-examination that he "dropped off" a copy of G.C. Exh. 16, the document that was handed out to employees summarizing the Company's offer, around 11 a.m. that day. He said he wanted the employees to have the information before the union meeting that was scheduled to take place that afternoon. Michael stated that there was not enough time to prepare a Spanish translation of the Company's offer.

[28] G.C. Exh. 18, the Union's August 3 letter addressed to President Mario Torrigino, sets forth the Union's view of the status of negotiations at the start of the session on health and welfare (income and dental care), pension, guaranteed hours, holidays, vacations, discharges and suspensions, equipment, sick leave, and classifications and wage rates.

There was a "joint session" that day, Michael said, and the mediator asked the Union its position, as he requested, on "the issue of mutual forgiveness regarding any lawsuits and charges that were pending" and "the issue of amnesty" for the Company's "loyal" nonstrikers. The Union responded that it could not grant amnesty, that it did not control the district attorney insofar as any pending criminal charges may be involved and by reiterating its position on the issue of the return of strikers—i.e., that "all of their people" must be put back to work immediately. Mike had said he repeated his offer to use a "preferential hiring list and take them back as vacancies occurred." It was "at that juncture," Michael said, that Morales asked for a confidential "private off-the-record discussion."

A private meeting between Morales and Michael followed and, according to Michael, each voiced his respective position concerning reinstatement of the strikers and the problems each had in representing his particular principals. Morales accepted (i.e., "reaffirmed" agreement on) Michael's offer of an additional holiday and truck washing proposal, offered Michael "two alternatives on the wages," and expressed a desire for a dental plan and immediate reinstatement of the strikers. Michael did not recall anything being said about discharge and suspension language. He was surprised, he said, at the progress made and told Morales that he would recommend approval of the "economic" changes that had been discussed. The relations had become "very cordial," Michael said, and "it looked like we were going [to] wrap things up."[29] Michael recalled that Morales talked "about helping us with the City." Michael said he declined to call the owners that day as Morales suggested. Michael said he wanted to sit down with the owners in the hope of getting "them to come up" with additional money. Michael gave Morales his business card, which bore his home number on the back, and Morales agreed to call on the following morning. Michael met with the owners[30] that night, he said, but had to tell Morales the following morning, Saturday, August 21, when the latter telephoned around 10:30, that he was "sorry" but "they would not buy it." Michael said he told Morales that the Union was asking for "too much money," and the company "won't fire all of their replacements." Michael said he told Morales that he would get back to him later, but before he did so the Union's attorney, Burton Boltuch, telephoned on the following day, Sunday, around 10:30 or 11 a.m. Boltuch inquired, according to Michael, "why the company did not accept the agreement that had been reached on the 20th." Michael denied that any agreement had been reached and told Boltuch: "Look, the issues are money, and the company won't fire everybody like Morales wants them to." Boltuch suggested, Michael said, that there were different "ways to treat the replacements," but Michael responded that the Company would not fire all of the replacements.[31]

The parties met again, with a Federal mediator present, at the Royal Inn in South San Francisco on August 24. After meeting privately with the mediator, Michael made an offer on behalf of the Company to the Union, as follows:

> Bob, I have an offer, and I believe it is better than what we had been doing. I want you to consider it. The company is willing to offer seventy cents in the first year; seventy cents in the second year; seventy cents in the third year in wages. And I said, "In addition to that the company is willing to leave on the table the dental plan; because we understand that's something that is very important to the union. However, in return for the increase in wages, I am removing from the company's offer the holiday, the pension increase, and I verified that the two days of sick leave that we had offered would be without pay-off, and vacations would stay the same." And, I made a preface, a comment that we would offer the money, the money, the dental plan, and, then, all of the other fringes, which were cost items to the company, would stay the same.

Morales indicated he was pleased with the offer and asked what the Company's position was with respect to recall of the strikers. Michael responded by explaining that "this economic offer was in conjunction with our prior position that the . . . replacements would not be terminated and the strikers would not be returned imme-

[29] Michael explained on cross-examination that he was initially authorized to offer a wage increase of 10 cents–5cents–5 cents per hour over a 3-year period on July 21, which amount he could increase by negotiating a cost-saving provision (e.g., discharge language that would allow termination for cause without utilization of a procedure requiring warning letters). On July 28 he was authorized to offer 60 cents, 60 cents, and 60 cents but "we did not get to that point." On August 20 Michael stayed with the Company's "last, best, and final" offer of "seventy, sixty-five, sixty-five," but Morales was wanting more in wages, suggesting 70 cents–75 cents–75 cents or an alternative amount with fringe benefits. Michael said Morales made proposals that day "on just about everything" so that he had a total package to present to his father. Michael stated that Morales made termination of replacements and immediate recall of the strikers a condition of agreement, explaining that "the contract was worthless without it."

[30] But on cross-examination Michael said he was not sure that Lou Picardo attended the meeting with Torrigino Senior on the night of August 20.

[31] It was later stipulated that Charging Party's attorney Burton Boltuch would testify, if called as a witness, essentially as follows: Boltuch telephone Michael Torrigino on Sunday, August 22, after Morales had telephoned Boltuch and reported that he felt that the parties had reached an agreement on August 20. Morales had reported that he felt that when the strikers were coming back was the only issue left open, and Morales was to learn that fact on Saturday, August 21, when he was to call Michael. Morales had also reported to Boltuch that he had called Michael on August 21 and was told by Michael that there was no contract and that strikers could not return. Boltuch inquired of Michael concerning the Company's position and whether he had authority to negotiate. Michael in response indicated the agreement of August 20 was "tentative," that he did have authority to negotiate and that the owners, his father and Picardo, were the only ones who knew why there was no agreement. Michael did indicate, however, that money and the immediate return of the strikers were involved in the Company's decision. Boltuch asked that principals, with authority to finalize settlement, be brought to a negotiating session, and Michael, in response, suggested that all union members should also appear. Boltuch told Michael that the Union wanted to conclude an agreement, independent of the strike replacement issue, and indicated as much in a letter to Michael (R. Exh. 5) which he immediately prepared and mailed himself.

Michael testified that he was irritated by Boltuch's telephone call on Sunday, August 22, and he felt that he was being set up for a charge. Michael stated that Boltuch disavowed being a negotiator for the Union but refused to say so in writing.

diately." In response to Morales' inquiry about how many strikers could return right away under the company proposal, Michael said he believed that there was one opening at that time. After some quizzing of Michael by the mediator, Morales asked Michael: "If I accept your proposal, can I play with the money . . . move it around?" Michael agreed that he could as long as the cost to the Company was not increased. Morales asked for time "to work the figures" and suggested that Michael call his father to find out how many strikers could return. Michael said he then spoke by telephone with the company owners, first with his father, and then Lou Picardo, who stated: "We are not going to fire anybody." Michael said he returned to the "meeting room" and told Morales that no vacancies existed. Thereupon Morales accused Michael of reneging on an agreement, of being unethical and of wasting Morales' time. Morales proceeded to tell the mediator what the Union had offered—"a dollar, fifty-five, fifty-five; seventy-five, seventy-five, seventy-five; and, the fringe benefits"—during the private meeting between Morales and Michael on August 20 and left. Michael stated that another bargaining session was held on September 7, but he gave no details concerning it.

I reject Respondent's contentions advanced in support of "The Due Process Issue." Respondent had due notice of the charges against it and had the opportunity to appear at the hearing, present evidence, and be fully heard. Consequently Respondent has had its day in court and has not been denied due process or any procedural statutory right. See *Green Spring Dairy v. CIR*, 208 F.2d 471 (4th Cir. 1953).

The Administrative Procedure Act does afford certain procedural safeguards, including the assurance of a lawful investigation, and it is well established, as Respondent asserts, that an agency must abide by its own rules and regulations. However, section 5(b) of the Administrative Procedure Act, relied on by Respondent, only requires that an informal means of *settlement* be made available. See *Teamsters Local 282 v. NLRB*, 339 F.2d 795 (2d. Cir. 1964). Further, the guidelines in the General Counsel's Casehandling Manual on which Respondent relies, sections 10056.3 and 10056.4, are not rules or regulations which the Board is empowered to enforce.[32] Section 3(d) of the Act provides that the General Counsel "shall have final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaint." Section 101.4 of the Board's Statements of Procedure, subpart B, states:

> As part of the investigation hereinafter mentioned, the person against whom the charge is filed, hereinafter called the Respondent, is asked to submit a statement of his position in respect to the allegations. The case is assigned for investigation to a member of the field staff, who interviews representatives of the parties and other persons who have knowledge as to the charges, *as is deemed necessary* . . . The regional director *may in his discretion dispense with any portion of the investigation* described in this section as appears necessary to him in consideration of such factors as the amount of time necessary to complete a full investigation, the nature of the proceeding, and the public interest. [Emphasis added.]

See *Pacific Southwest Airlines v. NLRB*, 587 F.2d 1032, (9th Cir. 1978). The *Accardi* doctrine announced in *United States ex rel Accardi v. Shaughnessy*, 347 U.S. 260 (1953), thus, has no application to the case at bar.

It is to be noted that the General Counsel has only issued a complaint, and it must be dismissed if the evidence does not sustain the allegations. None of the Board cases cited by Respondent are apposite to the case at bar. *Electronic Components Corp. v. NLRB*, 546 F.2d 1088 (4th Cir. 1976), involved a summary Board order, issued without a hearing, directing an employer to bargain with a union which had been certified by the Board without an investigation of the employer's objections to an election as required by Section 102.69(c) of the Board's Rules and Regulations. *NLRB v. Western Cartridge Co.*, 138 F.2d 551 (2d Cir. 1943), involved "conduct" of the Board's trial examiner, and *Texas Instruments v. NLRB*, 599 F.2d 1067 (1st Cir. 1979), involved an "ALJ's lack of analysis" in writing a decision, giving the "appearance of stacking the deck."

I reject the contention of the General Counsel and the Charging Party Union that Respondent failed to give its bargaining representative, Michael Torrigino, sufficient authority as alleged in paragraph 13 in the complaint. In their briefs, the General Counsel and the Union argue that Respondent sent to the bargaining table an inexperienced and incompetent negotiator who had no authority to consummate an agreement. They further maintain that the record establishes that Respondent never intended to reach an agreement with the Union. These contentions, and all arguments advanced in support of the 8(a)(5) and (1) charges, are likewise rejected.

Section 8(d) of the Act defines the duty to bargain collectively as "the mutual obligation . . . to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement." Such obligation does not compel either party to agree to a proposal or to make a concession. *NLRB v. American National Insurance Co.*, 343 U.S. 395 (1952). The essential element in the bargaining principle is the serious intent of the parties to reach a common ground. *Romo Paper Products Corp.*, 220 NLRB 519 (1975).

A determination of whether a respondent has met the good-faith bargaining standard requires consideration of the totality of the respondent's conduct. *M. R. & R. Trucking Co.*, 178 NLRB 167 (1969), enfd. in part 434 F.2d 689 (5th Cir. 1970); and *NLRB v. Insurance Agents*, 361 U.S. 477 (1960).

[32] Cf. *Gulf State Mfrs. v. NLRB*, 579 F.2d 1298 (5th Cir. 1978). The administrative law judge and the Board in that case had allowed the General Counsel to proceed on charges (as being "reinstated") even though they had been withdrawn with prejudice and were time barred by sec. 10(b). The court of appeals denied enforcement of the Board's decision on this aspect of the case, noting that sec. 10120.5 of the Casehandling Manual prohibited such action. The court pointed out that violation of the Board's "own internal procedures" in that case did adversely affect Respondent's rights, depriving it of its 10(b) defense.

Although an employer is not required to be represented by an individual possessing final authority to enter into an agreement, this is subject to a limitation that it does not act to inhibit the progress of negotiations. *Carpenters Local 780*, 244 NLRB 277 (1979). The degree of authority possessed by the negotiator is a factor which may be considered in determining good-faith bargaining. *Lloyd A. Fry Roofing Co. v. NLRB*, 216 F.2d 273 (9th Cir. 1954).

While "tentative" agreements are not necessarily subject to being withdrawn at any time for any reason, agreements reached on individual items during negotiations are not necessarily final and binding. *NLRB v. Alterman Transport Lines*, 587 F.2d 212 (5th Cir. 1979). Quoting from the court's decision in *Alterman* at 221:

> As we have observed before, "probably in few other instances is the task of judging so difficult" than determining whether a party has fulfilled its duty "to enter into discussions with an open and fair mind, and a sincere purpose to find a basis of agreement . . . . The truth is that objective standards are generally either unavailable or unavailing. And conduct done at one time judicially ascertained to manifest good faith, may, under other circumstances, be a mere pretense." *NLRB v. Herman Sausage Co.*, 5 Cir., 1960, 275 F.2d 229, 231.

While Michael Torrigino had no labor negotiating experience prior to meeting with the Union's officials in June 1982, it can hardly be said that he was an incompetent negotiator. The record discloses that Michael was a licensed attorney and had prepared himself for meeting with union representatives by obtaining and examining copies of contracts used in the scavenger industry. He conferred with a family friend, an official of another Union (IBEW), who furnished him with relevant materials to study. He conferred with the Company's two owners and advised them from time to time concerning the negotiations. Michael testified credibly that he was authorized by the owners to represent the Company during the negotiations and to make compromises and agreements in accord with terms that had been discussed. Michael was not granted absolute or unlimited authority, but that fact did not convict Respondent of bad-faith bargaining.

Mario Torrigino, Respondent's president and principal owner, was unquestionably unhappy with employees Merced Ramirez, Victor Ramirez, and Aurelio Navarro because of the backpay the Company was required to pay them, and for that reason sought to change the discharge and suspension language so it could exercise "the prerogatives of management." But it was not bad-faith bargaining for the Company to seek such change.[33]

Respondent was, of course, obviously concerned with economics—as was the Union—and sought to lower costs in a number of ways. But having such an objective and attempting to accomplish it did not amount to bad-faith bargaining.[34] The Company sought a number of concessions intially on pension contributions, vacations, and holidays and admittedly did not propose a wage increase until July 21 (and only a modest one then) when an additional holiday was proposed.[35] The Company had discussed various proposals and made concessions and/or agreements on a number of issues, including hours of work, rest and lunch, leased equipment, and additional holidays. When employees went on strike, however, there had been no agreement on wages, discharges and suspension, equipment, or on grievances and arbitration.

The Union's conduct is also relevant and must be considered. See *Continental Nut Co.*, 195 NLRB 841 (1972); also *Times Publishing Co.*, 72 NLRB 676 (1947). It is to be noted that Morales undertook to "educate" Respondent's spokesman, Michael Torrigino, about labor relations—what a negotiator could do and not do, what constituted unfair labor practices, and unlawful demands. Morales' walking out of negotiations on June 29 and again on July 28 did not help the Union's or the General Counsel's cause. At the June 29 session Morales responded to Michael's efforts to discuss what Michael regarded as noneconomic or language issues as "bullshit" and briefly walked out with his union colleague James Payton. Morales and Payton walked out again on July 28 with Morales maintaining that Michael had attempted to change some things that had been "previously settled." The Union sought to avoid dealing with Respondent's designated bargaining representative on two occasions by going to the Company's vice president and part owner Lou Picardo and asking that he, rather than Michael, bargain with the Union.

The Union, to be sure, also made concessions and agreed to a number of company proposals, but it is to be noted that the Union had adhered to its positions with respect to additional holidays and discharge and suspension language. Morales claimed that Michael had agreed

[33] The General Counsel and the Charging Party maintain that Mario Torrigino pressed for the language change so the Company could terminate employees at will. Such assertion is based on the testimony of union official Morales as to what Torrigino said and what the latter meant by it. Morales was hardly an unbiased witness, and, in any event, I reject such assertion. The Company had a right, as Respondent suggests in its brief, to hold and voice an opinion that it should have the power to discharge an employee for cause, contrary to what the arbitrator found in the case of Victor Ramirez, without first having to dispatch warning letters within a specified time period.

Respondent also points out in its brief that the principal owner, Mario Torrigino, attended bargaining sessions on July 17 and 29, and July 26 and 28 prior to the strike, the last being when "extensive discussions on economic items" were held. (The General Counsel claims erroneously that Mario "apparently" attended only two sessions.) Curiously, and inconsistently, one paragraph of the complaint alleges Respondent's bargaining representative had insufficient authority between June and September 1982 to bind Respondent but elsewhere avers that Respondent refused to agree to terms or execute contracts that had been negotiated for it in August. Also, the Charging Party maintains at one point in its brief that "the company never delegated sufficient authority to Michael Torrigino" prior to the strike but suggests subsequently therein that Michael had more than enough authority on June 29 and July 26 when he ordered his father, the principal owner of Respondent, "to 'shut up.'"

[34] The Union and the General Counsel refer to Respondent's proposals as "radical" and "outrageously one-sided," implying that they were unlawful per se.

[35] An additional increase was proposed before the strike by letter on July 28. Michael said he submitted the wage proposal at the July 28 bargaining session and was authorized to increase it. Morales and Payton walked out of the meeting, however, so it was not discussed.

in July to the Union's proposal that would require retention of a discharged employee on the Company's payroll, but I find otherwise.[36]

The Company's "last, best and final offer" of July 30 in the form of a hand-delivered letter modified its position on discharge and suspension (with the Company agreeing to a provision requiring three offenses within 6 months and issuance of two warnings except for certain specified offenses) and indicated agreement on a number of items. The letter (G.C. Exh. 17) indicated Respondent was willing to meet and "discuss these matters" but noted that "since you walked out of our last meeting we will leave it up to you to propose another time and place and to notify Mr. Bergerson." The sending of such letter and the distribution of a different "final offer on economic matters" to employees 2 or 3 hours earlier prompted Morales to call a strike against Respondent "on the basis of Unfair Labor Practices." The General Counsel and the Union maintain that sending of the different "final offer" to employees was an attempt to bypass the bargaining representative and deal directly with the employees, constituting a separate 8(a)(5) violation, but I reject such contention.

In *Procter & Gamble Mfg. Co.*, 160 NLRB 334 (1966), the Board stated:

> As a matter of settled law, Section 8(a)(5) does not, on a *per se* basis, preclude an employer from communicating, in noncoercive terms, with employees during collective-bargaining negotiations. The fact that an employer chooses to inform employees of the status of negotiations, or of proposals previously made to the Union, or of its version of a breakdown in negotiations will not alone establish a failure to bargain in good faith [citing *NLRB v. Reed & Prince Mfg. Co.*, 118 F.2d 874 (1st Cir. 1941)].

General Counsel's Exhibit 16, the document distributed to Respondent's employees, outlined the Company's major proposals that were sent by letter to the union office. General Counsel's Exhibit 16 in no way disparaged the Union of its bargaining representative status, was not coercive, and amounted to "no more than a legitimate tactic of urging the employees to communicate with their representative, to persuade them to tell their negotiators they wanted them to accept the company's newest offer." See *Safeway Trails*, 216 NLRB 951 (1975); also *Wantagh Auto Sales*, 177 NLRB 150 (1969).[37] Respondent, to be sure, opened itself up to suspicion of bad-faith bargaining by distributing General Counsel's Exhibit 16, but it did not rise above that. See *Stanley Oil Co.*, 213 NLRB 219 (1974).

There is nothing in the record to suggest Michael had any less authority, or insufficient authority, to represent the Company after the strike. Nor is there proof that Respondent bargained in bad faith after August 2. The Union agreed on August 3 to the Company's proposals on holidays, dental plan, guaranteed hours, and equipment, but the amount of pension contribution and wages remained outstanding that day and on August 6 when the parties met again. Nonagreement is not to be equated to bad faith, however. The Company withdrew "all offers" on August 6, but it did so lawfully because of the change of circumstances resulting from the Union's strike. See *Times-Herald*, 249 NLRB 13 (1980).[38]

A finding that agreement was reached on August 20 and again on August 24 requires acceptance of Morales' testimony over Michael's, and I am unable to do so. Michael testified that he was "surprised" and "shocked" at how reasonable Morales had been in the "private session" the two had together on August 20, but Michael explained that the Union's demands were still "in excess of what the company's current position" was at that time. Michael told Morales that he would recommend that the Company accept the Union's offer, and he did so. Morales surely understood Michael's response for Morales asked Michael to call his father immediately to get approval. The August 22 letter of union counsel supports Michael's version as it recites that a "tentative agreement" was reached and Michael "would recommend it to the owners of the company."

As for reaching an agreement on August 24, Michael's version of the meetings held that day is also more credible than Morales'. There is no dispute about the fact that Michael withdrew the offers of an additional holiday, the payoff of 2 days of sick leave, and the increased contribution to the pension plan in return for an increased wage offer, and that Morales indicated an interest in the revised offer. Morales then inquired about the return of the strikers, a subject Michael said he had not recently discussed with the company owners. Michael made it clear to Morales before the latter met privately with Business Representative Payton to "play with the fig-

[36] The correspondence does not indicate such agreement was reached. See G.C. Exh. 17, Attorney Torrigino's July 30, 1982 letter to the Union. Union Business Respresentative Payton gave equivocal but unpersuasive support to Morales' claim that agreement had been reached on this issue. Payton stated that Michael had indicated on July 16 that he did not like the Union's proposal but "later changed his mind." He indicated he was not sure when Michael changed his mind and acknowledged that the Union's proposal in writing (typed) was shown to Michael later on August 3—and only briefly, with Morales handing Michael a typed document across the table and then taking it back. Michael testified that Morales "reiterated" an oral proposal that discharged employees could "stay on the payroll until a discharge was decided" at some point ("I'm not certain that it was on July 12"). Michael asserted that he never agreed to the Union's proposal, although he said he did not tell Morales on August 3, when shown it in typed form, that he would "sign this agreement right now if that will settle the strike." Michael said Morales rejected the offer: "[Morales] said, 'No way. We want more money.' And that there were a lot of other issues."

[37] Morales indicated great concern over the differences between G.C. Exh. 16 and G.C. Exh. 17. In explaining the differences, however, his major complaint was that G.C. Exh. 16 was incomplete and did not inform employees of everything that was set forth in the letter sent to the Union (i.e., details as to cost to employees under the dental plan, washing of trucks, increase of probationary period for new employees, employee cost for packing cans if more than two should be needed, lower rate of pay if reassigned to lower seniority class, and shoe allowance). Morales did note that G.C. Exh. 17 did not refer to additional sick and funeral leave mentioned in G.C. Exh. 16.

[38] Quoting the decision in *Hickinbotham Bros.*, 254 NLRB 96 (1981): "A strike is a two-edged sword. Depending upon how it affects the employer's operations, the strikers may gain concessions or they may lose concessions previously obtained." Here, as in *Lloyd A. Fry Roofing Company*, supra, the Union was operating on a "take-it-or-leave-it basis," and calling of a strike contributed to the failure to reach an agreement.

ures," that it wuld be necessary to make further consultation about the return of the strikers. I do not credit Morales' assertion that Michael undertook to give assurance that there would be "no problem" in the recall of all the strikers if the Union were to simply stay within the money terms of the offer made on behalf of the Company that day. Michael told Morales that the Company was not going to fire the replacements. Morales was bound to have known that Michael would have had to get clearance on the reinstatement of the strikers.[39]

I find that the record shows that the parties did not reach a complete agreement on August 20 or on August 24 as alleged in the complaint or at any other time. Accordingly, the "Heinz remedy" sought by the General Counsel is not appropriate.[40]

The complaint alleges Respondent refused unlawfully, contrary to Section 8(a)(3), reinstatement of striking employees following their unconditional offer to return to work about August 21 and that since that date Respondent has unlawfully demanded, contrary to Section 8(a)(5), that such employees waive their right to reinstatement.

Insisting that the Union waive reinstatement of strikers as a condition of reaching agreement would have been unlawful, of course. See *Lytron, Inc.*, 207 NLRB 554 (1973); *Masonic Home*, 215 NLRB 75 (1974), enfd. 548 F.2d 1276 (6th Cir. 1976); and *American Cyanamid Co.*, 235 NLRB 1316 (1978), enfd. 592 F.2d 356 (7th Cir. 1979). But, contrary to what Morales testified and the argument of the General Counsel and the Charging Party, Michael did not impose such a condition, either on August 20 or 24. Morales sought to make it appear that Michael was doing so, but the record persuades me that the only demand made was that of Morales—that the strikers be returned immediately as a condition of any agreement. Such demand by Morales was not an unqualified offer that the strikers would return to work. Michael's saying no to such request of Morales, moreover, did not constitute an imposition of an unlawful condition.

Here again Michael's testimony is more reliable than that of Morales. Michael testified that on August 20 he told Morales, following Morales' demand that the men must go back to work immediately and after Michael had spoken to the Company's labor counsel by telephone, that the Company would not fire replacements but would place the strikers on a preferential hiring list. On August 24 Michael repeated what the Company's position was on the return of the strikers when Morales asked about the number of openings at the time—"replacements would not be terminated and the strikers would not be returned immediately."

The Union, through Payton, did make an unconditional offer to return the strikers on September 8. I reject the contention that Morales made an unconditional offer on any earlier occasion. Neither the General Counsel nor the Charging Party press the point in their briefs that an unconditional offer was made by the Union prior to that date, each only maintaining that such an offer was made by the Union through Payton about September 8 "at the very latest."[41]

I do not find that Respondent's conduct either caused or prolonged the strike, called by Morales on August 2, as the complaint alleges. The Charging Party contends that Respondent's prestrike conduct violated Section 8(a)(5) and (1) and "therefore" caused the strike to be "an unfair labor practice strike from its inception." The General Counsel contends that the strike was an unfair labor strike for a number of reasons—i.e., Respondent's alleged "direct dealing," Michael's alleged lack of authority, the Company's alleged intent not to agree, and Respondent's late "miniscule" economic proposal. I have previously considered and rejected such contentions. The allegation was not sustained.

Respondent's striking employees, even though economic strikers, did, and do, have a right to be recalled and reinstated when vacancies occur. *Laidlaw Corp.*, supra. The record does not disclose, however, that Respondent had violated the Act by failing to recall or reinstate such strikers after the Union made an unqualifiifed offer of their return on September 8.[42] The Charging Party maintains that Michael Torrigino admitted that there was "at least" one opening on September 8, but I do not so interpret his testimony. Michael stated that the Company did not actually know how many of its employees went out on strike (Perez and Castellanos were on vacation at the time the strike began) but, pressed on cross-examination to testify from memory ("off the top of my head") as to when the permanent replacements were hired, indicated that seven or eight were replaced on August 13 and that all of the strikers had been replaced by sometime in early September. Said Michael:

> It was sometime in September—in, in the first—after the first week of September, yeah.

Michael explained that one of the replacements was later discharged and replaced in November by one of the strikers. Such testimony does not provide an adequate basis for finding Respondent unlawfully failed and refused to recall economic strikers at a time when they had signified the requisite willingness to return to work. Nor do the "job vacancies of up to a week's duration" occurring in November and December 1982, which were filled

[39] Morales agreed on cross-examination, after being shown on his affidavit, that he had insisted that Michael make any necessary telephone calls about the return of strikers.

[40] In *H. J. Heinz Co. v. NLRB*, 311 U.S. 514 (1941), the Supreme Court held that an employer's obligation to bargain in good faith included a duty to sign a written agreement embodying terms that had been agreed upon. But in *H. K. Porter Co. v. NLRB*, 397 U.S. 99 (1970), the Court held that the Board could not compel an employer to sign a contract containing a checkoff provision that had not been agreed to—even though the record indicated bad-faith bargaining on the employer's part by repeatedly refusing to bargain on the issue.

[41] Economic strikers are, of course, entitled to reinstatement when they unconditionally offer to return to their jobs if they have not been replaced, and later, although replaced, if available when there is a job opening. See *Laidlaw Corp.*, 171 NLRB 1366 (1968), enfd. 414 F.2d 99 (7th Cir. 1969), cert. denied 397 U.S. 920 (1970).

[42] The failure to reinstate economic strikers falls sufficiently within the ambit of par. 17 and 18, in my view, although the complaint alleges Respondent "caused and prolonged" the strike, which averment I find not sustained. The complaint does not allege, and the record does not establish, as the General Counsel asserts, that the strikers were unlawfully discharged.

by temporary workers Dorris Matter, James Frances, and Jay Lourenco, facts stipulated to and relied on by the General Counsel, establish an unlawful failure or refusal to reinstate economic strikers. Contrary to the General Counsel's argument, I find the meager information in the record concerning the work performed by these three individuals named is not sufficient to permit a determination that any of them were placed in job vacancies that had to have been offered to a striker. *Certified Corp.*, 241 NLRB 369 (1979), holds, contrary to what the General Counsel maintains, that the temporary nature of a job *is* a critical factor in determining whether it is "substantially equivalent" to what position a striker had held.[43]

CONCLUSIONS OF LAW

1. Respondent Coastside Scavenger Company is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union, Sanitary Truck Drivers and Helpers Local 350, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, is a labor organization within the meaning of Section 2(5) of the Act.

3. All drivers, helpers, and mechanics employed by Respondent at its Pacifica, California facility, excluding clerical employees, supervisors and guards as defined in the Act, constitute an appropriate unit for the purpose of collective bargaining within the meaning of Section 9(b) of the Act.

4. The strike which commenced about August 2, 1982, by the Union against Respondent has at all times been, and remains, an economic strike.

5. Respondent has not engaged in any unfair labor practice alleged in the complaint.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[44]

ORDER

It is ordered that the complaint issued against Coastside Scavenger Company is dismissed.

[43] And see *Randall v. NLRB*, 687 F.2d 1240 (8th Cir. 1982), which cites both *Certified Corp.*, supra, and *Bancroft Cap Co.*, 245 NLRB 547 (1979) (discussed by the General Counsel). After citing *Certified Corp.*, the court stated: "The existence of a temporary job is not the equivalent of a vacancy to which a striker should have been reinstated."

[44] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

Kelly Broadcasting Company d/b/a KCRA-TV *and* International Brotherhood of Electrical Workers, Local Union No. 202, AFL-CIO. Case 20-CA-17626

29 January 1985

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS HUNTER AND DENNIS

On 10 February 1984 Administrative Law Judge Michael D. Stevenson issued the attached decision. The judge issued an Erratum on 21 February 1984. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief. On 25 June 1984 the Board issued an Order remanding the proceeding to the judge for additional findings and conclusions. On 3 July 1984 the judge issued the attached supplemental decision. The Respondent filed exceptions and a supporting brief.

The Board has considered the decision, the supplemental decision, and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

The judge found that the Respondent violated Section 8(a)(5) and (1) of the Act by refusing to sign and by repudiating a collective-bargaining agreement with the Union. The Respondent contends it had no obligation to sign or honor the alleged agreement because prior to the commencement of bargaining the parties agreed that any agreement reached would not be effective and no agreement would be executed until a pending decertification petition was resolved. We find merit in the Respondent's contention.

For many years the Respondent and the Union have been parties to a series of collective-bargaining agreements. The most recent agreement expired on 31 December 1981. Negotiations for a successor agreement continued into 1982[1] when on 11 August a petition to decertify the Union was filed in Case 20-RD-1759.[2] Negotiations were temporarily suspended on filing of the petition. About 19 August the Union's attorney Anne Andrews contacted the Respondent's attorney Richard Loftus Jr. to seek to persuade the Respondent to resume bargaining in light of the Board's recently issued decision in *RCA Del Caribe, Inc.*, 262 NLRB 963 (1982). After further discussion with Andrews later that month, Loftus agreed that negotiations could resume. In these discussions Andrews and Loftus specifically addressed the framework for the resumption of negotiations. Thus, the credited testimony of Loftus is that he informed Andrews that negotiations could resume but, in view of the pending decertification petition, "the union might not represent a majority of the employees and we could not execute a contract in that circumstance, and that until that impediment was resolved in some way, we could not execute an agreement." Loftus testified further that he informed Andrews that, if an agreement were reached, "it would be executive [sic] and effective after this impediment, this problem, this petition, was resolved." It is undisputed that in these discussions Andrews agreed with the representations set forth by Loftus.

On 30 August the parties resumed negotiations. Within a few weeks substantial agreement was reached on the remaining bargaining issues, and on October bargaining unit employees ratified the agreement as reached. By letter of 28 October the Union stated to the Respondent that "[i]f we prevail in the decertification election" the Union desired to rebuild the relationship between labor and management. The Union's next correspondence to the Respondent was on 27 December when it noted that numerous employees had yet to acquire membership in the Union under the union-security provision of the agreement. On 3 January 1983 the Respondent declined to comply with the union-security provision and noted that "a serious question exists as to whether or not there is an enforceable contract in place." On 7 January 1983 the Union insisted that a binding agreement was in effect. On 14 January 1983 the Respondent stated that unless and until the Union was certified as bargaining representative there was no effective contract between the Union and the Respondent.

Based on the foregoing, the judge concluded that the discussions between Andrews and Loftus prior to the resumption of bargaining were nothing more than an exchange of legal opinion between counsel concerning current Board law. He found they failed to reach an agreement that any subsequently negotiated collective-bargaining agreement would not be effective and would not be executed until the pending decertification petition was resolved. Accordingly, the judge concluded that the parties reached full and complete agreement on a new contract and that the Respondent violated the Act by thereafter refusing to sign it and honor its terms. Although finding that Andrews and Loftus reached

[1] All dates are in 1982 unless noted otherwise.

[2] On 1 December 1982 a decertification election was held in Case 20-RD-1759. Because of challenged ballots and unopened mail ballots the election was not immediately determinative. Following the filing of objections to the conduct of the election and consideration of the determinative challenged ballots, the Board issued a decision on 29 August 1984 in *KCRA-TV*, 271 NLRB 1288 (1984). In its decision the Board remanded the proceeding to the Regional Director with directions to open and count certain ballots and to either certify the results or conduct a second election depending on the status of the opened ballots.

no binding agreement affecting the legal obligations of the parties, the judge also found that the parties intended a binding agreement to result "as soon as the decertification petition was resolved, or as soon as the failure to resolve the decertification petition was no longer a legal barrier to execution of the contract, whichever condition occurred first." It therefore appears that the judge concluded on the one hand that the parties agreed to *no* conditions affecting their legal obligations and at the same time concluded that they agreed to *two* alternative conditions affecting their obligations. As set forth below, we find that the judge erred in both respects and that the parties in fact agreed to one "condition"—a circumstance that admittedly had not arisen at the time of the alleged unfair labor practices.

In *RCA Del Caribe*, above, the Board found that the mere filing of a representation petition by an outside challenging union would no longer require or permit an employer to withdraw from bargaining or executing a contract with an incumbent union. Thereafter, in *Dresser Industries*, 264 NLRB 1088 (1982), the Board applied this rule to the filing of a decertification petition.[3] Neither *RCA Del Caribe* nor *Dresser*, however, addressed itself to whether an employer and an incumbent union may establish by mutual agreement their own framework for collective bargaining, including deferral of the effective and execution date of any agreement reached. We find that this is precisely what the parties agreed to in this case.

The credited testimony of the Respondent's attorney Loftus establishes that, prior to the resumption of bargaining and before issuance of the Board's decision in *Dresser*, counsel for the Respondent and counsel for the Union began discussions on an essential predicate for bargaining—the agreement's effective and execution date. Loftus' testimony establishes that he and Attorney Andrews agreed in these discussions that any agreement reached by the parties in bargaining, in the words of Loftus, would be "effective after this impediment, this problem, this petition, was resolved" and until that time "we could not execute an agreement." Contrary to the judge, we reject the notion that this understanding was only an academic discussion on the current state of Board law and not a meeting of the minds between representatives of parties engaged in binding collective bargaining. Clearly, counsel for both the Respondent and the Union were discussing arrangements for the resumption of collective bargaining and not the current state of Board law in the abstract. It is therefore appropriate to construe their comments as defining the obligations of their respective clients and not, as found by the judge, as the mere exchange of legal opinion. Accordingly, we find that based on the credited testimony of Loftus the parties agreed to defer the effective and execution date of any agreement reached until the pending decertification petition was resolved. Contrary to the judge, there is no evidence the parties also agreed that subsequent developments in Board law would alter their agreement regarding the contract's effective and execution date. Indeed, as noted by the judge, there is no evidence whatsoever that the parties even discussed *Dresser* after its issuance, much less altered their previously reached agreement regarding the contract's effective and execution date.

We also disagree with the judge that once *Dresser* issued it altered *by operation of law* the framework for bargaining mutually agreed on by the parties. Nothing in *Dresser* precludes parties engaged in collective bargaining from reaching mutual agreement on whatever effective and execution date they so desire. If the parties desire, as here, to defer the agreement's effective and execution date until resolution of a pending decertification petition, we discern no reason in law or policy why such a mutual agreement should not be given effect. Thus, this is not a case where an employer and a union have bargained away statutory rights in a manner at odds with Federal labor policy. See *NLRB v. Magnavox Co.*, 415 U.S. 322 (1974). On the contrary, the credited evidence establishes that the parties simply designated an effective and execution date in futuro for their respective contractual obligations conditioned on resolution of the pending decertification petition in a manner favorable to the Union.[4]

In short, we find that the general rule in *Dresser* that the mere filing of a decertification petition does not require or permit an employer to withdraw from bargaining or executing a contract with an incumbent union does not govern this case. Rather, a union and an employer may by mutual agreement defer the effective and execution date of any contract reached until the decertification peti-

[3] Chairman Dotson and Member Dennis did not participate in *RCA Del Caribe* or *Dresser* and express no view here on whether those cases were correctly decided.

[4] The judge found it unlikely that the parties would pursue negotiations only to put the agreement on the "back burner" pending resolution of the decertification petition. We note, however, that the Union did not communicate with the Respondent between October and late December regarding the agreement and that during this period it neither prepared nor asked the Respondent to prepare a written contract for signature. Moreover, apart from resolution of the decertification petition, the agreement reached contained no specific effective date. Most significantly, the credited testimony of Loftus establishes that, irrespective of the judge's doubt that the parties likely would agree to put the agreement on the "back burner," this is in fact what they agreed to prior to the resumption of bargaining.

tion is resolved. Because we have determined that the parties reached such an agreement in this case, we find that the Respondent did not violate the Act by refusing to sign and honor a contract before the pending decertification petition in Case 20–RD–1759 was resolved. We shall therefore dismiss the complaint in its entirety.

ORDER

The complaint is dismissed.

DECISION

STATEMENT OF THE CASE

MICHAEL D. STEVENSON, Administrative Law Judge. This case was tried before me in San Francisco, California, on September 27 and October 5, 1983, pursuant to a complaint issued by the Regional Director for Region 20 of the National Labor Relations Board on February 18, 1983, which is based on a charge filed by International Brotherhood of Electrical Workers, Local Union No. 202, AFL–CIO (the Union)[1] on February 10, 1983.[2] The complaint alleges that Kelly Broadcasting Company d/b/a KCRA–TV (Respondent) has engaged in certain violations of Section 8(a)(1) and (5) and Section 8(d) of the National Labor Relations Act (the Act).

Issues

The first issue is whether about September 9 Respondent and the Union reached agreement on a collective-bargaining agreement concerning employees in an appropriate unit and, if so, whether Respondent subsequently refused to execute and repudiated that collective-bargaining agreement in violation of the Act.[3] A second issue, derived from the first, concerns the question whether at all times material to the case a pending decertification petition constitutes a bar to an enforceable collective-bargaining agreement.

All parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, to argue orally, and to file briefs. Briefs, which have been carefully considered, were filed on behalf of the General Counsel and Respondent.

On the entire record of the case, and from my observation of the witnesses and their demeanor, I make the following

FINDINGS OF FACT

I. RESPONDENT'S BUSINESS

Respondent admits that it operates a television station with its principal office located in Sacramento, California. It further admits that during the past year, in the course and conduct of its business, its gross volume exceeded $100,000 and that annually it sells goods and services valued in excess of $50,000 to customers outside the State of California, and purchases and receives directly from points outside the State of California goods and/or services valued in excess of $50,000. Accordingly, it admits and I find that it is an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

Respondent admits, and I find, that International Brotherhood of Electrical Workers, Local Union No. 202, AFL–CIO, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES[4]

A. *The Facts*[5]

For approximately 20 years, Respondent and the Union have been signatory to a series of collective-bargaining agreements. The last such agreement was effective from June 19, 1979, through December 31, 1981. (G.C. Exh. 2.) Prior to this agreement, another was effective between 1976 and 1979. At least for these two prior agreements, it was the custom and practice of the parties for Respondent to prepare the final agreement, which would then be executed by the parties. Prior to this final act, the parties would negotiate an agreement, the Union would ratify it, and then representatives of each side would meet to resolve administrative details and refine language.

Prior to expiration of the last agreement in December 1981, the parties began negotiations which continued into 1982. About June 14, Respondent declared an impasse in negotiations and implemented certain economic proposals contained in the final offer. Between December 31, 1981, and June 14, Respondent had maintained the terms and conditions of the expired agreement.

After impasse, the parties continued to negotiate. The Union was represented by Peter S. Cunha, business manager of the Union since 1981 and longtime union agent. Since March, Cunha was advised by Anne Andrews, attorney at law, who also played a secondary role in negotiations. Respondent was represented by Attorney Richard Loftus Jr. as chief spokesman and primary negotiator. Loftus was assisted in negotiations by Don Saraceno, general manager of Respondent for the past 8 years. These four persons were the primary witnesses at the hearing. There were some conflicts between the witnesses for the General Counsel and the witnesses for Respondent. However, these discrepancies are not significant.

About August 11, a decertification petition was filed in Case 20–RD–1759.[6] It was the opinion of Loftus that,

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[1] Attorney Anne H. Andrews initially filed an appearance on behalf of the Union. After discussions regarding her dual role as attorney of record and witness at the hearing, she elected to withdraw her appearance.

[2] All dates herein refer to 1982 unless otherwise indicated.

[3] While the complaint does not specifically allege a failure to execute, this element is clearly implied and was discussed and litigated by the parties prior to commencement of the hearing.

[4] Respondent's unopposed motion to correct the transcript is granted.

[5] The facts in this case are essentially undisputed. My findings of fact are based in part on a stipulation between the parties.

[6] On December 1, a representation election was held pursuant to that petition. However, the results of that election were nondeterminative be-

Continued

based on then current Board law, Respondent could not continue to negotiate in light of the decertification petition, and negotiations were suspended for a brief period. Sometime in early to mid-August, Andrews talked to Loftus by telephone and stated that in light of a new Board decision, *RCA Del Caribe, Inc.*, 262 NLRB 963 (1982), the Respondent could resume negotiations. After reading and considering the case, Loftus agreed. The parties met for further negotiations at the law offices of Loftus on August 30.

Andrews and Cunha brought a person named Chipps with them to the negotiating session. He was a representative of AFTRA, a union interested in representing the "talent" or on-air personalities of the unit, which is more specifically described below. Andrews knew that Respondent strongly opposed splitting the unit and she admitted that Chipps' presence was primarily to pressure Respondent into reaching agreement. Ultimately, at the request of Saraceno, Chipps and two other union observers, Ray Denton, a witness at the hearing, and Anita Fain, union shop steward at Respondent, were excluded once the negotiating meeting began.

No agreement was reached on August 30. The Union did not agree to two basic proposals of Respondent which had been implemented after impasse. The proposals concerned a two-tier wage structure by which present employees would be "grandfathered" at present wage rates plus later percentage increases and new employees would be paid at permanent lower rates. Another sticking point concerned pay rates and probationary periods for assistant technicians. Saraceno had prepared a handwritten memo which he gave to Andrews purporting to justify the Respondent's need for its proposals. (G.C. Exh. 3.) Andrews described this memo as a "jumping-off point" for the discussion.

After this unsuccessful but promising meeting, Saraceno returned to his office where he had one or more discussions with Respondent's owner Kelly. Various considerations were discussed. For example, Saraceno had received information that the Union was planning to strike about September 19. Respondent desired to avoid a strike. Further complicating matters was Saraceno's plan to leave in 5 days for a 3-week vacation in Europe where he would be essentially unreachable. In light of these factors which created a sense of urgency, Saraceno and Kelly, with the approval of Loftus, decided to try a novel approach to reach agreement.

Cunha was on vacation preparing to leave town with his family. Saraceno obtained Cunha's unlisted telephone number and called him. He asked to meet with Cunha privately, without lawyers or other advisers, to see if these two could reach agreement. Cunha agreed to delay his departure for vacation and further agreed to meet with Saraceno on the Tuesday after Labor Day. The meeting place was the Nut Tree Restaurant, just off the freeway, and roughly midway between Sacramento and San Francisco.

The two men met for about 2 hours at the time and place stated above. Indeed, agreement was reached on a merit increase system, the assistant technician dispute, and other matters of less significance. Cunha told Saraceno that no strike would occur pending developments. Before departing for his vacation, Cunha called Andrews to convey the results of the meeting and directed her to meet with Saraceno and Loftus to reduce the Nut Tree agreement to written form. Cunha then left on his vacation to return on September 13.

On September 9, Andrews met with Loftus and Saraceno at the law office of Loftus. Andrews was accompanied by Andrew Baker, an associate in her law office who had recently graduated from law school. Like Andrews, Baker testified at the hearing. The meeting lasted 2–3 hours. Saraceno brought approximately 120 copies of the Company's proposal to be mailed to employees as part of the ratification process. (G.C Exh. 6.) Saraceno also brought a written explanation of what he and Cunha had agreed to at the Nut Tree. (G.C. Exh. 7.) In addition, Andrews and Baker prepared a rough draft representing the Nut Tree agreement. (G.C. Exh. 4.) Then Andrews and Loftus prepared a rough draft of a letter for Cunha's signature. (G.C. Exh. 5.) This was to be mailed to employees in the ratification process as part of a package of materials to be further described below. Both sides agreed that a mail ratification process would be used. In that respect, it was agreed that a ballot would be included with the materials mailed to unit members a short time hence.

At this point there is some conflict in the testimony. Andrews stated that the pending decertification petition was discussed: "in what manner the decertification petition could be made to go away." Andrews went on to testify that she proposed to Loftus and Saraceno that a supervisor could admit his involvement in the circulation of the petition, thus leading to the dismissal of the petition. Loftus, on the other hand, in response to the question of whether the pending decertification petition came up, replied, "I don't think so." It should be noted that Loftus had previously testified that after the *RCA Del Caribe* case had been called to his attention by Andrews, he told her that he believed that negotiations could resume, but that "there was a presumption in my mind, anyway, that at that point in time, the Union might not represent a majority of the employees and we could not execute a contract in that circumstance, and that until that impediment was resolved in some way, we could not execute an agreement." According to Loftus, Andrews agreed with his legal opinion. Andrews did not deny this testimony. Baker and Saraceno did not testify on this point. It does appear that initially there was uncertainty on both sides with respect to how the decertification petition would affect negotiations. On September 30, however, another important case, *Dresser Industries*, 264 NLRB 1088 (1982), was decided by the Board. This case will be discussed below. There is no evidence the parties discussed this case and its effect on negotiations.

About September 13, Andrews talked to Cunha, who had by then returned from his vacation. After some discussion, Cunha approved both the merit increase plan

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cause of challenged ballots and unopened mail ballots. Both parties filed objections to the conduct of the election and the matter is currently pending before the Board on exceptions filed to the hearing officer's report.

and the assistant technician language. Andrews then prepared a final draft of the agreement relative to assistant technicians (G.C. Exh. 8) and relative to the merit step salary schedule. (G.C. Exh. 9.) Loftus approved both final drafts. Cunha also made certain minor changes in Saraceno's proposal (G.C. Exh. 6).

Sometime between September 22 and 30, the Union mailed a package of materials to each of its members. As noted above, this included Saraceno's proposal (G.C. Exh. 6), the two attachments (G.C. Exhs. 8 and 9), a ballot, with envelope, to be mailed back to Andrews, and a letter from Cunha to unit members explaining the entire procedure. This letter reads as follows (G.C. Exh. 10):

September 22, 1982

Dear IBEW Local 202 Member at KCRA:

The Union has reached a tentative agreement with your Employer on a new proposal for a three (3) year collective-bargaining agreement. A copy of the detailed proposal is enclosed for your careful consideration and decision.

In order that we achieve a fair expression of the sentiment of the entire unit to this proposal, the "referendum" process is being utilized. To this end, I enclose a mail ballot, a ballot envelope and a self-addressed envelope for you to return your ballot to the Union's attorney, Ann Andrews, who has been instructed to open and count the ballots on Wednesday, October 6, 1982 at noon.

While this proposal does not resolve all of the problems which prior Company proposals have contained, it has substantially reduced or modified many of them.

The Union recommends this offer to the membership, and urges you to ratify it.

The offer contemplates that all current employees will be "grandfathered" at present wage rates (with negotiated increases in 1983 and 1984). The term "grandfathered" means that current employees will receive their present wage rates (with increases on January 1, 1983 and 1984) and any future negotiated increases, without ever being placed on the lower wage scale agreed upon for new hires after June 15, 1982. Persons hired after June 15, 1982 in the following classifications will be hired at the new wage rates as set forth in detail in the enclosed offer: writers, art and film department employees, newsfilm, lab technicians, and floorpersons. All other new hires will be eligible to receive merit increases at the end of the 43-month escalator which would make them equal to current employees. If a new hire who is eligible to receive a merit step increase does not receive the increase, this determination would be subject to the grievance and arbitration provisions of the collective-bargaining agreement.

The restructuring of certain wage scales and the creation of other classifications does not originate with your Employer. The Union has faced these same proposals in the San Francisco market with KRON, KPIX, and KTVU and those agreements now reflect the changes resulting from technology and economics notwithstanding the fears generated by cable, home video tape and disc, the upcoming satellite stations which will reduce the number of viewers and subsequently, their portion of the revenue generated in the marketplace.

This Agreement, if ratified, has but little more than two years to run. During this time, I propose that the Union together with a representative diverse committee from the KCRA membership, sit down with management and attempt to work out mutually agreeable solutions to all the problems which is [sic] of concern both to management and its employees so that the future advancements in technology and the changes required due to competition for the viewer can be met with confidence by both labor and management.

In the interim we have achieved the goal of a contract which maintains the security and integrity of the jobs of the membership at KCRA in these times of economic adversity.

In any event, whether it is your decision to approve or reject this proposal, please make your decision count by voting.

Sincerely and Fraternally,

/s/ Peter S. Cunha
Business Manager

On October 6, Andrews and Cunha counted the ballots. During the counting, Loftus called twice to see whether ratification had occurred. Finally, Andrews called him back to report that ratification had occurred by a large margin.

On October 13, Cunha sent a 2-1/2-page letter to unit members relative to what lay ahead in the Union's relationship with Respondent. (G.C. Exh. 11.) On October 28, Cunha sent a copy of his October 13 letter to Saraceno with a cover letter which reads as follows (G.C. Exh. 12):

Dear Don:

Enclosed herewith is a copy of a letter sent to each member of the KCRA bargaining unit. I am sure you concur with the objectives set forth in the letter.

If we prevail in the decertification election, I want to commence without delay the efforts needed by both labor and management to rebuild the relationship required if we are to achieve the goals we mutually seek of trust and cooperation.

Kindest personal regards and best wishes.

Sincerely yours,

/s/ Peter S. Cunha
Business Manager

On December 27, Cunha wrote another letter to Saraceno which reads as follows (G.C. Exh. 13):

Dear Mr. Saraceno:

The following employees have been employed by KCRA in excess of thirty (30) days and have failed to acquire membership in the Union pursuant to the provisions of Section 1.10 of our agreement.

Richard Beavers	Thom Marchillo
James Finnerty	Steve Patterson
Randy Mann*	(Harry Martin)
Valdice Nicholas	Janice Young
Gilbert Rios (delinquent member)	Chet Brown
Harry Uhlenberg	Albert Lundeen
Kathy Wilbur	Ronald Middlekauff
Carol Bland	Margaret Pelley
Mark Hikoyada	Jeff Strailey
	Vernado Watts

*[Not in original; indicates name was lined out.]

All of the above employees were listed on the Excelsior list by KCRA.

The Company has failed to notify the Union of their employment pursuant to the provisions of Section 1.10 of the agreement.

We have sent *each* of the above listed employees membership application forms along with the request they remit with the completed application, the initiation fee of $50.00.

If there is no response within a seven (7) day period, we will have no alternative but to request their discharge.

Until our agreement is declared void by the NLRB, we expect KCRA will honor all of its provisions.

Additionally, Gilbert Rios failed to maintain his membership in good standing and has ignored notices from this office of his delinquencies. Accordingly, we request his removal from any and all work covered by our agreement until such time as he has paid his dues to date. You will note that I delayed sending this letter so that it would not result in anyone losing their job before Christmas.

I solicit your cooperation in assisting us in rectifying the membership problem, which to a large extent results from the station's failure to observe the requirement of the agreement relative to new hires.

Very truly yours,
/s/ Peter S. Cunha
Business Manager

On January 3, 1983, Saraceno wrote back to Cunha as follows (G.C. Exh. 14):

Dear Pete:

Your letter of December 27th came as quite a surprise to me for several reasons. First of all, some of the employees on the list have told me that they have been paying their dues and should be members in good standing of Local 202. Secondly, there are other employees whose names do not appear on the list who are members of the bargaining unit who have not become members of Local 202 and have not paid union dues. Finally, most of the employees whose names appeared in your letter have been employed for several months. I do not understand why all of a sudden, out of the blue, you have now decided to make the demand you made in your letter.

I have contacted our lawyers and was advised of two things:

1. A serious question exists as to whether or not there is a contract in place which requires KCRA-TV to terminate employees for failing to pay union dues.

2. Given the fact that the status of Local 202 as the representative for a majority of the members of the bargaining unit remains an open question because of the pending election, it may very well be unlawful for us to take action against employees who, presumably, have not supported the Union.

Although the lawyers told me that the NLRB might find this request or our compliance with it an unfair labor practice, I am confident you did not intend by your letter to retaliate against people who failed to support Local 202 in the recent election. Additionally, they indicated any action like this may jeopardize any future election should the recent one be set aside. Accordingly, I asked our lawyers to defer the filing of charges with the National Labor Relations Board.

I suggest you contact your lawyers and discuss the situation before you proceed further. In the meantime, I am going to hold off taking any formal action in response to your letter.

Sincerely,
/s/ Don Saraceno
General Manager
KCRA-TV

P.S. I have sent a copy of this letter to the employees involved so they will understand where we stand in this situation.

There followed a flurry of other letters between the parties which need not be recited in full. On January 5, Cunha wrote a letter to Saraceno complaining about a possible violation of the contract and attempting to invoke the grievance and arbitration clause. (G.C. Exh. 15.) Next, Cunha replied to Saraceno's letter of January 3, 1983, by expressing surprise and anguish at management's position. Cunha insisted that the collective-bargaining agreement was in full force and effect and concluded by modifying the list of allegedly delinquent employees submitted in his December 27 letter. (G.C. Exh. 16.) The final letter in evidence was sent from Loftus to Cunha on January 14, 1983. It is helpful to have this letter recited (G.C. Exh. 17):

Re: *Our Client KCRA-TV*

Dear Mr. Cunha:

Our client has asked this office to respond to your letters dated January 5 and 7, 1983. Your letters evidence a misunderstanding on your part as to the legal obligations imposed on our client insofar as grievances and union security are concerned. As will be demonstrated below, our client is under no obligation to discharge employees for their failure to obtain and/or maintain membership in your labor organization. Additionally, our client is under no obligation to participate in any form of grievance/-arbitration procedure.

It is an elementary proposition of law that an employer's obligation to honor the union security clause in a collective bargaining agreement ends upon expiration of the contract. *Marine and Ship Building Workers* v. *NLRB (Bethelehem Steel Co.)*, 53 LRRM 2878 (3rd Cir. 1963). Additionally, as was recognized by your attorney in her letter to our client's employees dated August 10, 1982, absent a signed contract, the Union cannot enforce any of the provisions of the agreement through the grievance and arbitration mechanism.

That letter implicitly acknowledged that as of June 14, 1982, the previous collective bargaining agreement between Local 202 and KCRA-TV expired. Therefore, any agreement upon which you base your contention that our client must honor a Union Security Clause and/or grievance procedure, must have arisen subsequent to August 10, 1982. It is our position that the subsequent negotiations and tentative agreement reached between Local 202 and our client's bargaining team did not create an enforceable contract. The parties specifically understood that the existence of a contract was conditioned upon Local 202 prevailing in the representation election which took place on December 1, 1982.

That tentative agreement was permitted by a change in the law enunciated by the National Labor Relations Board in *RCA Del Caribe, Inc.*, 262 N.L.R.B. No. 116 (1982). Your attention is directed to the following language found in that case: "If the incumbent prevails in the election held, any contract executed with the incumbent will be valid and binding."

Unless and until Local 202 is certified as the representative of a majority of the employees in the bargaining unit, there is no binding contract between Local 202 and KCRA-TV. Accordingly, our client will not comply with your demand that KCRA-TV fire several of its employees.

During the course of the recent representation proceedings, our client has made every effort to maintain the status quo and do nothing to disturb the "laboratory conditions" which should surround a representation election. We are extremely disappointed by your apparent unwillingness to do the same. The timing of your demand that our client fire some thirty-five employees in the bargaining unit is suspect to say the least. It appears to our client that you have taken this step in order to punish those employees in the bargaining unit who had the audacity to vote against Local 202 in the recent election. We submit that your conduct in this regard amounts to a violation of Sections 8(b)(1)(A) and 8(b)(2) of the National Labor Relations Act. Should it persist, we will be compelled to file an unfair labor practice charge with the National Labor Relations Board.

Sincerely,

/s/ RICHARD J. LOFTUS, JR.

cc: Ann H. Andrews

B. *Analysis and Conclusions*

I begin by reviewing certain basic principles of Board law. In *Pacific Coast Metal Trades Council (Foss Launch)*, 260 NLRB 1117 at 1119 (1982), Administrative Law Judge Pollack, in a Board-approved decision, stated the following:

> Section 8(d) of the Act explicitly requires the execution of a written contract incorporating any agreement reached if requested by either party. *H.J. Heinz Company* v. *N.L.R.B.*, 311 U.S. 514, 523 (1941); *Retail Clerks International Association and Retail Store Employees Local 322, Jack Gray and Glen Conyers, their agents (Roswil, Inc., d/b/a Ramsey Supermarkets)*, 226 NLRB 80, 87 (1976). However, neither party is required to sign a bargaining agreement containing terms not previously agreed upon. The General Counsel must show not only that an agreement was reached, but that the document which Respondents have refused to execute accurately reflected that contract. *Oil, Chemical and Atomic Workers International Union and its Local 7-507 (Capital Packaging Company)*, 212 NLRB 98, 108 (1974).

Putting aside the decertification petition issue for the moment, there is little question that the parties reached agreement on September 9 and that said agreement was ratified by the Union on October 6. Witness this testimony from Saraceno:

> Q. (By Judge Stevenson) In other words, as you sit there now but for this decertification petition and what you say your lawyer told you about its effect, you would then agree that there was a contract that was ratified, but for that single factor, is that true?
>
> A. I would have lived with those terms if we could get by the decertification.
>
> Q. To put it in slightly different wording, the only thing keeping you from an agreement with the Union is the effect of the decertification petition?
>
> A. You've got that precisely correct.
>
> Q. . . . is it further fair statement that you don't believe there is any difference of opinion with the Union as to what was agreed to and ratified by the membership? Is that true?

> A. No, I don't think there is any major hangup, except we've still got to get down and put this thing in writing.

Even Loftus, though more cautious in his testimony, refers to an "agreement in principle" which would develop into a collective-bargaining agreement only on resolution of the decertification petition.

Curiously, Respondent contends in its brief (pp. 5–7), in partial disagreement with its own witnesses quoted above, that a full and complete agreement was never reached. More specifically, Respondent claims that no effective date nor discipline and discharge procedure was agreed upon, and that the parties never met to rewrite the entire document. Elsewhere in its brief, Respondent also claims that the Union never asked Respondent to execute a written contract (pp. 4–5), and that because the contract was never executed it is not enforceable (pp. 15–16). These claims share a common feature in that they are utterly lacking in merit and border on the frivolous.

First, it was the custom and practice of the parties to have Respondent prepare the final document for execution. This process between ratification and execution can take up to 6 months. Here, the effective date was October 6, the date of ratification. It is true that the effective date was never explicitly stated because Respondent never prepared the document. Evidently the Union believed that the final document was in the process of being prepared pursuant to the usual custom and practice. If Respondent unlawfully refused to prepare the document, then it would have been futile for the Union to request execution. Surely Respondent would not sign an agreement that it failed to reduce to writing.[7] Accordingly, the Union's failure to request execution can hardly be a defense since Respondent refused to prepare the document in the first place. Surely Respondent cannot exploit its own misconduct. Finally, I do not agree that the final agreement lacked a discharge and discipline provision. All parties agree that the prior contract was part of the new agreement to the extent it was not changed by agreement of the parties. Article VI, section 6.1, clearly sets forth the discharge and discipline agreement of the parties.[8]

I turn next to the heart of this case to determine whether a pending decertification petition constitutes a bar to an enforceable collective-bargaining agreement. In this respect, I begin with the case of *RCA Del Caribe, Inc.*, 262 NLRB 963 (1982). Relying on that case, all parties agreed that the suspension of bargaining caused by the filing of the decertification petition should cease, and that the parties should resume their negotiations. As noted above, the parties did resume negotiations and ultimately reached agreement. On September 30, the Board decided a second relevant case, *Dresser Industries*, 264 NLRB 1088 (1982). There, the Board held (at 1089, emphasis added):

> A rule permitting an employer to withdraw from bargaining solely because a decertification petition has been filed does not give due weight to the incumbent union's continuing presumption of majority status and is not the best way to achieve employer neutrality in the election. For these reasons, we hold that the mere filing of a decertification petition will no longer require or *permit an employer to withdraw from bargaining or executing* a contract with an incumbent union.[9]

Notwithstanding what appears to me to be a clear statement of labor law some 6 days before the Union ratified the contract, Respondent nevertheless contends that no meeting of the minds occurred and, therefore, there was no contract. These arguments must be rejected.

Before the Board imposes an obligation on the parties to sign a collective-bargaining agreement, there must be a meeting of the minds.[10] In this case, I find that a meeting of the minds did occur. To support this conclusion, I turn to the record. Saraceno wanted agreement before he left on vacation and before the Union took a strike vote. He called Cunha at home and persuaded the latter to defer his vacation until the two met at the Nut Tree Restaurant. After preliminary agreement on the issues which had led to impasse, Cunha agreed to defer the strike vote, and no strike ever occurred. On September 9, the parties met and agreed to final details. I find that the parties fully knew and understood they were entering into a binding agreement.[11]

Respondent also provided some of the material to be sent to employees in the ratification process, agreed to the ratification by mail, and on October 6 expressed keen interest in the results of the vote. These are all factors in favor of a binding agreement. Could it reasonably be said that the parties went through all of this just to put the

[7] In *Trojan Steel Corp.*, 222 NLRB 478, 483 (1976), enfd. 551 F.2d 308 (4th Cir. 1977), respondent unlawfully refused to execute a labor agreement. The fact that the agreement submitted by the union had an incorrect effective date and had omitted entirely a clause proposed by respondent reserving the right to pay wage rates above the minimum scale did not constitute a defense.

[8] Art. VI "*Discharge—Rehiring*," sec. 6.1 "Discharge," reads as follows (G.C. Exh. 2):

Section 6.1 DISCHARGE. Employees may be discharged for incompetence or reduction in staff, upon two (2) weeks' notice or pay in lieu thereof. The Union shall have the right to initiate grievance procedure under Article III of this Agreement to determine the question of competence.

(a) Employees may be discharged without notice for gross insubordination, for being under the influence of liquor or nonprescribed drugs while on duty, and for refusal to properly perform regularly assigned duties. Employees may also be discharged for repeated failure to meet financial obligations, for causing embarrassment to the Employer while on duty, or for just cause. (This section shall not conflict with Section 1.10.)

[9] It should be noted in the instant case that there is no issue regarding Respondent's good-faith doubt as to the Union's continuing majority status based on objective evidence. Rather, the Employer here bases his refusal to execute the contract solely on the pending decertification petition.

[10] *Lincoln Hills Nursing Home*, 257 NLRB 1145, 1153 (1981). In that case, the Board affirmed an administrative law judge's finding that no meeting of the minds had occurred. The union had ratified terms different from those offered by the employer.

[11] See *Mount Airy Psychiatric Center*, 230 NLRB 668, 671 (1977); *Midvalley Steel Fabricators*, 243 NLRB 516 (1979), enfd. as modified 621 F.2d 49 (2d Cir. 1980).

agreement on the "back burner" where it would have remained until this very day pending a decision by the Board. I think not.[12] Finally, and perhaps most persuasively, Respondent's stated position is so manifestly contrary to clearly stated Board law as expressed in *Dresser Industries*, supra, that Respondent's defense simply cannot be credited.

Respondent further argues in its brief (p. 18) that assuming for the purposes of argument an agreement was reached, Respondent has merely declined to implement it. While recognizing that the Board requires a postdecertification agreement to be executed, Respondent suggests that such an agreement need not be implemented under Board law. This argument is too absurd to be treated in any but the most summary fashion. I reject it as lacking in merit.

To the extent that Respondent had an inarticulated concern about the effect of the pending decertification petition on the agreement reached with the Union, said unexpressed and unclear reservation is not sufficient to preclude a binding agreement.[13]

In light of the above, I find that about September 9 Respondent and the Union reached agreement, that Respondent subsequently refused to execute the agreement, and that on January 3, 1983, Respondent repudiated the agreement.[14] I further find that in committing the above acts Respondent violated Section 8(a)(1) and (5) of the Act as alleged.

In conclusion, I consider Respondent's contention that, notwithstanding my findings of labor law violations above, it was under no duty to terminate the employees who ceased paying dues in violation of the union-security agreement. First, I reject Respondent's claim that the only security agreement in effect was oral. Section 1.10 of the prior agreement (G.C. Exh. 2) contains a written union-security provision.[15] Since this section was not modified or deleted by the new agreement, I find that it was the intent of the parties that it become part of the new agreement.

Notwithstanding the above, I make no finding on whether Respondent violated the Act in refusing to discharge the employees listed in the union letters of December 27 and January 7, 1983. That issue was not raised by the complaint nor was it litigated.[16] At pages 13-14 of its brief, Respondent needlessly raised this issue, while the General Counsel properly does not.

CONCLUSIONS OF LAW

1. Kelly Broadcasting Company d/b/a KCRA-TV is engaged in commerce within the meaning of Section 2(6) and (7) of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

2. The Union, International Brotherhood of Electrical Workers, Local Union No. 202, AFL-CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. The following employees of Respondent constitute a unit appropriate for the purposes of collective-bargaining within the meaning of Section 9(b) of the Act:

> All employees employed in its engineering, art, news, and programming departments at its Sacramento, Stockton, Modesto and San Francisco, California locations, excluding office clerical employees, salesmen, traffic department employees, guards and supervisors as defined in the Act.

4. At all times material herein, the Union has been the duly designated exclusive representative of the employees in the aforesaid appropriate unit.

5. About September 9 Respondent and the Union reached agreement on a collective-bargaining agreement, and the agreement was ratified by the Union on October 6.

6. By refusing to sign the collective-bargaining agreement, the terms of which were otherwise agreed upon, because of a pending decertification petition and by repudiating the agreement for the same reason, Respondent has refused to bargain with the Union in violation of Section 8(a)(5) and (1) of the Act.

THE REMEDY

Having found that Respondent has violated Section 8(a)(5) and (1) of the Act, I will recommend that it be ordered to cease and desist therefrom and to take certain affirmative action as set forth below designed to effectuate the policies of the Act.

[Recommended Order omitted from publication.]

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[12] Cf. *Apache Powder Co.*, 223 NLRB 191 (1976).

[13] Cf. *Servis Equipment Co.*, 198 NLRB 266, 268 (1972).

[14] See *NLRB v. Marine Optical*, 671 F.2d 11 (1st Cir. 1982).

[15] This section reads as follows:

Union Shop.

(a) The Employer agrees that membership in the Union on or after the thirty-first (31st) day following the beginning of employment or the effective date of this Agreement, whichever is later, shall be a condition of employment; provided the Employer shall not be obligated hereunder to discharge or discriminate against any employee for non-membership in the Union:

(1) If he has a reasonable grounds for believing that such membership was not available to the Employee on the same terms and conditions generally applicable to other members; or

(2) If he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the Employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership.

(b) When new or additional Employees are needed, the Employer shall notify the Union of the number and classifications of Employees needed and the Union shall have a reasonable opportunity to refer applicants for the vacancies to be filled.

(c) The Employer agrees, within seven (7) days of the date of hiring, to notify the Union of the name or names of all Employees hired.

(d) In applying the above provisions, it is agreed that the parties will adhere to existing statutes which make preference or discrimination in hiring based upon membership or non-membership in the Union an unfair labor practice.

[16] I further note that before a union can require an employer to discharge employees for failure to comply with a valid union-security clause, the union has certain duties and obligations due and owing toward the affected employees. These include appropriate notice of the amount in arrears, an adequate opportunity to make payment, and an explanation of the methods used in computing the amount due. See *Metaltronics Hospital Employees Local 955 (Pharmaseal Laboratories)*, 254 NLRB 601 (1981). No credible evidence was presented in this case to show the Union satisfied its duty.

SUPPLEMENTAL DECISION

MICHAEL D. STEVENSON, Administrative Law Judge. On June 25, 1984, the Board issued an unpublished "Order Remanding Proceeding to Administrative Law Judge." More specifically, the Board directed me to resolve whether a "critical portion" of the testimony of a certain witness is credible. I turn to comply with the Board's Order.

Attorney Richard Loftus testified for Respondent at the hearing that subsequent to his reading of the Board's newly issued decision in *RCA Del Caribe, Inc.*, 262 NLRB 963 (1982), he had a conversation with Union Attorney Anne Andrews and stated, in pertinent part, that based on his understanding of *RCA Del Caribe* he believed that negotiations on a new labor agreement could resume. However, he further believed and stated that the parties could not execute an agreement until a pending decertification petition was resolved. He further testified that Andrews agreed with this legal opinion. As I noted in the opinion, Andrews did not deny the conversation. I credit this testimony of Loftus in toto.

To the extent that the Board's review of my decision will turn on this credibility finding, then so be it. However, I reiterate my original decision and make certain additional findings, analyses, and conclusions.[1] I find that there was never any agreement between the parties that a collective-bargaining agreement could not be executed and would not be effective until a pending decertification petition was resolved. Rather, a lawyer for Respondent, Loftus, gave a legal opinion to a lawyer for the Union, Andrews, based on current Board law, and Andrews agreed with the legal opinion based on current Board law. The difference is greater than mere semantics.

In my thinking there is a distance of 2-1/2 country miles between an unconditional agreement that no effective contract will result until the decertification is resolved and a lawyer's legal opinion, with which his opponent agrees, that no effective contract will or can result until the decertification is resolved.

In the former, the agreement remains a binding agreement. In the latter, a number of possibilities might occur. The first, which need not be resolved here, is that both lawyers may have been wrong as a matter of law. The second is that there is a change in the legal precedent on which the original legal opinion was based. That is exactly what happened here, as I attempted to make clear in my original decision. That is, on September 30, 1982, the Board decided *Dresser Industries*, 264 NLRB 1088 (1982). Based on the actions of union and employer representatives subsequent to the Loftus conversation credited above, I find that the parties intended a binding agreement to result as soon as the decertification petition was resolved or as soon as the failure to resolve the decertification petition was no longer a legal barrier to execution of the contract, whichever condition occurred first. I must assume both attorneys were aware of the *Dresser* case prior to the union ratification on October 6, although there is no direct evidence to support that conclusion. However, whether one or both were aware or not is irrelevant to this decision. By operation of law, the *Dresser* case removed the legal impediment that both attorneys had agreed in August would preclude execution of a collective-bargaining agreement.[2]

In sum, I have credited Loftus, but find in the final analysis of this case that his credited testimony does not affect the final result. Since my final decision does not change, I will incorporate by reference all additional findings of fact, conclusions of law, and the recommended Order into this supplemental decision.

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[1] I interpret the wording of the Board's Order as not only permitting, but requiring, this explication in light of my new credibility resolution.

[2] *Dresser* was fully applicable to the facts of the instant case retroactively. See *Documentation, Inc.*, 263 NLRB 706 fn. 3 (1982).

Sun Coast Foods, Inc. *and* International Chemical Workers Union, Local 540. Cases 15–CA–8758 and 15–CA–8836

30 January 1985

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS HUNTER AND DENNIS

On 21 October 1983 Administrative Law Judge J. Pargen Robertson issued the attached decision. The Respondent and the General Counsel each filed exceptions, supporting briefs, and answering briefs.[1]

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions only to the extent consistent with this Decision and Order.

This case involves actions that occurred following the closing of a pet food processing plant operated by Quaker Oats, Inc. and its reopening by the Respondent. On 25 June 1982[3] Quaker Oats ceased operating and terminated its employees, including 70 production and maintenance employees represented by the Union.[4] The Respondent reopened the facility 19 July, employing 51 production and maintenance employees. The Respondent's entire unit work force was drawn from the group of employees who formerly worked at Quaker Oats. In addition the Respondent hired several individuals who were supervisors and managers for Quaker Oats. These included John Christensen, manager for Quaker Oats and vice president and general manager for the Respondent; Andy Hammond, manager of employee and community relations at Quaker Oats and purchasing and planning manager for the Respondent; Richard Bishop, manager of engineering and maintenance for both Employers; and Zelma McKnight, maintenance supervisor for Quaker Oats and plant supervisor for the Respondent.

Although the Respondent initially, on request, had agreed to meet with the Union, on 16 September the Respondent canceled the scheduled meeting with the Union and since that date has refused to bargain with the Union. The Respondent relied on a petition signed by 35 of its 51 unit employees asserting that they did not wish to be represented by the Union.

The General Counsel alleged that the Respondent unlawfully refused to hire seven job applicants because of their union activities at Quaker Oats. The General Counsel also alleged that certain unlawful statements were made by the Respondent's supervisors and that the Respondent unlawfully refused to bargain with the Union.

The judge found that there was no evidence that the Respondent's decision to employ 51 rather than 70 employees was unlawfully motivated. The judge found, however, that the Respondent unlawfully refused to hire four individuals because of their union activities. The judge also found that the Respondent violated Section 8(a)(1) of the Act by threatening employees that it would screen job applicants to avoid dealing with the Union and grievances. The judge further found that the Respondent violated Section 8(a)(5) and (1) of the Act by failing to recognize and bargain with the Union from the date the Respondent began operations.

The General Counsel excepts to the judge's finding that the Respondent's decision to employ a reduced work force was not unlawful. The General Counsel also argues that the judge erred in finding that the Respondent lawfully refused to hire applicants Jack Crowley and Eddie Mims. The Respondent excepts to all violations found by the judge. For the reasons set out below we find merit to the Respondent's exceptions and shall dismiss the complaint in its entirety.

A. *The Reduced Work Force*

As noted above, the Respondent commenced operations 19 July with a unit work force of 51 employees. The judge found that no evidence was presented to show that this reduction from 70 employees used by Quaker Oats was unlawfully motivated. The judge therefore considered only whether the Respondent discriminatorily selected employees other than the alleged discriminatees.

The General Counsel excepts to this finding. The General Counsel contends that the Respondent reduced its work force in order to eliminate the Union, and in particular to eliminate union supporters who were active in filing grievances while employed by Quaker Oats. The General Counsel asserts that the Respondent's vice president and general manager, Christensen, gave conflicting testimo-

[1] The Charging Party filed a motion seeking leave to adopt as its own the General Counsel's exceptions. We grant the motion and, accordingly, we have treated the General Counsel's exceptions as constituting also the Charging Party's cross-exceptions.

[2] The Respondent and the General Counsel have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[3] All dates are in 1982 unless otherwise indicated.

[4] Quaker Oats and the Union had a collective-bargaining agreement in which Quaker Oats recognized the Union as the representative for all maintenance and production employees at its canning plant at Pascagoula, Mississippi, excluding all office and clerical employees, laboratory employees, watchmen, guards, and all supervisory employees as defined in the National Labor Relations Act, as amended.

ny on the Respondent's need to reduce its work force, testifying at one point that a reduction was needed to make a profit and at another point that a second additional shift of employees was what a profitable company required.

The Respondent asserts in answer that the General Counsel failed to allege the reduction in work force as a violation of the Act. The Respondent further contends that the record does not support such a finding.

We find merit in the Respondent's position and reject the General Counsel's exceptions. The complaint allegations made no mention of the Respondent's decision to hire fewer employees than its predecessor employed, and this aspect was not fully litigated at the hearing. Even assuming the allegation was fully litigated, we do not find sufficient evidence of unlawful conduct by the Respondent.

Christensen credibly testified that as a Quaker Oats manager he instructed his supervisors to design a plan for improved efficiency and economy to present to potential buyers which would require fewer employees to operate the facility. This testimony was corroborated by the supervisors, who detailed a procedure they used in evaluating the number of workers needed and the best workers for each job. As discussed by the judge, the Respondent's implementation of this system involved consideration of each applicant's demonstrated work ability and seniority at Quaker Oats. Christensen's additional remark on the need for a second shift related to a genuine but less immediate interest in increasing efficiency further by addition of a second shift and is not inconsistent with his plan to reduce costs as long as the plant operated on a single shift basis. We are not persuaded that Christensen's comment on the need for a second shift casts doubt on the Respondent's motive. Rather, we find that it was the Respondent's intention to begin operations with a smaller work force than that employed by Quaker Oats, an objective that was reflected in a reduction of similar proportions among the nonunion salaried employees and within the Respondent's lawful discretion.[5] Accordingly, we agree with the judge that the proper inquiry is whether the Respondent rejected certain applicants for discriminatory reasons.

[5] An alleged successor employer, of course, has a right to choose the size and composition of its own work force limited only by the duty not to discriminate against employees of its predecessor for reasons proscribed by the Act. *General Processing Corp.*, 267 NLRB 1281 (1983).

B. *Findings on the 8(a)(1) Allegations and Union Animus*

The judge found that in 1977 alleged discriminatee Jack Crowley was elected union president on a platform pledging to file and process employee grievances. Beginning with Crowley's term and continuing until Quaker Oats' close, the number of grievances filed and pursued by employees increased. The judge found that this was a source of considerable disturbance to Quaker Oats' management. The judge also found that certain Quaker Oats' supervisors told employees that the grievances and the presence of the Union caused the plant to close and that if the plant reopened it would be without a union.[6] The judge concluded that the Respondent, through the supervisors it retained from Quaker Oats, harbored animus toward the Union and toward those employees who were identified with the Union in its post-1977 period. The judge did not find that these remarks violated the Act because they were made before the Respondent was created. However, the judge found that about a week after the Respondent reopened the plant alleged discriminatee Mary Long telephoned Christensen to ask why she had not been hired. Long testified that Christensen said he had told his supervisors to screen applicants for employment carefully, and to select employees so as to avoid the "predicament" that existed at Quaker Oats. Long admitted that Christensen never mentioned the Union nor defined what he meant by Quaker Oats' predicament. The judge determined, however, that Christensen's references to screening and to avoiding the "predicament" were designed to tell Long that the Respondent was not going to deal with the Union and grievances. The judge relied in part on his findings that while Quaker Oats was in operation Christensen and other Quaker Oats' supervisors told employees that there would not be a union under the new owners. The judge concluded that Christensen's remarks to Long violated Section 8(a)(1) of the Act.

We disagree. In the context in which it was made, Christensen's reference to screening and his

[6] Specifically, the judge found that in the spring of 1982, amid rumors that Quaker Oats was closing the plant, Christensen told Quaker Oats employee Eldon Waltman that Quaker Oats' main office was "real upset about the way the union was writing grievances for women and blacks." The judge also found that on 22 June, while escorting a potential buyer through the Quaker Oats plant, Christensen told employee Crowley that, although things looked good for finding a buyer to keep the plant in operation, there would be no union when the plant reopened. In addition the judge found that on 29 April Quaker Oats Supervisor Richard Bishop told employee Alvin Bethany that the Union was the cause of the plant closing and that the plant would be without a union if it reopened. Finally the judge found that between 29 April and 25 June Quaker Oats Supervisor Zelma McKnight told employees that neither "trouble makers" nor the Union would be there when the plant reopened.

remark on Quaker Oats' predicament is ambiguous and is a likely reference to that company's inability to remain in business. We do not find that these ambiguous statements violated the Act. The record does not show that Long was aware of the more pointed remarks made by Quaker Oats' supervisors prior to closing that might arguably give some other veiled meaning to Christensen's statement. In any event the statement on its face remains an innocuous comment which would not reasonably tend to restrain, interfere with, or coerce employees in the exercise of their rights.

We also disagree with the judge that the evidence establishes that the Respondent harbored a general animus toward the Union. While we agree that the remarks made by various supervisors while employed by Quaker Oats tend to show antiunion sentiment, we note that the Respondent nonetheless selected its entire work force from employees of its predecessor. By doing so the Respondent assured itself of the Union's presence, at least as far as the Respondent's obligation to recognize the Union until its majority standing was placed in doubt as discussed below. Such a step by the Respondent strongly militates against the finding that the Respondent held and acted on the views expressed by its supervisors prior to their employment. The Respondent could have precluded any obligation to recognize the Union as representative of its work force by considering the 233 employment applications it received prior to opening, over 70 percent of which were from persons not employed by Quaker Oats, and hiring a majority who had not been employed by Quaker Oats. In view of the hiring procedure used by the Respondent we find that the evidence does not establish that the Respondent harbored animus toward the Union.

C. *The Refusal to Hire*[7]

As noted above, for the reasons stated below, we reverse the judge's finding that the Respondent violated Section 8(a)(3) and (1) by refusing to hire the four individuals discussed below.

1. Mary Long was hired by Quaker Oats in 1955. From 1969 until Quaker Oats closed she worked as a janitor. For the last few months of Quaker's operation, she was the sole janitor employed. The judge found that Long was a union member since 1955, that she served as shop steward in the late 1960s, and that she was the financial secretary around 1977. Long also was on the Union's negotiating committees for collective-bargaining agreements and for a special experimental project agreement ("the sardine committee"). The judge found that Long was first in seniority in the maintenance department. Of 22 employees junior to Long, 10 were hired. Long was replaced by Swetlena Goff, who had worked for Quaker Oats since 1976 in the casting department.

The judge found no documentary evidence of poor work. He credited Long's testimony that she never received a written warning or criticism. The judge found that she was complimented on her performance by her supervisor and by Christensen. Supervisors Bishop and McKnight, however, testified that the plant was not properly maintained by Long during the last few months.

The judge did not credit the testimony that Long's work was inferior. He concluded that Long should have been selected for employment based on the Respondent's guidelines of seniority and work performance. The judge considered that Long was "deeply and visibly" involved in the Union after 1977. Relying on his earlier findings that the Respondent was hostile toward the Union after 1977, the judge found the Respondent's basis for not hiring Long to be pretextual and concluded that the failure to hire Long violated Section 8(a)(3) of the Act.

The Respondent argues that Long's union activities were negligible. Long testified that she handled only four or five grievances while she was a union officer. As a committee member, Long was not a primary spokesman. The Respondent contends that Long was a good employee for a number of years, but that in the last few months of employment her ability to complete her job duties diminished because of health problems which caused her to miss 4 or 5 weeks of work and which coincided with Quaker Oats' elimination of the other janitorial position. The Respondent relied on the testimony of Supervisors McKnight, Christensen, and Bishop that Long frequently complained about not feeling well and that her work deteriorated. Supervisor Bishop testified that he decided to hire another individual because of Long's difficulties.

We find merit to the Respondent's exceptions. The General Counsel has failed to carry her burden to show that the Respondent refused to hire Long because of her union activities. The main deficiency in the General Counsel's case is the failure to show that Long's union involvement after 1977 was part of the Union's resurgent activity. Although Long was a union member and served as financial secretary and negotiating committee member in the post-1977 era, we note that she had minimal involvment with grievances and that employees with comparable union affiliations were

[7] We agree with the judge's conclusions that the Respondent did not violate the Act by refusing to employ applicants Henry Davis, Jack Crowley, and Eddie Mims. We find no merit to the exceptions of the General Counsel regarding Crowley and Mims.

both hired and rejected by the Respondent. When this factor is combined with the Respondent's lack of demonstrated animus, the General Counsel's prima facie case fails.

Even assuming that the prima facie case was made, we find that the Respondent has demonstrated that it would not have hired Long even in the absence of her union activities. The judge credited Long's testimony that her work was not criticized, and the Respondent readily admitted that Long was a good employee for many years. However, Long admitted in her testimony that in the several months before Quaker Oats closed, she was hospitalized and was absent from work for 4 to 5 weeks with ill health. She further testified that, on her return to work, the duties required of her had doubled. Given these factors, we find that the Respondent believed that another individual was more capable of fulfilling its job requirements and for that reason did not hire Long.

2. David Sewell was a manufacturing specialist in Quaker Oats' manufacturing department. After 1977, Sewell was a steward, a chief steward, a vice president and, at the close, president of the Union. During that time he served on 15 to 20 grievance committees. Sewell was first in seniority among the manufacturing department employees who applied to the Respondent for jobs. The judge credited Sewell's testimony that his work was never criticized. The judge concluded that Sewell would have been hired in the absence of union activity.

We disagree with the judge and find merit to the Respondent's exceptions. The Respondent's supervisors credibly testified that the manufacturing department at Quaker Oats was the least efficient division. The Respondent's belief in this opinion is demonstrated by the fact that the Respondent hired just 2 of the 11 individuals from that department who applied.[8] One of the employees hired served as a steward in 1980; several rejected employees had no visible union affiliation. We are convinced by these factors that the Respondent applied the lawful criteria of seniority and work performance. Although Sewell had greater seniority than those employees hired, the General Counsel has not shown that his performance was equal to or better than that of the individuals who were accepted. When we consider this in combination with the absence of union animus of the Respondent, we must conclude that the General Counsel has not carried her burden to show unlawful discrimination.

[8] In dismissing the allegations that the Respondent refused to hire Sewell, Sipp, and Sanderson, each of whom worked in the manufacturing department, we note an incongruity in the judge's decision in that he accepted as lawful the Respondent's decision to hire only two employees from this department, but nevertheless found that three persons were unlawfully denied employment.

3. Eugene Sipp was a meat handler in the manufacturing department at Quaker Oats. Sipp was a steward from 1977 to 1978 and filed four or five grievances while serving in that capacity. He also acted as recording secretary from 1978 to 1982, and was on the grievance and negotiating committees. Sipp was eighth in seniority in the manufacturing department. The judge credited his testimony that his work was never criticized and concluded that in the absence of union activities Sipp would have been hired. We disagree, and find, for the same reasons as we found in the case of David Sewell, that the General Counsel has failed to make out a case of unlawful discrimination.

4. Curtis Sanderson was a forklift operator in the manufacturing department at Quaker Oats. Sanderson was a member of the Union since his hire in 1970 and served as steward in 1979 and 1980, when he processed between 15 and 25 grievances. The evidence does not indicate any union activity by Sanderson after 1980. Sanderson was fourth in seniority in his department. The judge credited his testimony that he was never criticized for the quality of his work. The judge concluded that he would have been hired in the absence of union activity. We disagree and find, again for the reasons cited in the case of David Sewell, that the General Counsel has failed to show discrimination in the Respondent's refusal to hire Sanderson.

D. *The Refusal to Bargain*

The General Counsel alleged that the Respondent unlawfully refused to bargain with the Union by withdrawing recognition 16 September. The judge found that the Respondent is a successor to Quaker Oats whose obligation to bargain with the Union attached 19 July, the date the Respondent resumed operations with the 51 employees it had hired.

The judge found that the Respondent's officers, Christensen and Hammond, while they were agents of Quaker Oats, negotiated with the Union concerning the effects of Quaker Oats' closing. During those negotiations, from late April until late June, Union Representative Hubert Mills repeatedly inquired about the identity of prospective buyers of the plant. Mills asked Hammond and Christensen to inform any buyer of the Union's representative status. The judge found that the Union made demands for recognition 6 May and 24, 29, and 30 June during Mills' meetings with Hammond and Christensen.

On 7 July the Union sent a bargaining demand letter to the Respondent's registered agent, Karl Wiesenburg. Wiesenburg replied that he did not have bargaining authority. On 5 August Mills again

wrote to Wiesenburg and requested a bargaining meeting or, if Wiesenburg lacked authority to bargain, the name of the appropriate official. On 16 August Wiesenburg wrote to Mills advising that his letter had been forwarded to the Respondent's vice president, Christensen. On 8 September Mills sent a bargaining demand letter to Christensen. On 13 September the Respondent's manager, Hammond, telephoned Mills and agreed to meet with the Union 22 September.

On 16 September Hammond received a petition signed by 35 of the 51 unit employees stating that the employees did not wish to be represented by the Union. Relying on the petition as casting a doubt on the Union's majority status, Hammond wrote to Mills 16 September and canceled the meeting. Since that date the Respondent has refused to recognize and bargain with the Union.

The judge found that the Respondent violated Section 8(a)(5) of the Act by failing since 19 July to recognize the Union. The judge found that the Respondent engaged in unlawful dilatory tactics between 19 July and 13 September. The judge found that this unlawful conduct, combined with what the judge found to be the Respondent's unlawful threats and refusals to hire, precluded the Respondent from having a good-faith doubt of the Union's majority status. In addition, the judge implied that the employee petition on which the Respondent relied was tainted by supervisory assistance. We find merit to the Respondent's exceptions to these findings.

We cannot agree that the Respondent engaged in dilatory tactics before recognizing the Union. We agree with the judge that the Respondent's obligation to bargain on request attached 19 July.[9] Following that date the Union made its bargaining demand 5 August. This demand was promptly answered by the Respondent's agent, Wiesenburg, 16 August. Although the Respondent did not contact the Union between 16 August and the Union's next demand 8 September, we do not consider such a gap of time so unreasonable as to indicate bad faith.[10] We find that the Respondent's 13 September reply and its agreement to meet 22 September satisfied its obligations.

We further find that the Respondent was privileged to withdraw recognition from the Union 16 September. On that date the Respondent was presented with a petition signed by a majority of its employees expressing their desire not to be represented by the Union.[11] Such a petition is an adequate basis on which the Respondent could base a reasonable doubt of the Union's majority status. Based on our dismissal of the complaint in all other respects, the Respondent's doubt was raised in an atmosphere free of unfair labor practices.[12] Accordingly, the Respondent has not engaged in any conduct violative of Section 8(a)(5) of the Act.

Based on our conclusions that the Respondent has not engaged in any unlawful conduct, we shall order that the complaint be dismissed.

ORDER

The National Labor Relations Board orders that the complaint is dismissed in its entirety.

[9] The Respondent concedes it is a successor and that it was obligated to bargain with the Union 19 July. In light of this, Chairman Dotson finds it unnecessary to express his view on the Board's law concerning successorship.

[10] It appears that the Respondent's inaction after 16 August may have been caused by a misunderstanding that Mills was to contact Christensen directly.

[11] The petition heading read, "We the following employees, do not wish for the International Chemical Workers' Union to represent us. The following employees names are listed below."

[12] We reject any implication by the judge that the employees' petition was tainted by supervisory participation. The record demonstrates that the petition was instigated by a unit employee in response to rumors that the Respondent and the Union were preparing to bargain. Employee Swetlena Goff testified that she and another unit employee composed the petition but were uncertain of the Union's complete name. Upon their inquiry, a supervisor told the employees the Union's name. Goff testified that she asked another supervisor for permission to seek employees' signatures. The supervisor responded that he "didn't care." We find nothing in these circumstances to justify a finding of supervisory assistance that would taint the employees' expression of disinterest in the Union.

DECISION

STATEMENT OF THE CASE

J. PARGEN ROBERTSON, Administrative Law Judge. This case was heard in Pascagoula, Mississippi, on May 23, 24, 25, and 26, 1983. Case 15–CA–8758 was filed on October 28, and amended on November 4, 1982. The complaint issued on December 10, 1982, and was amended on February 3, 1983. Case 15–CA–8836 was filed on December 28, 1982. That complaint issued on January 31, 1983. As shown hereafter, the complaints allege that Respondent engaged in various violations of Section 8(a)(1), (3), and (5) of the Act.

On the entire record, and from my observation of the witnesses, and after due consideration of the briefs filed by the General Counsel and Respondent, I make the following

FINDINGS OF FACT

I. ALLEGED UNFAIR LABOR PRACTICES

A. *Background*[1]

This case involves activity shortly before and during the closing of a plant, and the plant's purchase and re-

[1] The commerce, facts, and conclusions are not at issue. Respondent admits that from July 19, 1962, Respondent, a Mississippi corporation with facilities located in Pascagoula, Mississippi, is engaged in the proc-

Continued

opening by a successor employer. Until the end of June 1982, Quaker Oats engaged in the manufacture of canned pet food in Pascagoula, Mississippi.

In April 1982, the employees were advised that Quaker Oats would close its Pascagoula facility. At the time of that announcement and for several years before 1982, the Pascagoula employees were represented by International Chemical Workers Union, Local 540. The General Counsel alleges that during the period before the facility was closed by Quaker, and reopened by Sun Coast Foods, employees were coerced through statements from their supervisors in violation of Section 8(a)(1) of the Act. Through those alleged illegal statements and others, the General Counsel contends that supervisors expressed displeasure with the Union which stemmed from the Union through new officers, adopting a more aggressive position on grievances and negotiations since 1977. The General Counsel alleges that the employees were threatened that the successor employer would operate without the Union and without troublemakers.

After the facility was closed and its employees laid off on June 25, 1982, the Quaker facility was reopened by its buyer, Sun Coast Foods, Inc. on July 19, 1982. Sun Coast employed 51 hourly employees. All 51 of those employees formerly worked at the same facility for Quaker. Immediately before its close, Quaker employed 70 hourly employees.

The General Counsel alleges that Respondent refused to hire seven former Quaker employees because of their involvement with the Union since the Union started its more aggressive activity in 1977. Those seven employees are Jack Crowley, Henry Davis, Mary Long, Eddie Mims, Curtis Sanderson, David Sewell, and Eugene Sipp.

During the period before the closing by Quaker, the Union negotiated with Quaker. During those discussions, the Union questioned Quaker as to whether it had a buyer. The officials representing Quaker included John Christensen, manager for Quaker at Pascagoula, and Andy Hammond, Quaker's manager of employee and community relations at Pascagoula. Immediately upon reopening by Sun Coast, Christensen was installed as Sun Coast's vice president and general manager and Hammond was Sun Coast's purchasing and planning manager. As of the last meeting between the Union and Quaker on June 30, Christensen and Hammond told the Union that they did not have a firm buyer, but they agreed to inform the Union when a buyer was identified. However, neither Christensen nor Hammond told the Union about Sun Coast's purchase.

On July 7, 1982, the Union requested to meet and bargain with Sun Coast through Sun Coast's registered agent for service of process, Attorney Karl Wiesenburg. The certificate and articles of incorporation of Sun Coast Foods, Inc., filed with the Mississippi Secretary of State on June 29, 1982, list Karl Wiesenburg as its registered agent. Shortly thereafter, Wiesenburg informed the Union that he lacked authority to bargain for Sun Coast. On August 5, the Union wrote Wiesenburg requesting the name of the person that was authorized to bargain for Sun Coast. Wiesenburg wrote the Union on August 16, acknowledging that he was the registered agent for service of process for Sun Coast. Wiesenburg indicated that he had forwarded the Union's letter to John Christensen.

On September 8, 1982, the Union again requested that Sun Coast meet to negotiate for its Pascagoula employees. This request was sent to John Christensen at the Pascagoula facility. Respondent was given a September 14 deadline to respond before the Union filed charges with the Labor Board.

On September 13, Andy Hammond called the Union and agreed to meet. That call was confirmed in a September 14, 1982 letter from Hammond to the Union's representative, Hubert Mills. The parties agreed to meet on September 22, 1982.

On September 16, 1982, Hammond wrote Mills that Respondent had been presented with a petition from 35 of its 51 employees expressing that they did not wish the Union to represent them. Hammond indicated Respondent would not meet with the Union.

The General Counsel alleges that Respondent violated Section 8(a)(1) and (5) by withdrawing its recognition of the Union.

B. *The 8(a)(1) Allegations*

Before 1977, there was some concern that the Union was not actually processing grievances at Quaker Oats' Pascagoula facility. Jack Crowley ran and was elected president of Local 540 on a campaign that he would file and process grievances. Supervisors Roger Danley and Zelma McKnight and General Manager Christensen admitted that employee grievances did increase after 1977 when Crowley was elected president. Union Representative Hubert Mills credibly testified that before 1977 few grievances reached arbitration—the stage where he became involved. However, with the election of Crowley, grievances increased to the point that from 1977 to the plant's June 1982 closing, Mills received more grievances for arbitration from Local 540 regarding Quaker's Pascagoula employees than from all of the 17 other locals he serviced.

John Tucker[2] and, subsequently, David Sewell followed Crowley as Local president before Quaker's June 1982 closing. The testimony indicated that the rate of grievances continued to increase after Crowley left office.

1. John Christensen

Former Quaker employee Eldon Waltman testified there were rumors in the spring of 1982 that the Pascagoula plant would close. Around that time, Waltman was called into John Christensen's office to receive a ring for

cessing and sale of canned pet food, and is an employer engaged in commerce within the meaning of Sec. 2(6) and (7) of the Act. The complaint alleges, and Respondent admits, that the Charging Party (the Union) is a labor organization within the meaning of Sec. 2(5) of the Act.

[2] Tucker was not employed by Respondent after the July 19 opening. However, he is not alleged as a discriminatee, and the record does not indicate anything regarding the failure to employ Tucker.

20 years' service. While waiting for two foremen, Waltman asked Christensen about the possibility of the plant closing. According to Waltman, Christensen told him:

> He said right at the present time that there wasn't no plans to close it, but they was—the Chicago office was real upset about the way the union was writing grievances for women and blacks. At the time they had about 36 in the process. And that they was upset about not accepting the contract for the sardines, and the sardines needed to come there and hold the plant together, and about that time the other bosses come in.

On April 29, 1982, Christensen announced to all employees that Quaker Oats would close the Pascagoula plant.

On June 22, 1982, Jack Crowley saw Christensen escorting a group throughout the plant. Crowley went to Christensen as Christensen passed through the waste treatment area. According to Crowley:

> I asked Mr. Christian how would be—what was the chance of the plant, and how did it look for the people that worked there? And he told me things was looking good, and he said, "I'll guarantee you one thing when it opens back up, that there won't be any union here."

About a week after Sun Coast started production on July 19, 1982, Mary Long called and asked Christensen why she had not been called back to work:

> So he told me he knew what I meant, and he felt the same way. He said he didn't [know] why I wasn't hired. He said, but he had told Eddie Furby and Dick Bishop and McKnight that he was going to leave it up to the three of them, and for them to screen those people good and to pick those that called back, because if they didn't they'd be in the same predicament they was before, and we couldn't have that.

Discussion

John Christensen denied making the above mentioned comments to either Waltman, Crowley, or Mary Long. For several reasons, I do not credit Christensen's denials.

In the first place and most importantly, I was not impressed with Christensen's demeanor. Throughout his testimony, Christensen appeared nervous and ill at ease. Moreover, Christensen appeared overly anxious to explain portions of his testimony.

Secondly, the record demonstrated that John Christensen was a knowledgeable manager that was in demand. Sun Coast informed him that his agreement to stay on and run the plant was vital to its interest in buying the facility. Nevertheless, according to Christensen's testimony, he was divorced from many of the important decisions at the facility. Christensen testified to the effect that he knew little about the development of the sale until shortly before the plant reopened. Christensen professed to have no advance knowledge that he was becoming a vice president and general manager for Sun Coast. He professed to know of no discussions involving the buyers regarding the Union.[3] He knew little about the work performance of most of the alleged discriminatees, and he professed little knowledge about the selection of Sun Coast employees. I find it unusual that any person charged with running a relatively small plant would have so little knowledge about relevant issues. It is particularly surprising here in view of the demand for Christensen to continue running the plant. It is doubtful that anyone would be in demand if he knew no more than Christensen professed he knew.

Thirdly, the statements considered above were allegedly uttered by several different supervisors to numerous employees. Substantial evidence does show that the Union increased its activities after 1977 to the point where almost any employer would have been disturbed. I find it incredible that Quaker's Pascagoula managers were not disturbed, and I discredit Christensen's testimony to that effect. Against that background, Christensen's comments to Waltman appear logical. Moreover, I was impressed with the demeanor of Waltman, Crowley, and Long as they testified regarding the alleged comments by Christensen. All three were able to testify in a comfortable manner regarding the alleged comments and the facts material to those particular circumstances.

2. Richard Bishop

a. *Jack Crowley*

Jack Crowley testified that he called the plant on July 7, 1982, about his application for employment with Respondent. Crowley testified that he talked with Dick Bishop.

> Oh yes. On—I believe it was July the 7th, I called the plant, and I talked to Dick Bishop, and I asked him was he going to call me back, and he in return he said the company has hired all the people that they intended to, and I said, "Well, what will be the chances of me getting on later?" And he said—kind of laughed over the phone, and made the statement to me that, that because I was a trouble maker, and because of my union activity, I wouldn't get on, and hung the phone up.

Bishop denied having any phone call with Crowley regarding Crowley's application at Sun Coast.

Discussion

I was generally impressed with Jack Crowley's testimony. In most areas, he appeared to testify candidly. However, I am convinced that Crowley was not always truthful. Apparently Crowley made several phone calls to Respondent's employee Ralph Bethany and inquired as to occurrences at the plant and as to Bethany's willingness to testify in the instant hearing. When questioned about Bethany, Crowley contended that he was unaware

[3] Nevertheless, art. 7.2 of the asset purchase agreement between Respondent and Quaker Oats (in evidence) demonstrates that the buyers (Respondent) did discuss and become aware of the Union at the Pascagoula facility.

that Bethany worked for Respondent. That statement was untrue. It was obvious that Crowley knew where Bethany worked.

It appeared that Crowley felt he was prohibited from talking with Bethany and, for that reason, he refused to admit facts which may have been incriminating. Similarly, his testimony regarding the Bishop phone call involved Crowley's personal interest (i.e., whether he was illegally denied employment). Therefore, in view of Crowley's demonstrated reluctance to be truthful when his personal interests are at stake, I shall discredit his testimony about the Bishop phone conversation.

b. *Alvin Ralph Bethany*

Alvin Ralph Bethany testified to a conversation he had with Richard Bishop following the plant closing announcement on April 29, 1982. At the hearing, Bethany testified that he had a conversation with Bishop in the parking lot and:

> We was talking—more or less we was talking about sardines. And he said that the union was the cause of the sardines not—not to go through. And that was it on that.

Bethany denied at the hearing that Bishop said that the plant was closing because of the Union or that the plant would have no union if it reopened. However, two written statements by Bethany were introduced into evidence. Bethany admitted signing the two statements. In both, Bethany testified that on April 29, 1982, Ralph Bishop told him that the plant was closing because of the Union and that, when it reopened, it would be without a union. One of the statements was given to the Union in July 1982; the other to Board Agent Clement Kennington in February 1983.

Bethany denied telling the Union and Board Agent Kennington that Bishop attributed the plant closing to the Union. I am convinced and find that Bethany did testify as related in those two affidavits. Bethany, who is currently employed by Respondent, admitted that he was under pressure not to testify, and that the pressure was getting to him. He was not under similar pressure when he gave the written statements.

I am convinced and find that Ralph Bishop told employee Bethany on April 29, 1982, that the Union was the cause of the plant closing and that the plant would be without a union if it reopened.[4] See *Alvin J. Bart & Co.*, 236 NLRB 242 (1978); *Star Kist, Samoa*, 237 NLRB 238 (1978); see also Fed.R.Evid. 803(24), 804(b)(1), and 804(b)(5).

3. Zelma McKnight

Eldon Waltman testified that following the April announcement that the plant would close, his fellow employees frequently asked their supervisor, Zelma McKnight, if "he knows anything, who was going to take over the company or what, and who was going to work."

According to Waltman, on many of these occasions, McKnight replied to the employees to the effect that "troublemakers" and the "Union" would not be there when the plant reopened. Waltman testified that all those incidents occurred between the April announcement that the plant would close and the actual closing. Waltman said that McKnight did not identify the troublemakers.

Former employee James Page corroborated Waltman. Page testified that he overheard a conversation in the maintenance shop a few weeks before Quaker closed the plant. Zelma McKnight, Eldon Waltman, Lonnie Graham, Bert Rae, and Carl Scale were present. Page overheard Zelma McKnight say that the plant "would probably reopen, but there wasn't going to be any union there and there wasn't going to be any trouble makers."

Zelma McKnight denied threatening that the reopened facility would be nonunion without troublemakers. Respondent also called Bert Rae, Lonnie Graham, and Robert McLain who are currently employed by Respondent. All those employees worked under Zelma McKnight at Quaker and all testified that they never overheard McKnight say that troublemakers and the Union would be eliminated if the plant reopened.

McKnight admitted that employees asked him about the possibility of the plant reopening. However, according to McKnight, he always responded simply that he did not know.

Discussion

Zelma McKnight was a supervisor under the direct supervision of Manager of Engineering and Maintenance Richard Bishop. The alleged comments made by McKnight are similar to the comments Bishop made to Alvin Bethany (above). I am convinced, on the basis of the entire record, that several supervisors, including Christensen, Bishop, and McKnight, felt that the Union and "troublemakers" within the Union contributed to the closing of the Pascagoula plant. Therefore, I find that the probabilities are that McKnight made the threats as testified by Waltman and Page.

Moreover, I do not credit McKnight on the basis of my observation of his demeanor. I do not believe that McKnight replied to numerous questions about possible reopening by simply saying that he knew nothing.

During the time of those conversations McKnight along with Bishop and others were involved in efforts to organize a more efficient operation at Pascagoula. Obviously, grievances oftentimes have a detrimental effect on efficiency. Respondent's contention that it was not bothered by increased grievances does not wash in view of the strong emphasis the reorganization group placed on streamlining their operations. McKnight admitted that there was an increase in the number of grievances filed, and that those grievances affected his operation by taking people from their work "to go to the union meetings and so forth."

Waltman testified that McKnight occasionally mentioned "that the union wouldn't be there [when the plant reopened] to write grievances on him, and giving him

[4] This matter was not alleged as an 8(a)(1) violation. However, I find that the conversation occurred, and I will consider that in subsequent findings herein where such considerations are material to the particular issue at hand.

hard times, is the way [McKnight] put it." I am convinced and find that Waltman and Page testified truthfully. I do not credit McKnight. Nor do I credit the testimony of those employees who currently work for Respondent.

C. *The Refusal to Hire*

As shown above, the credited evidence in support of the 8(a)(1) allegations demonstrates that it was Respondent's intent through its supervisory force to eliminate the Union. The initial decision regarding hire at Sun Coast rested with John Christensen. According to Christensen, he delegated that responsibility to three of his high-level supervisors, Richard Bishop, Lee Dodge, and Ed Furby.

As shown above, credited evidence demonstrated that Respondent's supervisory hierarchy felt that the Union and grievances under the collective-bargaining agreement contributed to Quaker Oats' decision to close. Other evidence demonstrated that it was not unusual for supervisors to blame the Union for Quaker Oats' problems at Pascagoula. Former employees Corinthian Smith and James Shannon credibly testified that Supervisor Ronald Landrum told employees, before the plant closed, that grievances were a nuisance to him and to management, and that when the plant reopened, it would be without a union.

The record proves that Respondent, through John Christensen and his supervisors, was motivated to eliminate the Union when the plant reopened on July 19, 1982. The General Counsel contends that the plan to eliminate the Union followed two routes: (1) The Company planned to deny reinstatement to hardcore union supporters, and (2) Respondent planned to deny recognition to the Union.

The alleged refusals to hire

In analyzing these allegations, it is important to distinguish the instant situation from a discharge case. Here, the General Counsel presented no evidence contesting Respondent's decision to employ 51 hourly employees as opposed to the 70 employed by Quaker at the time of closing. Therefore, the critical query must involve whether Respondent discriminatorily selected for employment employees other rather than the alleged discriminatees, because of their protected activities.

In consideration of the above issue, I shall consider: (1) whether the particular employee was associated with the post-1977 union activities in light of my finding above of Respondent's demonstrated animus; (2) whether the particular employee was discriminatorily denied employment;[5] and (3) whether the evidence established that that particular alleged discriminatee would have been denied employment in the absence of protected activity.

[5] In consideration of this issue, I note that General Counsel did not prove that Respondent's asserted basis for selecting employees was, in and of itself, illegal. Therefore, as to each individual, I shall apply the standard used by Respondent. The factors used were (1) number of years of canning factory experience, and (2) demonstrated *good* work performance (see letters from Respondent to Hankins of the NLRB Regional Office (G.C. Exhs. 22 and 23)).

a. *Jack Crowley*

There is no doubt that Crowley was visibly involved in protected activity. Crowley was elected president of Local 540 in 1977 after he campaigned on a platform to process grievances. Crowley estimated that he was involved in the processing of approximately 170 grievances. After serving as president for 2-1/2 years, Crowley served as steward and chief steward until the plant closed. Crowley testified that he and Andy Hammond had words regarding the filing of grievances during meetings in 1977 and 1978. According to Crowley, Hammond threatened to discharge him in 1978 when Crowley brought up grievances being filed with black employees. Hammond testified that he did not recall having those disputes with Crowley.

Regardless of my determination as to whether the Crowley-Hammond arguments occurred in 1977 and 1978, it is clear, and I find, that Respondent was aware of Jack Crowley's deep involvement in the post-1977 union. The record, and especially that portion noted in discussions above, clearly established that Respondent was motivated to rid itself of Jack Crowley.

Therefore, I shall now consider whether the record shows that Crowley was discriminatorily rejected for employment.

As indicated above, Respondent allegedly based its employment decision on two factors: (1) seniority and (2) work performance.

(1) Seniority

The record includes a maintenance department seniority list dated June 25, 1982. Twenty-two employees appeared on that list. Jack Crowley, who was originally hired by Quaker on August 14, 1972, appears as the 18th employee on the seniority list. Only four employees are listed as junior to Crowley. None of those four junior employees were hired by Respondent. Additionally, seven employees listed as senior to Jack Crowley were not hired. One of those seven is listed as "disabled," and another is alleged discriminatee Mary C. Long.

On the basis of the above evidence, which was not disputed by the General Counsel, I find that Jack Crowley did not qualify for employment by Respondent on the basis of his seniority.

(2) Job performance

Respondent offered testimony which included testimony from a former supervisor of Jack Crowley to the effect that Crowley did not perform his work satisfactorily. That former supervisor, Lonnie Roberts, is not presently employed by Respondent. Crowley, in his testimony, contended that he was a competent employee.

Work review evaluations in the record show that Jack Crowley was rated "marginal" on maintenance skills in March and April 1979. No other work review evaluations were received in evidence. Columns for good, satisfactory, marginal, and unsatisfactory appear on the evaluation form.

The General Counsel offered "change notices" for Jack Crowley from Quaker Oats business records. Those

notices which were dated in 1972, 1973, and 1974 list Crowley as a trainee and list his "quality of service" as good. Ratings of excellent, good, fair, and poor were included on those forms.

Change forms submitted also include three dates, January 6, 1975, and August 24 and 31, 1981. The 1975 form lists Crowley's "new job class" as "maintenance man" and the "good block" under quality of service is checked. Both the 1981 forms appear to represent increases in pay and list, as "reason," "operation of seniority." On those two 1981 change forms, no rating is given under "quality of service."

Despite the confusion over the quality of Crowley's performance, Crowley did admit that he was not skilled at electrical work or at reading blueprints. He admitted that he performed no troubleshooting work and that he was not a certified welder. Crowley admitted that he was once asked by Supervisor McKnight to waive seniority in order to permit Eddie Mims[6] to return to the maintenance department. Crowley admitted that he has taken only 2 of over 18 training courses offered for maintenance employees.

In addition to the above, Respondent offered testimony through Manager of Engineering and Maintenance Richard Bishop to the effect that all the needed skills in maintenance were covered by hiring employees, many of whom having more than one of the skills required, who appeared before Jack Crowley on the seniority list. No evidence in the record rebutted that testimony.

In view of the above, I am unable to find that Respondent treated Jack Crowley with disparity. The record does not support a finding that but for his union and other protected activities, Jack Crowley would have been selected for employment. The record does show, as alleged by Respondent, that in consideration of seniority and work performance, a full employee complement was hired from those employees senior to Crowley. The record failed to show that any of the employees hired lacked competence or that their prior work performance was unsatisfactory.

The General Counsel correctly questioned Respondent's contention that its supervisors did not consult work records before making the decision on selection of the work force. However, that fact does not establish a violation. If the record had developed discrepancies between work records and testimony from supervisors, I may have questioned that testimony and, perhaps, credited documentary evidence on the issue of work performance. However, in the case of Jack Crowley, the records failed to show such a discrepancy. Therefore, I find that discrimination was not proven as to Crowley.

b. *Henry Davis*

Davis worked for Quaker from 1973 until the plant closed on June 25, 1982. His last job was "Depalletizer Operator" under the direct supervision of Fred McKnight. Lee Dodge was head of the canning department over Fred McKnight. Dodge selected employees from canning for employment with Respondent.

[6] Mims is also an alleged discriminatee in these proceedings.

(1) Union activities

Davis joined the Union around 1974. About 2-1/2 or 3 years before the plant closed in 1982, Jack Crowley appointed Henry Davis to the position of shop steward. Davis estimated that he filed 20 or 25 grievances for other employees.

Davis testified that while he was shop steward, first Jack Crowley was president, then John Tucker. Eugene Sipp was recording secretary and treasurer, Dave Sewell was vice president, and Curtis Sanderson was one of the shop stewards.

(2) Seniority

Henry Davis was 16th on the canning department June 25, 1982 seniority list. The list included a total of 27 employees. Of those 15 employees with more seniority than Henry Davis, 11 were hired by Respondent. Of the four not hired, one, Fannie Mae Williams, a depalletizer operator, did not apply and another, Robert G. Heston, was disabled. The two others with more seniority than Henry Davis that were not hired were Dorothy Mae Williams who, like Davis, was a depalletizer operator, and Jack S. Schmiers, a "clean-up leaderman."

Of the 11 employees with less seniority, four were hired. One did not apply, one was disabled, and five were not hired. No one formerly employed as a "depalletizer operator" was hired. The only Quaker "depalletizer operators" were Fannie Mae Williams, Dorothy Mae Williams, and Henry Davis. The four employees junior to Henry Davis that were hired by Respondent, included two "cereal unloaders," a "blender operator," and a "closer attendant."

(3) Job performance

Davis admitted that when he was assigned to the "closer attendant" job, he could not keep up and was disqualified from working that position. When operating a forklift, Davis backed into a post on one occasion and lifted into and bent one of the production lines on another occasion. He also admitted spilling a pallet of 10,000 cans. Davis was removed from the job of greasing machines because he was "putting too much grease in the machines." Davis was unable to hold an unloading job because the ladder he had to climb to measure syrup was "too high for [him] to climb up."

Davis received a written warning on October 7, 1980, for urinating in one of the cans at his work station on the depalletizer. Davis admitted that he had done that on other occasions and that female employees complained that the cans he used to relieve himself got mixed in with the other cans on the sanitary line and the workers got urine all over their hands.

I sympathize with Davis. He impressed me as an honest man. However, the record did not reveal the existence of any jobs at Respondent for which Davis was qualified. As shown above, no depalletizer operators were hired by Respondent and, by his own admissions, Davis had shown an inability to handle other positions.

Although Davis' union activities may have been a source of concern, the record demonstrates that Henry

Davis would have been denied employment by Respondent in the absence of protected activities.

c. *Mary Long*

Mary Long was hired by Quaker on June 25, 1955. She served as janitor from 1969 until the plant closed on June 25, 1982. Her last immediate supervisor was J. B. George. George worked under the supervision of Mark Chamberlain who was directly under John Christensen. When the plant closed, Long was the only janitor at the plant.

(1) Union activity

Before 1977, Long was a shop steward once in the late '60s. She had been a member of the Local since 1955. After the Union became more aggressive under Jack Crowley, Long became financial secretary for Local 540 around 1977. She was on the Local's negotiating committee for its last three contracts with Quaker, and she was on the Local's negotiating committee for a special agreement for an experimental project with sardines.

(2) Seniority

Mary Long was at the top of the maintenance employees June 25, 1982 seniority list. Twenty-two employees were listed as junior to her. Ten of those twenty-two were hired by Respondent. Long was replaced by an employee from the casing department, Swetlena Goff.

Goff was not employed as janitor when Quaker closed, and there is no evidence showing that she had janitorial experience. Goff was employed by Quaker in 1976—some 21 years after Mary Long.

Additionally, Goff was not a member of Local 540. She testified that she notified Quaker that she had dropped out of the Union in 1978. As shown below, Goff circulated a petition to decertify Local 540 in September 1982.

(3) Job performance

Long credibly testified that she never received writeups or criticism of her work during the 27 years she worked for Quaker. She testified without rebuttal that shortly before the plant closed in June 1982, Mark Chamberlain complimented her work:

> Yes, used to before the plant closed, he'd come by the garbage can and helped me with the garbage can, and told me that he knew it had been hard, but—it was a lot of work, but I had kept the plant real clean, and he appreciated the way I had kept the front up in there trying to sell the plant, and he felt like what I had done had helped to sell the plant, and he just wanted me to know that he appreciated it.

Long testified without rebuttal that John Christensen and Supervisor J. B. George complimented her work:

> Q. I see. How about Mr. Christensen, did he ever talk to you about your job?
>
> A. Well, once he—maybe more than once, several times when he would see me, he told us that myself and Margaret Boyd, another employee there, that our names were all over Chicago for keeping the office like a hospital.
>
> Q. I see. And how about your supervisor, J. B. George, did he ever talk to you about your job?
>
> A. Yeah, each time I come in contact with Mr. George, he would tell me "looking good, looking, keep up the good work."

Neither Chamberlain nor George was called to dispute Long's testimony. Christensen first testified that after cutting janitors from two down to one, Mary Long complained that she could not do all the work. Christensen testified that he understood that was why she was not rehired. Later, Christensen testified that he observed that Long was not cleaning the offices up to standard.

Richard Bishop testified that restrooms were not cleaned while Mary Long was the lone janitor. Zelma McKnight testified there were several areas that needed attention when Long was janitor. Both Bishop and McKnight testified that Mary Long frequently complained about her health.

Discussion

Unlike the situation with employees mentioned above, there is no documentary evidence demonstrating that Mary Long performed her work poorly. Long's testimony that she was complimented by all her supervisors, George, Chamberlain, and Christensen, is unrebutted. I was impressed by Long's demeanor. She testified comfortably with apparent candor. I shall credit her testimony.

Neither Bishop nor Zelma McKnight, who testified against Long, supervised her work.

No one testified that Long was ever written up, or spoken to, as to poor quality work. Long testified that she was never spoken to or disciplined.

Therefore, I am unable to credit testimony that Long's work was inferior. It was Quaker's policy to discipline employees when necessary, as shown regarding other alleged discriminatees. Long testified without contradiction that she was never disciplined in her 27 years with Quaker Oats.

In view of the above, I find that Respondent refused to employ Mary Long in violation of its asserted guidelines. Mary Long should have been selected for employment on the basis of being the most senior employee in the maintenance department and having an unblemished work record.

Mary Long was deeply and visibly involved in the affairs of Local 540 after 1977.

Respondent's hostility to the activities of the Union from 1977 is shown above. I find that Respondent's asserted bases for the discharge of Mary Long were pretextual and the true reason was her involvement in union affairs after 1977.

In view of my findings above, and especially in consideration of the fact that Mary Long was the only janitor employed by Quaker Oats on June 25, 1982, I find that

the record evidence does not show that Mary Long would have been denied employment absent her protected activities.

d. *Eddie Mims*

Eddie Mims was hired by Quaker on October 4, 1972. Mims worked in the maintenance department. He worked in the boiler room for the 3-1/2 to 4 months before the plant closed on June 25, 1982. Like all the other alleged discriminatees, Mims applied for work with Respondent but was not hired.

(1) Seniority

Mims was one of the most junior maintenance department employees. He ranked 19th out of 22. None of the employees below him were hired by Respondent. Neither of the two employees immediately above him in seniority, Jack Crowley and Arnold Martino, were hired. However, Martino was listed as disabled. Of the 18 maintenance employees with more seniority than Mims, only 10 were hired by Respondent.

(2) Work performance

Respondent contends that its major problem with Mims' job performance involved his temper. Former Supervisor Lonnie Roberts testified to a series of incidents during 1977, 1978, and 1979 when Mims lost his temper and became abusive. Roberts testified that Mims threatened him physically on numerous occasions during that period of time. Mims admitted that he and Roberts had arguments. However, Mims attributed those occurrences to Roberts having "racial problems." Roberts is white. Mims is black. Mims denied that he ever threatened Lonnie Roberts.

On April 14, 1982, Mims had a run in with his supervisor at that time, Harry Winnett. Subsequently, a meeting was held with Andy Hammond, Harry Winnett, Grant Murry, Union Steward David Sewell, and Mims. Hammond pointed out that Mims had been loud, insulting, threatening, and insubordinate. Mims, in turn, accused his supervisors of being prejudiced. Mims stated that he was "not going to tolerate it."

Findings

Obviously, employees are protected under the Act from discipline because they vigorously prosecute grievances under their collective-bargaining agreement. In the case of Eddie Mims, some of Respondent's evidence regarding his intemperate behavior occurred in the context of grievance proceedings. On other occasions, Mims may have been protesting what he viewed as racial discrimination by supervisory personnel. However, the record shows that, on several other occasions, Mims had run-ins with supervisors, including Lonnie Roberts and Harry Winnett, which did not involve protected activity. The record shows that on numerous occasions, Eddie Mims appeared to become irrational in his anger over what should have been nothing more than a minor incident. One such incident which was noted by former Supervisor Roberts in his personal records[7] (quoted in part) follows:

> I stopped & touched Eddie on the left shoulder, as he turned around I told him to get off the phone & back to work, the reason I told him in this manner was that I saw a football sheet in front of him, I then told him to put that thing up as I have told you before you are not to bring them to work.
>
> Eddie got verry upset at this time & said he was talking to his wife. I told him I didn't care who he was talking to, to hang up the phone, at this time Eddie became verry upset he started cursing & yelling at me about no M.F. was going to interupt him while he was talking to his wife. He then hit the phone receiver against the bottom of the phone booth. I told him to stay there, I went to the processing door to see if Eddie Furby was inside, I wanted a witness, Furby was not (no one was). At this time Eddie said something else on the phone and hung it up. I then followed him to the shop where I told him to come over to the lathe where Jack was. I told Jack I wanted him to know what had happened. Eddie yelled out, you dam richt, I will tell you what happen, I started telling Jack but didn't ged far. Eddie was yelling in my face, about no bonch of M.F.s was going to interupt him while he was talking to his wife not even John C, & he would tell him the same thing, I told him he would probably get the chance. I told Jack he was talking on the phone with a football card in front of him, he said (Eddie) you are a dam lyer. I ask him to show Jack what he had & he said what he had in his pocket was his business & no M.F. was going to see in it. At this time he was about 12 inches from my face & beating his fist on the belt guard on the lathe. [Sic.]

Mims admitted the above incident. However, he denied that he was upset or that he cursed Roberts. Unfortunately, from Mims' standpoint, the record demonstrates the occurrence of several instances similar to that above.

In view of the substantial evidence, including Mims' admissions, and the testimony of Lonnie Roberts and Andy Hammond, I am convinced and find that Eddie Mims had a number of serious disputes with supervisors during which he became loud and insubordinate. In making that finding, I note that one of the witnesses for the General Counsel, alleged discriminatee David Sewell, was not asked and did not testify in corroboration of Mims regarding the April 14, 1982 meeting with Andy Hammond, Winnett, and Murry. I must presume that Sewell would not have corroborated Mims if he had been asked about that incident.

I find that Mims' behavior was a justifiable basis on which to downgrade Mims' job performance. Additional-

[7] Roberts recorded in his personal record several other incidents involving Mims.

ly, as shown above, Mims lacked the necessary seniority to qualify for one of the jobs offered by Respondent.

Therefore, I find that Eddie Mims was not treated discriminatorily. Mims would not have been employed by Respondent in the absence of his protected activity.

e. *Curtis Sanderson*

Curtis Sanderson started working for Quaker Oats on January 19, 1970. He worked until the facility closed on June 25, 1982. At that time his job was forklift operator. Ronald Landrum was Sanderson's immediate supervisor. The department head over Landrum was Production Manager Lee Dodge. Sanderson applied for work with Respondent in early July 1982.

Sanderson was a member of the Union from shortly after his original hire date. Sanderson testified that, during the first 6 years of his employment, the Local had a reputation of being close to management and not pursuing employee grievances. Sanderson served as shop steward in 1979 and 1980 and processed some 15, 20, or 25 grievances.[8] In processing those grievances, Sanderson worked with Supervisors Furby and Ronald "Slim Landrum."

Evidence showed that Landrum was particularly hostile to the Union and to the filing of grievances. Former employee Corinthian Smith, who was a leaderman (manufacturing specialist) when the plant closed, testified as follows regarding a conversation with Landrum about 3 weeks before the plant closed:

> I said, "Well," I said, "I'm going to do the best I can long as I'm here." He said, "These other people," he says, " I feel sorry for them in a way," he said, "There's a lot of them going to be standing around with their mouth open, and it'll be too bad, because when Quaker Oats sell out," he says, "A lot of them won't be able to come back here, and we won't have to be bothered with them any more. It's hard to get along with them, and we just won't have to be bothered with them any more." And he says, "Nothing can help them then, because they'll be on the outside looking in." He says, "Because as far as the union's concerned, and all of that," he says, "It'll be done away with. Because I'm really tired of these grievance being filed against me, anyway," he said, "it's just getting a nuisance. Every time you turn around it's just grievance, grievance."
>
> He says, "But it won't be long, and it'll all be over." He said, "No union, and grievance—filing grievance will help then, because another company will have it, "take it over." That's the conversation we had that day.

Smith testified to another conversation with Landrum about a week later. Employee James Shannon was also present:

> Okay, so he—he say, "Smitty, you've never ever refused to do what I tell you to do," says, "But, I'm going to tell you," he says, "It's a job around here to supervise some of these people today. They're slow about doing it, they don't want to—act like they don't want to do it," he says, "and if you try to push them too hard, they're going to have grievances up against you," he says, "it's just pretty rough on you. Like I told you back there," says, "It's all winding down, it's just winding down to where I won't have to be going through this stuff." He said, "Of course, you take these grievances they're having written up on me and filing against me, and all that," he says, "then I got to put up with it," he says, "it's just getting to be a nuisance with it." He said, "But it won't be long before all this will be over," he says, "and most of them's going to be standing on the outside looking on the inside, it just be something else to do." He says, "I feel sorry for them," he says, "But I don't think the company going to hire them back," he says, "they won't have no help if we get them back, going in the grievances or what not, won't accept every," says, "I don't believe they'll accept them back here any more."

James Shannon testified that he recalled a conversation with Corinthian Smith and other employees present with Ronald Landrum where Landrum told them that the plant would close down, and he would hire some of them back but Landrum guaranteed there would be no union.

Ronald Landrum denied discussing the Union with Smith or Shannon. He denied telling them what could occur to the Union if the plant reopened. I was not impressed with Landrum's demeanor. Both Corinthian Smith and James Shannon demonstrated good demeanor. Neither is alleged as an alleged discriminatee herein and neither has anything to gain through this proceeding. Their testimony appeared logical, and I credit their testimony.

In view of Sanderson's involvement in the grievance procedures with Ronald Landrum, it is apparent that Landrum's remarks to Smith constitute threats to not rehire Sanderson after the plant reopened.

The testimony of Lee Dodge demonstrated that Ronald Landrum was instrumental in selecting which employees under his supervision at Quaker would be rehired by Respondent. Landrum rejected Sanderson as an employee for Respondent. On the basis of the above facts, I find that Ronald Landrum was motivated to reject Sanderson because of his activities on behalf of Local 540.

I shall now consider whether Respondent discriminated against Sanderson by applying the guidelines set forth in Respondent's statements of position to the Board.

(1) Seniority

Curtis Sanderson ranked fourth on the Quaker manufacturing department seniority list for June 25, 1982. Two of the three employees senior to Sanderson, Corin-

[8] Ronald Landrum testified that he was unaware that Sanderson was an officer in the Union. Landrum did not deny that Sanderson was shop steward or that Landrum was involved in the processing of grievances with Sanderson.

thian Smith and James Shannon, did not apply for employment with Respondent. The other employee senior to Curtis Sanderson was David Sewell, another alleged discriminatee that was denied employment.

There were 14 employees on the seniority list for the manufacturing department. Only two were hired by Respondent. Those two, Howard L. Walters classified as meat handler and Willie L. Tanksley classified as laborer, ranked 11th and 12th on the seniority list.

Curtis Sanderson was classified as manufacturing specialist on June 25, 1982. Manufacturing specialist was the most skilled, highest nonsupervisory ranking position in the department.[9]

(2) Work performance

Ronald Landrum testified that Curtis Sanderson was not a "willing worker." Landrum and Lee Dodge said that Sanderson took excessive breaks and talked too much. Landrum characterized Sanderson as not being cooperative. He said Sanderson "would be disagreeable" sometimes after receiving a work order. However, Landrum admitted that he never wrote up Sanderson for poor work or other work performance infractions. He admitted that Sanderson had a fair "amount of ability."

According to Sanderson's testimony, he received a number of writeups before his marriage in 1975. However, since his marriage, Sanderson has received only one other writeup.[10] The testimony of Dodge and Landrum failed to show that they were aware of those pre-1976 disciplinary writeups on Sanderson. Dodge and Landrum did not include the writeups in their alleged basis for refusing to hire Sanderson.

Sanderson testified in dispute with Dodge and Landrum, that he was never cautioned about taking excessive breaktime, or wandering away from his work station, and he was never late for work.

I credit Sanderson's account of his work performance.[11] Sanderson was open about his writeups and he demonstrated excellent demeanor. Although Respondent contended his work performance was poor, that evaluation was not documented even though it was the practice at Quaker to write up employees in similar instances. I find that the assertions of Landrum and Dodge as to Sanderson's work performance were untrue and were advanced as a pretext in order to avoid hiring Curtis Sanderson.

The record demonstrates, and I find, that Curtis Sanderson was denied employment by Respondent because of his union related activities while he worked at Quaker Oats. In consideration of the objective factors of seniority and work performance, Sanderson should have been hired.

f. *David Sewell*

David Sewell was hired by Quaker on January 12, 1970. At the June 25, 1982 plant closing, Sewell, like Sanderson, was classified as manufacturing specialist under the supervision of Ronald Landrum. Sewell applied for work with Respondent but was told by Lee Dodge that he "didn't make the list."

Sewell was shop steward, then chief shop steward during the presidency of Jack Crowley. Subsequently, Sewell was elected vice president under John Tucker. After Tucker's presidency, Sewell became president of Local 540. He was Local president when the plant closed on June 25, 1982. During his time as chief steward, vice president, and president, Sewell served on some 15 to 20 grievance committees. He testified that some of the grievance discussions became "heated."

(1) Seniority

David Sewell was the most senior of those manufacturing department employees that applied for work with Respondent. No one senior to him in that department was hired by Respondent.

(2) Work performance

David Sewell was categorized similarly to Curtis Sanderson by both Lee Dodge and Ronald Landrum. According to Dodge, Sewell did not work well on his own, lacked initiative, and took excessive breaks. Landrum testified that Sewell took excessive breaks and was not a willing worker.

On the other hand, David Sewell testified that he was never criticized for his work.

I credit Sewell. It is unbelievable that an employee as incompetent as Dodge and Landrum would have us believe they had in, David Sewell would be promoted to and maintained in a leaderman position. Despite Dodge and Landrum's testimony to the contrary, the collective-bargaining agreement at section 5.10(b) provides that Sewell could not hold the leaderman position unless he had the ability. Moreover, despite Dodge's indication that Sewell was always an unsatisfactory employee, there was no documentation to that effect.

As in the case of Sanderson, I find that Respondent's assertions as to the reasons Sewell was not hired were pretextual. Sewell would have been employed, but for his union activities, under an objective application of the seniority and work performance guidelines which Respondent claimed it applied.

g. *Eugene Sipp*

Eugene Sipp was employed by Quaker from August 28, 1972, until the June 25, 1982 closing. He was classified as a meat handler under Ronald Landrum.

Sipp became active in the Union in 1977 when he became shop steward. He filed four or five grievances. After about a year as steward, Sipp became recording secretary for the Local. He held that job until the plant

[9] Although Respondent contended that employees reached the position of manufacturing specialist solely through seniority, the collective-bargaining agreement at sec. 5.10(b) indicates that although preference is given the senior applicant for a position, "[N]o employee shall be selected unless he has the ability to perform the job within 30 working days."

[10] Sanderson had a dispute with another employee in the break room. Sanderson told the other employee to stop cursing in the presence of an employee's wife and child. Sanderson received a 3-day suspension for threatening to harm the other employee.

[11] Additionally, Sanderson was supported by the testimony of David Sewell. Sewell worked as leaderman over Sanderson and Eugene Sipp (see below) and testified that Sanderson and Sipp "did excellent work."

closed. As recording secretary, he served on the grievance committee which consisted of the Local president, vice president, and recording secretary. On the management side during the grievance meetings, those present would include the particular supervisor involved in the grievance, along with Andy Hammond, Bob Chamberlain, and sometimes John Christensen.

Sipp was also on the negotiating committee after 1977.[12] Sipp served on the grievance committee regarding the sardines experiment.[13]

(1) Seniority

Sipp ranked eighth on the June 25, 1982 seniority list from the manufacturing department. However, none of the seven more senior employees were hired by Respondent. Those seven included David Sewell and Curtis Sanderson. The only manufacturing employees hired by Respondent were Howard L. Walters and Willie L. Tanksley. Both were junior to Sipp.

(2) Work performance

Ronald Landrum admitted that Eugene Sipp performed his job well. According to Landrum, "[w]hen [Sipp] performed [his work], he performed it good." However, according to Landrum, Sipp, like Sanderson and Sewell, was not a willing worker and he took excessive breaks.

Lee Dodge described Eugene Sipp as "a person with a lot of ability. Natural ability but again wouldn't perform, wouldn't use his ability, excessive breaks, and absent from his work area."

Again, as in the case of Sanderson and Sewell, Respondent produced no documentation[14] in support of its assertion that Sipp took excessive breaks and was not a willing worker.

Sipp candidly testified that after 1977, he received no oral or written criticism of his work from his supervisors. Sipp testified that he was continuously complimented on his work and that he and another employee were frequently selected to do the inventory because of their ability. I was impressed with Sipp's demeanor, and I credit his testimony in full.

As in the case of Sanderson and Sewell, I find that Respondent refused to hire Sipp for pretextual and spurious reasons. If Respondent had applied its objective guidelines of seniority and work performance in a nondiscriminatory fashion, Sipp would have been hired in July 1982. I find that he was unlawfully denied employment because of his union activities after 1977.

[12] As part of its defense, Respondent claimed that it hired several employees who were deeply involved with the Union at Quaker. Sipp corroborated other evidence by testifying that those employees who are listed below did not play an active role in union affairs after the signing of the 1979–1980 collective-bargaining contract: D. L. Davis, Cumbest, Colin Brown, Bert Rea, Tanner, Willie Tanksley, and Ralph Bethany

[13] According to Sipp, during one of the meetings over the sardine experiment in 1981, John Christensen remarked that "the Company was used to getting what they wanted from the Union."

[14] Sipp testified that he did receive one writeup in 1977 when he and two other employees went home without authorization.

D. *The Alleged 8(a)(5) Violation*

On June 25, 1982, when Quaker Oats closed its Pascagoula, Mississippi canning plant, it was party to a collective-bargaining agreement with Local 540 which was to be effective from January 24, 1980, until January 24, 1983. The contract applied to maintenance and production employees at Quaker's Pascagoula facility. Local 540 had exclusively represented the employees in the Pascagoula bargaining unit for a number of years before 1980.

Following its close on June 25, the Pascagoula facility was sold to Sun Coast Foods, Inc. (Respondent). On July 19, 1982, Sun Coast opened and resumed the operation formerly conducted by Quaker Oats using the same facility. Sun Coast employed 51 hourly employees. All 51 formerly worked for Quaker Oats at the same facility. Quaker Oats' payroll at the time the facility was closed included some 70 hourly employees.

Additionally, Sun Coast employed several supervisors that were employed by Quaker Oats including General Manager Christensen, Meat and Processing Manager Lee Dodge, Engineering and Maintenance Manager Richard Bishop, Purchasing and Planning Manager Andy Hammond, and several lower level supervisors.

According to the testimony of International Chemical Workers Union Representative Hubert Mills,[15] after Quaker Oats announced on April 29, 1982, that the plant would close, he met with John Christensen and Andy Hammond on May 6, to discuss the effects of the closing. During that meeting, Mills stated to Christensen:

> Well, if you find a buyer will you agree to get him to—inform them that there's a union here and get them to accept our contract?

Christensen then replied:

> Well, you're getting the cart before the horse. We've got to find a buyer first.

Mills met again with Hammond on June 24, 1982, to discuss the closing. Mills asked if a buyer had been found. Hammond replied, "[N]o, they had some lookers."

At a June 29, 1982 meeting Hammond again told Mills they had no buyer. At a June 30, 1982 meeting Mills was again told by Hammond they had no buyer. Mills then asked Hammond why the local newspaper had a story that Sun Coast Foods was buying the plant. Hammond replied:

> "Well, I don't know," says, "I understand that some people got some options on it, but we didn't have a buyer."

Mills then replied:

> Well, we want to negotiate with you on the sale of this, and taking these people back and all, and when

[15] Mills demonstrated excellent demeanor. In large measure, his testimony was not contested. I credit his testimony.

you find out who's buying the plant, will you let me know?

Nevertheless, Mills was never advised about the sale of the plant. Mills had the Union's legal department check on Sun Coast Foods. He was advised that Karl Wiesenburg, Pascagoula, Mississippi, was the registered agent for Sun Coast Foods, Inc.

On July 7, 1982, Mills sent a bargaining demand letter to Wiesenburg. Approximately a week after July 7, Karl Wiesenburg left a message for Mills stating that he did not have authority to bargain on behalf of Respondent.

On August 5, 1982, Mills again wrote Wiesenburg. He informed Wiesenburg that he had learned that the sale of the Quaker Oats plant to Sun Coast was finalized on July 15, 1982. Mills again advised Wiesenburg that the Union represented the plant's employees. He requested to meet concerning those employees and, if Wiesenburg lacked authority to bargain, that Wiesenburg advise him of the name and address of the person who had authority.

On August 16, Wiesenburg wrote Mills advising that he is Sun Coast's registered agent. Wiesenburg also stated that he had forwarded Mills' letter to John Christensen.

Having heard nothing further, Mills sent a bargaining demand letter to John Christensen on September 8, 1982. Mills stated that he would file charges with the Labor Board unless he heard something by September 14, 1982.

On September 13, 1982, Andy Hammond called and agreed to meet with Mills on September 22, 1982. Those arrangements were confirmed by Hammond in a September 14 letter wherein he also stated that Respondent does not intend to "assume the labor agreement between" Quaker Oats and the Union.

On September 16, Hammond wrote Mills canceling the September 22 meeting. Hammond stated that 35 of their 51 employees had presented Sun Coast with a petition stating they did not wish the Union to represent them.

Since September 16, Respondent has not agreed to recognize and meet with the Union.

Finding

There is no doubt that Respondent is the successor to Quaker Oats at Pascagoula. Although there was a brief hiatus [16] in operation from June 25 to July 19, 1982, there was continuity of the same business operations; Respondent used substantially the same work force as Quaker; Respondent employed substantially the same supervisory hierarchy; and Respondent manufactured the same product. (*NLRB v. Burns Security Services*, 406 U.S. 272 (1972).)

Although The General Counsel does not contend that Respondent had an obligation to bargain before setting initial terms and conditions of employment, it is clear, and I find, that Respondent's bargaining obligation attached no later than the start of operations on July 19, 1982. At that time it had employed a full complement of 51 hourly employees and all those employees were former Quaker Oats bargaining unit employees. (*Ranch-Way, Inc.*, 203 NLRB 911 (1973); *Turnbull Enterprises*, 259 NLRB 934 (1982).) Therefore, whether the critical date on which the bargaining obligation attached is determined by the bargaining demand (*Pre-Engineered Building Products*, 228 NLRB 841 (1977)), or the date when a full complement was employed (*Pacific Hide & Fur Depot*, 223 NLRB 1029 (1976), enf. denied 553 F.2d 609 (9th Cir. 1977)), it is clear that Respondent was obligated to recognize and bargain with the Union on July 19, 1982.

Before July 19, 1982, the Union had demanded recognition. On July 7, 1982, the Union made its demand on Respondent's registered agent Karl Wiesenburg. Even before that date, the Union made its demand for recognition on May 6 and June 24, 29, and 30, 1982, through John Christensen and Andy Hammond. Despite the status of Christensen and Hammond on those dates, it is clear that they both became agents of Respondent on or before July 19, 1982 and, at that time, they were fully aware of the Union's desire to be recognized by Respondent and to meet with Respondent and negotiate.

From before July 19, 1982, Respondent was dilatory in treating the Union's demand for recognition. Neither Hammond nor Christensen advised the Union that Sun Coast had purchased the Quaker Oats plant even though they agreed to do so on June 30, 1982. After its demands on Christensen and Hammond and its July 7 and August 5, 1982 demands on Agent Karl Wiesenburg, the Union received no response from Respondent until September 13, 1982.

During that delay, Respondent was engaged in activity violative of Section 8(a)(1) and (3) as shown above.

The general rules in successor situations is that the majority status of the predecessor's union is presumed absent a showing that the successor employer had a good-faith doubt as to the majority status of the union which must be based on objective considerations (*Celanese Corp. of America*, 95 NLRB 664 (1954); *Saks Fifth Avenue*, 247 NLRB 1047 (1980)). Moreover, the employer must show that the objective considerations were known to it at the time of withdrawal and were raised in a context free of employer unfair labor practices (*Computer Sciences Corp.* 236 NLRB 266, 281 (1978); *Dayton Motels*, 212 NLRB 553 (1974); *Orion Corp. v. NLRB*, 515 F.2d 81 (7th Cir. 1975)).

The circumstances here demonstrate that the above conditions were not satisfied and Respondent did not demonstrate that it acted in good faith when it withdrew recognition.

As shown above at the time of Respondent's withdrawal, the alleged objective considerations were raised in the context of unfair labor practice violations. Moreover, it appears obvious that Respondent was already in violation of Section 8(a)(5) when it withdrew recognition on September 16, 1983.

On July 19, 1982, when Respondent started production, it was faced with prior demands to bargain from the Union. Those demands had been made to Respondent's general manager John Christensen, to its purchasing and planning manager Andy Hammond, and to its regis-

[16] See *Grico Corp.*, 265 NLRB 1344 (1982), where a hiatus was found not to affect the finding of a successorship relationship.

tered agent Karl Wiesenburg. Additional demands were made by the Union on August 5 and September 8, 1982. By not recognizing the Union on July 19, 1982, Respondent violated Section 8(a)(1) and (5) of the Act.

Respondent, of course, contends that it recognized and agreed to meet with the Union during a September 13, 1982 phone conversation between Andy Hammond and Hubert Mills. Those arrangements were confirmed in Hammond's September 14 letter to Mills.

According to Purchasing and Planning Manager Andy Hammond, Respondent's supervisor for casing in the warehousing department Frank Murry, was asked by employee Swetlena Goff to supply the wording for an employee petition.[17] Goff told Hammond that "she didn't want the Union to carry the plant and wanted to let Mr. Christian[sen] know how the employees felt." The employees' petition contains the following heading:

> We the following employees, do *not* wish for the International Chemical Workers Union to represent us. The following employees names are listed below.

Subsequently, according to Swetlena Goff, she showed the petition to Supervisor Zelma McKnight and asked McKnight to permit her to circulate the petition during her working time. McKnight told her he did not care. Goff circulated the petition during her working time.[18] The petition contains 35 signatures. Each signature is dated. The dates are September 14, 15, and 16, 1982.

According to Hammond, Swetlena Goff gave the completed petition to Supervisor Zelma McKnight. McKnight gave the petition to Manager of Engineering Richard Bishop who passed it on to John Christensen. Christensen gave the petition to Hammond. On September 16, Hammond wrote the withdrawal of recognition letter to the Union.

Under the above circumstances, I find that Respondent violated Section 8(a)(1) and (5) by refusing to recognize and bargain with the Union from July 19, 1982. Respondent unreasonably delayed responding to the Union's numerous demands for recognition during a time when it, as successor to Quaker Oats, had an obligation to recognize the Union. During that unreasonable delay, Respondent engaged in activity violative of Section 8(a)(1) and (3). Moreover, immediately after its delayed recognition, upon being presented with a petition prepared with the assistance of two of its supervisors, Respondent withdrew recognition and canceled its scheduled meeting with the Union.

Where, as here, the predecessor employer was party to a collective-bargaining contract with the Union, the successor must give the Union a reasonable period in which to negotiate in the absence of employer unfair labor practices. Here, the Union was deprived of any opportunity to negotiate.

II. RESPONDENT'S ADDITIONAL 8(A)(1) DEFENSE

Respondent correctly contends that several of the alleged 8(a)(1) violations occurred before its creation. The record demonstrates that Respondent was incorporated on June 29, 1982, and that it started operation on July 19, 1982.

The complaint did not allege, and the General Counsel did not show, that Respondent's predecessor committed 8(a)(1) violations, and that Respondent was aware of those violations at the time of its purchase. The General Counsel did show that supervisors of both the Respondent and its predecessor engaged in certain 8(a)(1) conduct before the predecessor sold the facility but at a time when the closing and sale of the facility was anticipated.

Obviously, such conduct demonstrates animus and motive on the part of those supervisors. However, as to the technical 8(a)(1) violations, I agree with Respondent. An employer cannot be found guilty of 8(a)(1) violations when those violations occurred before its creation.

The General Counsel does allege that Respondent violated Section 8(a)(1) during the John Christensen phone conversation with Mary Long. As shown above, Mary Long credibly testified that she called Christensen about a week after July 19, 1982, to inquire why she had not been called back to work. Christensen told her that he had directed his supervisors to carefully screen applicants and to select employees so as to avoid the same predicament they had before. In isolation, Christensen's above comments may appear innocuous. However, at that time, the employees had been advised by several supervisors, including Christensen, Bishop, Zelma McKnight, and Ronald Landrum, that the new employees would not have the Union, and that troublemakers would be eliminated. When Long called, Christensen was responding to her inquiry as to why she had not been called to work. Christensen's reference to thorough screening of applicants and avoidance of the former "predicament" was obviously designed to tell Long that Sun Coast was not going to get into the predicament of dealing with the Union and grievances. I find that Christensen's comments evidence violations of Section 8(a)(1).

CONCLUSIONS OF LAW

1. The Respondent, Sun Coast Foods, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. International Chemical Workers Union, Local 540, is a labor organization within the meaning of Section 2(5) of the Act.

3. By threatening employees that it would carefully screen applicants and avoid its former predicament, Respondent threatened that it would select job applicants so as to avoid having to deal with the Union and the filing of grievances, and thereby engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

4. All maintenance and production employees of the Company's canning plant at Pascagoula, Mississippi, excluding all office and clerical employees, laboratory em-

[17] Frank Murry did not testify. Swetlena Goff testified at the hearing that employee Mary Bell wrote the heading on the petition and that Frank Murry supplied her and Bell with the Union's name. However, in October 1982, Goff told Andy Hammond that she asked Supervisor Murry to supply the words for the petition.

[18] Goff testified that on other occasions she was permitted to solicit money if "someone was sick."

ployees, watchmen, guards, and all supervisory employees as defined in the National Labor Relations Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

5. At all times material herein, and especially since July 19, 1982, International Chemical Workers Union, Local 540, has been, and is, the exclusive collective-bargaining representative of the employees in the above-mentioned appropriate unit.

6. By refusing to recognize and bargain with the Union since July 19, 1982, Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) and (5) of the Act.

7. By refusing to employ Mary Long, Curtis Sanderson, David Sewell, and Eugene Sipp, since on or about July 19, 1982, Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act.

8. Respondent has not otherwise engaged in violation of unfair labor practices as alleged in the complaint

THE REMEDY

Having found that Respondent has engaged in unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act. As I have found that Respondent unlawfully refused to employ Mary Long, Curtis Sanderson, David Sewell, and Eugene Sipp, I shall recommend that Respondent be ordered to offer those employees immediate and full reinstatement to the jobs they formerly held with Quaker Oats or, if those jobs no longer exist, to substantially equivalent positions without prejudice to their seniority or other rights and privileges. I shall further recommend that Respondent be ordered to make whole Mary Long, Curtis Sanderson, David Sewell, and Eugene Sipp for any loss of earnings they may have suffered as a result of the discrimination against them. Backpay may be computed with interest as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and *Florida Steel Corp.*, 231 NLRB 651 (1977).[19]

[Recommended Order omitted from publication.]

[19] See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962).

Dextra Industries, Inc. *and* Shopmen's Local Union No. 455, International Association of Bridge, Structural and Ornamental Iron Workers, AFL-CIO

G & G Fabrication Inc. *and* Shopmen's Local Union No. 455, International Association of Bridge, Structural and Ornamental Iron Workers, AFL-CIO. Cases 29-CA-7277, 29-CA-7395, 29-CA-7610, and 29-CA-7786

30 January 1985

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS HUNTER AND DENNIS

On 18 January 1983 Administrative Law Judge Harold B. Lawrence issued the attached decision. Respondents Dextra Industries, Inc.[1] and Dextra Industries of Deer Park, Inc.,[2] the Charging Party,[3] and the General Counsel filed exceptions and supporting briefs, and Respondent G & G Fabrication Inc. filed an answering brief.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[4] and conclusions as modified and set forth in full below.[5]

The judge concluded, and we agree, that Respondent Dextra violated Section 8(a)(1), (3), and (5) of the Act by refusing to negotiate a collective-bargaining agreement with the Union and thereafter terminating its shop employees in order to avoid its bargaining obligation with the Union. However, the judge further found that Respondent Dextra violated Section 8(a)(1) and (5) by failing to bargain with the Union over its decision and the effects of its decision to subcontract the work performed by the shop employees. We reverse this latter finding of unlawful conduct because the General Counsel did not allege in the complaint that Respondent Dextra failed to bargain with the Union over its decision and the effects of its decision to subcontract the work. Accordingly, we find the judge's remedy to be inappropriate, and we shall, therefore, alter it to remedy only the violations properly alleged and found.

Since we agree with the judge's finding that Respondent Dextra Deer Park is an alter ego of Respondent Dextra, we agree with his conclusion that both of these entities are liable for remedying the violation found. In fashioning a remedy, however, we will not require Respondent to resume operations with its own employees because to do so would be unduly burdensome and is unnecessary to effectuate the policies of the Act. Rather than force the resumption of this operation, we find that the policies of the Act will be sufficiently fulfilled by our full make-whole order covering the terminated employees. Cf. *Great Chinese American Sewing Co.*, 227 NLRB 1670 (1977).

AMENDED REMEDY

We shall require that Respondent Dextra and Dextra Deer Park bargain collectively with the Union with respect to the terms and conditions of employment in the event that Respondent resumes employing employees to perform unit work.

We shall also order Respondent Dextra and Dextra Deer Park to make whole all employees who were discriminatorily terminated on 30 June 1979, for any loss of pay suffered by reason of the discrimination, by paying to each of them a sum of money equal to the amount he or she would normally have earned as wages from the date of their discharge until such time as each secures, or did secure, substantially equivalent employment with other employers or until Respondent reinstates them. Backpay and interest are to be computed in accord with the Board's usual formula set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and *Florida Steel Corp.*, 231 NLRB 651 (1977). See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962).

In the event that Respondent Dextra and/or Dextra Deer Park decide to resume employing employees to perform unit work, we shall order that Respondent offer to as many of the discriminatorily discharged employees as business volume permits reinstatement to his or her former position or, if such position no longer exists, to a substantially equivalent position, without prejudice to his or her seniority or other rights and privileges.

ORDER

The National Labor Relations Board orders that the Respondent, Dextra Industries, Inc. and Dextra Industries of Deer Park, Inc., Deer Park, New York, its officers, agents, successors, and assigns, shall jointly and severally

1. Cease and desist from

[1] Hereafter referred to as Dextra.

[2] Hereafter referred to as Dextra Deer Park.

[3] Hereafter referred to as the Union.

[4] In sec. II,A,1 of his decision, the judge stated that Dextra is a wholly owned subsidiary of Dextra Deer Park, whereas Sidney Ochs, president of both entities, testified that his wife, Ruth Ochs, was the sole shareholder of Dextra. This inadvertent error is insufficient to affect the results of our decision.

[5] Member Dennis finds merit in the General Counsel's exception to the judge's failure to find that Respondent Dextra violated the Act when its president told employees that, if they "would go non-union," he would make them foremen; that he would like to "work something out with the men" after the collective-bargaining agreement expired; and that he had found a pension fund and hospitalization plan better than those of the Union. In context, the statements constituted inducements to the employees to reject the Union in violation of Sec. 8(a)(1) and direct dealing with the employees rather than the Union in violation of Sec. 8(a)(5).

(a) Refusing to bargain collectively with Shopmen's Local Union No. 455, International Association of Bridge, Structural and Ornamental Iron Workers, AFL–CIO over the terms and conditions of employment of employees in the following contractual bargaining unit:

> All production and maintenance employees including plant clericals, employees of the company engaged in the fabrication and/or manufacture of all ferrous and non-ferrous metals, iron, steel and other metal products, including plastic products, all maintenance employees of the company engaged in maintaining machinery and equipment and in other maintenance work in or about the company's shop or shops, and excluding office clerical employees, superintendents or employees who are represented by any other union affiliated with the AFL–CIO with whom the company has signed a collective-bargaining agreement.

(b) Discharging employees for the purpose of avoiding the obligation to bargain collectively with the above-named or any other labor organization representing their employees.

(c) In any other manner interfering with, restraining, or coercing employees in the exercise of any rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action which is necessary to effectuate the purposes of the Act.

(a) On request, if the Respondent resumes employing employees in the unit, bargain collectively with Shopmen's Local Union No. 455, International Association of Bridge, Structural and Ornamental Iron Workers, AFL–CIO as the exclusive bargaining representative of all employees employed in the aforesaid bargaining unit with respect to wages, hours, and other terms and conditions of employment.

(b) Offer Hank Martin, Kevin Duffy, Michael Frenna, Thomas J. Greean, Sal Sfalanga, and Melvin Davis immediate and full reinstatement to their former jobs to the extent that business volume permits in the event that the Respondent decides to employ employees for unit work or, if their jobs no longer exist, to substantially equivalent jobs without prejudice to their seniority or other rights and privileges and make them whole for any losses they may have suffered by reason of the discrimination against them in the manner set forth in the section of this decision entitled "Amended Remedy."

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Mail to the last known addresses of the employees above named copies of the attached notice marked "Appendix."[6] Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be mailed immediately to the employees and posted at a location in the Respondent's office at 135 East Industry Court, Deer Park, New York, where notices to employees are customarily posted, and shall be maintained by it for 60 consecutive days in conspicuous places where notices to employees are customarily posted. The Respondent shall take reasonable steps to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that the allegations not specifically found herein are dismissed.

[6] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
>
> To form, join, or assist any union
>
> To bargain collectively through representatives of their own choice
>
> To act together for other mutual aid or protection
>
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT refuse to bargain in good faith with Shopmen's Local Union No. 455, International Association of Bridge, Structural and Ornamental Iron Workers, AFL–CIO with respect to wages, hours, and other terms and conditions of employment of the employees in the appropriate unit. The appropriate unit is:

All production and maintenance employees including plant clericals, employees of the company engaged in the fabrication and/or manufacture of all ferrous and non-ferrous metals, iron, steel and other metal products, including plastic products, all maintenance employees of the company engaged in maintaining machinery and equipment and in other maintenance work in or about the company's shop or shops, and excluding office clerical employees, superintendents or employees who are represented by any other union affiliated with the AFL–CIO with whom the company has signed a collective-bargaining agreement.

WE WILL NOT discharge employees for the purpose of avoiding our obligation to bargain with the above-named or any other labor organization representing our employees.

WE WILL NOT in any other manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, if we resume employing employees in the appropriate unit, bargain in good faith with the Union with respect to wages, hours, and other terms and conditions of employment.

WE WILL offer Hank Martin, Kevin Duffy, Michael Frenna, Thomas J. Greean, Sal Sfalanga, and Melvin Davis immediate and full reinstatement to their former jobs to the extent that business volume permits in the event that we decide to employ employees to perform unit work and WE WILL make them whole, with interest, for any losses suffered by reason of our discriminatory discharge of them. Backpay will run from the date of discharge until such time as they secure substantially equivalent employment with other employers or until we reinstate them.

WE WILL mail a copy of this notice to the last known addresses of the above-named employees.

DEXTRA INDUSTRIES, INC.; DEXTRA INDUSTRIES OF DEER PARK, INC.

DECISION

STATEMENT OF THE CASE

HAROLD B. LAWRENCE, Administrative Law Judge. This consolidated case was heard before me at Brooklyn, New York, on August 9 and September 7, 8, and 9, 1982. Shopmen's Local Union No. 455, International Association of Bridge, Structural and Ornamental Iron Workers, AFL–CIO (the Union) filed the charge in Case 29–CA–7277 on June 22, 1979; in Case 29–CA–7395 on August 7, 1979; in Case 29–CA–7610 on November 19, 1979; and in Case 29–CA–7786 on February 14, 1980. The hearings were held on the basis of the allegations set forth in a second order consolidating cases, amended consolidated complaint and notice of hearing, dated February 29, 1980, and a notice of motion to amend complaint, which was granted, and on amendments to the complaint made at the hearing.

The substance of the allegations is that Dextra Industries, Inc. (Dextra), a metal fabricator, violated Section 8(a)(1), (3), and (5) of the Act by refusing to bargain with the Union respecting a collective-bargaining agreement to replace an existing agreement scheduled to expire June 30, 1979; bargaining directly with the employees; promising the employees unspecified improvements in working conditions in order to induce the men to abandon their support of the Union; and discharging six employees in order to undermine the Union. Dextra and a corporation known as Dextra Industries of Deer Park, Inc. (Dextra Deer Park) are alleged to have been joint employers during the period from September 1, 1980, to October 1, 1981, and to have been alter egos and a single employer from and after that date. Dextra, Dextra Deer Park, and a company known as G & G Fabrication, Inc. (G & G) are alleged to have been joint employers since October 1, 1981, "formulating and administering a common labor policy." Accordingly, it is contended that Dextra Deer Park and G & G were obligated to offer reinstatement to the employees who had been discharged by Dextra on June 30, 1979, and to negotiate with the Union on a new collective-bargaining agreement.

The answers interposed by Respondents[1] deny all allegations of wrongdoing and deny that any violation of the Act has been committed. G & G, besides denying that it had any alter ego or joint employer status with either Dextra or Dextra Deer Park, interposed an affirmative defense of nonjoinder of a necessary party, namely, Local 424 of the United Brotherhood of Industrial Workers, which is the certified representative of its own metal-working employees.

The parties were afforded full opportunity to be heard, to call, examine and cross-examine witnesses, and to introduce relevant evidence. Posthearing briefs have been filed on behalf of the General Counsel, and on behalf of Respondents Dextra, Dextra Deer Park, and G & G.

On the entire record and based on my observation of the demeanor of the witnesses and the manner in which they gave their testimony, and after consideration of the briefs submitted, I make the following

FINDINGS OF FACT

I. JURISDICTION

There is no issue as to jurisdiction, the jurisdictional allegations of the complaints, as amended, having been admitted in the answers and clarified at the hearing. Dextra was a Kentucky corporation engaged in the business of metal fabrication, which at the times pertinent to the complaint annually shipped from its place of business

[1] Dextra was formally dissolved effective October 31, 1981. It has appeared in this proceeding by counsel who interposed answers to the complaint and to all amended complaints, including the last one issued on March 19, 1982. However, at the hearing, it was represented by its president Sidney Ochs with the concurrence of the General Counsel.

Deer Park, Long Island, New York, directly to points ide the State of New York products valued in excess 50,000. Dextra Deer Park, incorporated in the Dis- of Columbia, was also alleged to have been continu- y engaged in the steel fabrication business and to e shipped products in excess of $50,000 on an annual s since October 1, 1982, from Deer Park to points ide of New York State. As appears below, despite Respondents' denial, I find that the allegation that tra Deer Park and Dextra were alter egos correctly s the fact of the matter and that Dextra Deer Park inued the business of Dextra after that corporation formally dissolved.

ccordingly, I find that Respondents are and have at all times material herein engaged in commerce in the meaning of Section 2(2), (6), and (7) of the

also find that the Union is now and has been at all s material herein a labor organization within the ning of Section 2(5) of the Act.

II. THE UNFAIR LABOR PRACTICES

. The Refusal to Negotiate a New Contract and the Discharge of the Shop Employees

1. The General Counsel's case

extra, a wholly owned subsidiary of Dextra Deer , was engaged in the metal fabrication business. It essed machinery not elsewhere available on Long d which had the capability of cutting, pressing, ing, and otherwise shaping sheets of iron and steel. equently, a great deal of this type of work was sub- racted to Dextra by other contractors. Dextra ed to Deer Park from Syosset, Long Island, when principal of Dextra, Sidney Ochs, constructed a ing there. He held title in the name of a corporation vn as Anchor Engineering Corporation; the name later changed to Dextra Industries of Deer Park, This corporation owned the building and the equip- located in it, and leased it all to Dextra.

ost of Dextra's employees had been with it in Syos- At that time, it was not a union shop, but Ochs did nave any aversion to a union. When the Company ed to Deer Park, it became a union shop without opposition from him. He first entered into a collec- bargaining agreement with the Union, effective July 73. The bargaining unit was as follows:

All production and maintenance employees includ- ing plant clericals, employees of the company en- gaged in the fabrication and/or manufacture of all ferrous and non-ferrous metals, iron, steel and other metal products, including plastic products, all main- tenance employees of the company engaged in maintaining machinery and equipment and in other maintenance work in or about the company's shop or shops, and excluding office clerical employees, superintendents or employees, who are represented by any other union affiliated with the AFL–CIO with whom the company has signed a collective- bargaining agreement.

The expiration date of the last collective-bargaining agreement was July 1, 1979, pursuant to an extension agreement dated January 12, 1978. Early in the year, the Union requested that Ochs negotiate a new contract. However, from March through June, Ochs steadfastly maintained that he was not in a position to negotiate because he was undecided as to whether or not he would remain in business. The Union pointedly reminded him, in writing, that he was legally required to discuss closure and its effects upon the employees with the Union. Ochs never did.

William Colavito, the union president, testified that he had meetings with Ochs on March 20, in late April or early May, at the end of May, on June 11 and 25, on July 2, and later in July, and that Ochs had not, during any of these meetings, expressed an intention to go out of business or to subcontract work. According to Colavito, Ochs maintained that he was going to sell or lease the building and go into the consulting business; he would stop fabricating. As early as the March 20 meeting, Ochs was complaining that he had lost $4000 the previous year and that he intended to let the collective-bargaining agreement expire.

Ochs undoubtedly made such statements to Colavito. Colavito is a credible witness and Ochs is a man who tends to think aloud. The exchange of letters between the Company and the Union reflects Ochs' determination to change matters without announcing any specific decision if, in fact, one had been reached. On March 20, the Union sent Dextra a letter asking what its intentions were. Having received no response it notified Dextra on April 12 of its intention to make changes in the contract due to expire on June 30. Dextra responded to that letter on April 18, notifying the Union that it was going to discontinue the operations of the shop. Notwithstanding this exchange of letters, Colavito testified that, when he conferred with Ochs in late April or early May, and asked for a response to the Union's March 20 letter, Ochs said he could not give the Union an answer at that point because he did not know what he was going to do. Ochs gave Colavito the same answer the next time they met, stating that he would need time and that he had been too busy to think things out. At the June 11 meeting, Ochs announced that he would not sign another contract with the Union; that he had not yet made up his mind what he would do; and that he would use the period from and after July 1 to make up his mind. In response to Colavito's suggestion that they sign a contract and work out some means of cutting costs and taking advantage of the Company's skilled work force, Ochs' response was that he preferred to have the plant remain idle and borrow money from the bank to keep it that way, and liquidate after 6 months.

On June 25, Colavito raised the question of the provision to be made for the employees. He testified that Ochs professed that he still had not made up his mind, but reported that he had had no bids from any purchaser or potential lessee; however, he had been too busy and would wait until after July 1. At that point, Colavito asked him about his intentions, insofar as the men were concerned, because the contract was about to expire.

Ochs stated he would give the men their sick leave and a layoff notice. At the meeting on July 2, when Colavito commented that sale or lease potential would be greater with the business running, Ochs' response was that he needed "flexibility."

Ochs' lawyer was present at their last meeting. He asserted that Dextra would not sign another agreement with the Union as long as a particular clause was in it. Colavito offered to discuss the matter, whereupon the lawyer stated that Dextra would not sign another agreement anyway.

On August 30, the Union sent Dextra another letter inquiring in detail about its intentions, which began: "You have indicated that you plan to terminate operations at your plant and go out of business."

It is apparent that, in these meetings, the Union maintained a position of readiness to bargain at all times. At their meeting, in late April or early May, Colavito and Ochs reviewed in a general fashion the question of the quantity of work, operating cost, and similar matters. At their next meeting, Colavito offered to look into the actualities of the nonunion competition if Ochs would give him specific details. However, he was unable to investigate because Ochs never provided the information despite his promise to do so. Ochs declined to sign any contract. Ochs did not dispute Colavito's expressed opinion that there was adequate work to keep the men employed; his contention was that the work was not profitable and that the Company was losing money on it.

At the meetings on June 11 and July 2, Colavito again urged Ochs to sign a contract, cut overhead costs, and keep the men working. All such suggestions were rebuffed.

According to Colavito, contributions to the union fund, not wages, were the big problem. Over the years, Ochs had been delinquent in making the requisite contributions and the Union had been lenient in its collection attempts. At the last meeting prior to the expiration of the contract, Colavito indicated to Ochs that the Union would be willing to work out different contractual rates of contribution for some of the production items and for new employees, but Ochs' position remained unchanged.

2. Dextra's defense

Dextra's defense is that it went out of business. Ochs testified that he did not recall the exact language of his conversations with Colavito during their many meetings, but he told Colavito many times that Dextra had lost money continuously since he put up the building at 135 East Industry Court in Deer Park and showed a profit from time to time only because Ochs drew a very small salary. Ochs was even losing money on his investment in the building because Dextra was unable to pay its rent to Dextra Deer Park. When he bid successfully on jobs, he lost money because his labor costs were two to three times those of the competition, which consisted of a number of cost-cutting enterprises scattered throughout the United States.

Ochs testified that his financial advisors, on the basis of their examination of his books and records, advised him in 1979 to go out of business immediately because he was losing money every day and had exhausted his ability to arrange financial assistance. Without financial assistance, he could not continue operations and pay the union benefits for which the business was obligated. His options were either to dispose of his inventory and pay off his debts, or to go into bankruptcy and lose his building and his home.

Ochs asserted that none of this seemed to make any impression on Colavito, whose only response, according to Ochs, was that Ochs should sign a contract with the Union and be successful.

All of the shop employees were discharged at the end of June 1979. The business was shut down for the first 2 weeks of July, but Dextra's customers were told only that the business was shutting down for 2 weeks. For several months thereafter, Ochs attempted to complete all of the work in the shop single-handedly. He kept only his office staff on payroll. This included the draftsman. After a while, he decided to rent the first floor of the premises, retaining the upper floor as an office and shop for Dextra Deer Park. G & G Fabricators, Inc. rented the lower floor under a 3-year lease. Ochs had subcontracted work to them since 1975, and he continued to do so after they entered into possession of the downstairs portion of the Deer Park building, the only difference being that now he subcontracted to them the type of work which they had formerly subcontracted to him, because the lease included rental of the equipment contained in the premises. G & G's employees were represented by another union. None of Dextra's employees applied for jobs with G & G and G & G did not offer them employment.

Formal dissolution of Dextra was effective as of October 31, 1981, on an application for dissolution filed on May 31, 1981. Its only undistributed assets are a bankruptcy claim against a former customer and a supply of steel.

There is no question but that operations were curtailed, but the testimony of Colavito and the men who worked in the shop during the spring of 1979, however, raises serious doubts that Dextra was actually discontinuing its operations. On the occasions when Colavito had meetings scheduled with Ochs, he made it a practice to confer with the men in the shop, and received reports of events and conduct which negated the idea of a termination of operations. While Ochs' responses and other statements to Colavito throughout the spring of 1979 indicated indecision with regard to the Company's intentions, Colavito was hearing from the men that Ochs had consulted a pension expert about the possibility of setting up a nonunion plan which would be better than the Union's; that Ochs had suggested the possibility of running a nonunion shop, with the men as foremen, over a new crew of nonunion employees hired off the street; that quantities of material and parts were being ordered which were inconsistent with a cessation of operations; that the Company had work, with orders coming in from several customers on a sustained, continuous basis; that the shop had embarked upon construction of an entirely new item, bagel ovens for Bagel Nosh, with a dozen ovens on order and new parts for them being delivered and stored on the premises.

Four of the six men who worked in the shop at that time testified. A stipulation was entered into between counsel respecting the testimony of a fifth employee who was not present at the hearing. Their testimony was that, during the period in question, Ochs attempted to persuade them to work with him on completion of an extension to the building, for which the foundation had been poured and unfabricated steel delivered. Ochs underwent the expense of sending the enormous brake machine off the premises for repair and repaired a damaged dye. They were building a bagel oven as a trial and there was talk of going into production with them. The amount of steel being brought into the shop was markedly increased, 30 tons of steel having been put on the shop floor in the very last week of June for use in filling an order from the Oliver Stove Company, a manufacturer of coal-burning stoves. Each stove required approximately 200 pounds of metal plate and Dextra conformed to its usual practice of ordering 30 tons of plate at a time. They also testified that at the time of the layoffs, the shop was extremely busy, with five bagel ovens waiting to be completed for the Bagel Nosh Company; work being done on all of the distribution buckets for the Hempstead Town recycling plant; work coming in from steady customers, such as Long Island Lighting Company; and work in the shop continuing on numerous short jobs and for customers who were not regulars, such as a company for whom they were working on an exhaust system.

An employee who stood on a picket line outside the premises throughout the second half of 1979 testified that work continued to be done at the premises during that period for former customers of Dextra and that Ochs was personally involved in it. He observed the customers' trucks and personnel coming and going, delivering, and picking up work. He observed that, on occasion, Dextra's draftsman assisted in loading their vehicles. He observed Ochs and the draftsman working on a piece of plate. He observed what he was sure, from his own past experience, was a conversation (which he could not, of course, hear) between Ochs and an unidentified person in which Ochs seemed to be instructing that person in use of the burning machine.

3. Analysis

The history of Dextra and Dextra Deer Park since 1979 fails to disclose actual liquidation and termination of the business operation which had been the core of Dextra's raison d'etre. It is understandable that someone discontinuing a business may sell off inventory and finish pending jobs at a carefully paced schedule so as to minimize the financial loss attendant upon termination of operations and personal liability on guarantees of business obligations. The methods pursued by Ochs present no such situation. He told the Union and the men in the shop that he would decide after June 30, 1979, whether he would stay in business or what he would do, asserting that the high cost of running a union shop was forcing him out of business. Yet he made no decision at the time he shut down Dextra and discharged the shop employees. He conceded in his testimony that to this very day he is undecided what he will do about the business, which has been conducted in the name of Dextra Deer Park since October 31, 1981. He rejected the Union's offer of a winddown agreement. He continued to accept new business, repair equipment, build inventory, instead of selling it off, and in other ways so conducted himself as to convince me that he attempted to circumvent the obligation to bargain with the Union on a new contract.

The testimony of the former employees finds confirmation in much of Ochs' own testimony, which clearly establishes that at the times pertinent to this case, no firm decision to go out of business had been made but rather that its continuation was contemplated. Significant factors were Ochs' concession that he intended to liquidate slowly; the fact that there was no corporate dissolution of Dextra until October 1981; the fact that the windup is still not complete; the fake announcement to the customers in July 1979 that the firm was closing for a 2 weeks' vacation; and the manifest desire not to sever business ties. Throughout the summer of 1979, from July 1 to September 30, Ochs single-handedly continued the operation; he testified that he worked 7 days a week until 2 a.m. each day to complete the work in the shop, performing all functions himself (shearing, bending, punching, forming, assembling, welding, and painting). However, this was manifestly not a matter of finishing off the pending jobs to avoid or minimize loss for he put a great deal of his time into the prototype oven for Bagel Nosh, obviously in anticipation of completing the orders he already had and getting further orders. Though the shop employees were discharged, Dextra continued to maintain a payroll of nonunit employees throughout the balance of 1979 and 1980. Four persons were on this payroll: Mrs. Ochs, a secretary, a cleanup or floor boy, and the draftsman, Galleta. Ochs kept Galleta on the payroll ostensibly for the purpose of running the office while Ochs got out the work. According to Ochs, Galleta "took the calls and handled the customers." However, there is evidence that Galleta wrote up the work orders of the work subcontracted to G & G, bringing it downstairs and dropping it on a desk in the G & G office and also helped load customers' trucks. Ochs gave an extremely interesting reason for subcontracting some of Dextra's work to G & G after that company moved into the Deer Park building: it was "because I was unable to move it from the building during the period when I was being picketed." Not only did Ochs refuse a winddown agreement with the Union, but he never responded to union inquiries about the termination except to tell Colavito at literally the last possible moment that he was discharging the men and paying them their sick leave.

While I find that Ochs did not promise a pension plan to the employees to induce them to abandon the Union or otherwise to affect their rights under Section 7 of the Act, I am nevertheless convinced by the evidence that he did investigate the feasibility of substituting another pension plan for that of the Union or, at the very least, that he looked into the relative merits of the available private plans and compared them with the union plan. This suggests an intention on his part to continue in business. Despite ample opportunity to do so, he offered no explanation in the course of his testimony. His remarks

to the men about potential nonunion operation, in the alternate forms of operation of a nonunion shop or by their going to work for a nonunion subcontractor, may be viewed in the same light, showing a state of mind which contemplated the continuation of business in one form or another for the indefinite future.[2]

Not to be overlooked are: the continued high volume of business activity in the spring of 1979, for a firm supposedly terminating operations, with work continuing to come in and inventory being maintained at consistent levels during April, May, and June 1979; Ochs' testimony that Dextra continued to purchase supplies, such as steel, after September 1979; and his assertions at the time of the hearing that he had yet to make a decision. In fact, his testimony about his current intentions with respect to Dextra Deer Park is strangely similar to what he had said in 1979.

At that time, he said he would close for a couple of weeks' vacation and make a decision. At the hearing, he said that he was going to do precisely the same thing to settle the fate of Dextra Deer Park. Ochs testified that Dextra Deer Park was not taking any orders "in order to find out what we're going to do, I again took a two weeks vacation period, so we're not taking any orders." He is telling people he is not filling orders at this time, but he nevertheless took orders, which he says are "in limbo." He admits to two or three outstanding orders. He offered no explanation of how he was keeping the customers whose orders are in limbo quiescent. (He says they have been notified, which makes it more remarkable.) He makes the statement, "At this time I'm not sure what my program is going to be." Ochs says he has orders pending with other subcontractors, which he refers to as necessary "to finish these few pieces, give them out." However, this is what he was supposed to be doing 3 years ago. Patently, his intention 3 years ago was not to achieve a speedy liquidation: he said as much, but with the implication that he was going to liquidate slowly. How slowly is something the Union and the employees could not have imagined at the time. At the risk of repeating the obvious, I must note that this liquidation was patently not the usual type, in the sense that a decision to terminate operations has been followed by steps taken to liquidate assets and liabilities as expeditiously as possible. In the case of Dextra, the process evolved in precisely the opposite manner.

The disparity between Ochs' words and deeds is wide with respect to every indicator of his true intentions. For example, with regard to inventory, Ochs testified that one reason the business had been so successful was that the maintenance of a very large inventory enabled him to provide the quick delivery the customers wanted, and the first step in liquidating the business was therefore to liquidate the inventory. He testified that "my only hope then was to cease operation as a fabricator and to subcontract my work so that I could clear up the large inventory. I think our statement at that time showed an inventory of $160,000. I wanted to take that inventory, finish work at hand, get additional work, produce that work, purchase nothing, if possible, after that, and then liquidate my debt. At that time, when my debt was officially liquidated, I wanted to cease operations." This makes it sound like the problem was the amount of money tied up in the steel inventory. Yet inventory was not only not liquidated, additional purchases were made. A stockpile of unfabricated steel remains in the building at Deer Park to this day.

The manner in which bank loans were handled is another indication of Ochs' true intentions. A businessman terminating a business cannot be criticized for desiring to extricate himself from sources of personal liability, but how indebtedness is handled is one way of determining if he is liquidating or attempting to continue operation of the enterprise, even if only until obligations are paid off. Three years after discharging the shop crew, Ochs testified that obligations of Dextra have been reduced "to a manageable amount." He owes a trade creditor about $18,000 and owes the Bank of Babylon between $30,000 and $35,000. The intent to pay these off is implicit. If the amounts are manageable and Ochs intends to do the necessary managing, it is hard to understand his asserted intention to go out of business in the near future.

Mention has already been made of the fact that the volume of business retained in house after June 30, 1979, is inordinately high for a business supposedly going into liquidation. Ochs testified that his financial advisers told him in 1979 that on the basis of their examination of his books and records they believed he should go out of business immediately because he was losing money every day and no longer had the capacity to arrange for financial assistance. The financial statements confirm the impression of the shop employees that Ochs' program was the reverse of the advice he claimed he was receiving. The 1978 volume was $800,000. The 1979 volume, even though Dextra was supposedly out of business for the last 3 months, amounted to $700,000. Ochs' explanation for this was that they had had a very busy spring and, when G & G moved into the building, Dextra was able to subcontract the work in the house and made shipments of approximately $130,000 in September and $110,000 in October, which substantially completed the work on the floor. The 1980 volume was $400,000 and the 1981 volume was $150,000.

Year	*Closing Inventory*	*Labor*	*Drafting*	*Subcontractor*
1978	$165,500	$149,563	$12,179	$ 15,261
1979	162,278	68,333	16,760	77,274
1980	51,278	3,225	18,190	110,120

Since, according to Ochs, Dextra had substantially completed the work on the floor by the end of October 1979, the foregoing figures strongly suggest that Ochs was taking in new business.[3] As a result, skepticism

[2] I do not credit Ochs' denial that he made any statement in this vein to any employee of Dextra.

[3] This observation is corroborated by the consolidated financial statements of Dextra Deer Park, which show that in the pertinent period inventory remained substantial and drafting expense and subcontracting markedly increased. The cost-of-sales figures for the fiscal years ending October 31, 1978, 1979, and 1980 show continued substantial operation

about his testimony regarding his intentions must be added to my skepticism respecting his contentions that his small salary and his health were major considerations in determining his course of action. His low salary, by itself, proves nothing—the acceptance of only a small annual salary taxable at normal income tax rates is a not unusual feature of current business investment practice, which often prefers deferred earnings or realization of the potential value of an investment on ultimate liquidation. As to the health argument, it suffices to note that, though Ochs mentioned to Colavito in May 1979 that he was ill and had high blood pressure, it was not a major point of discussion between them. Furthermore, there is no evidence in the record regarding his actual health and Ochs testified that, after discharging all the men in the shop, he personally continued working on the pending jobs, 7 days a week, until 2 a.m. every day.

The evidence which is credible thus establishes that Ochs was simply evading his obligation to negotiate with the Union on a new contract to replace the one that was about to expire. He had determined, not that he would go out of the metal fabricating business, but that he would operate without the Union. His actions show that plainly enough, but the statements which he made to the shop employees, quoted below in the next section, make it impossible to come to any other conclusion regarding his motivation.

B. *Direct Bargaining with the Employees and Promises of Improvements in Working Conditions*

Two refrains run through Ochs' conversations with his employees during the spring and summer of 1979. One is the argument that the Union undermined his ability to compete. The other is his skepticism with regard to the reliability of the union pension fund. Ochs felt strongly that the expenses involved in doing business as a union shop made his operation a losing proposition. At one time or another he expressed to each of the men his very strong desire to rid himself of the Union. For example, in an outburst to Michael Frenna, the shop steward, when the Union put a lien on his bank account in March 1979, Ochs said that he believed Colavito was trying to close him up as he had closed up other shops. During this conversation, Ochs repeated statements he had made on prior occasions to the effect that the Company was losing money. He showed Frenna figures in a book reflecting his contributions to the union funds. Frenna also quotes him as having made the following statement: "You know, if you six guys would go nonunion, we could put the new building up in the back. . . . You six guys would be kings—six foremen. We'll hire a bunch of guys off the street for minimum wage." The following week, Frenna was asked by Ochs for everybody's name, age, and date of birth, and subsequently Frenna saw Ochs in his office in the presence of someone who, from Frenna's description of the scene, appears to have been an insurance agent.

Thomas Greean, a union member for 28 years, testified that Ochs predicted that Greean would be unable to collect his pension because there would be no money in the union pension fund when he retired. Ochs told Greean that he was looking for a pension fund for the men and had found one better than the Union's. He also claimed to have found a better hospitalization plan than the one offered by the Union.

Kevin Duffy, another union member, quoted Ochs as saying that the Union was not doing its job because it was not organizing his nonunion competition; he wanted them to operate under the same disadvantages he did. Ochs said he wanted to work out something with the men but could not talk until after July 1, which, of course, was the day after the collective-bargaining agreement expired.

Ochs complained to Greean that the Union was bankrupting him: He was putting a lot of money into the union funds, he was losing jobs because he could not compete with nonunion shops, and he could not make money on the jobs he had because the Union was making his operating costs too expensive. On June 30, after the layoffs, Ochs telephoned Greean at home, apparently calling from the office. Ochs told Greean that he intended to lease his building to two companies, one of which had its own unionized work force. The other company, which was nonunion and lacked the skills of the Dextra work force, would be able to hire the Dextra shop people. It would have to be a nonunion shop. The order for 10 bagel ovens would ensure plenty of work and the prototype was still in the shop. Ochs said he had another order for five more ovens.

At the hearing, Ochs explained that the statements which he made to the men in the shop were not a matter of circumventing the Union, but rather of discussing a problem common to him and the others who had created the business. Such remarks were characteristic of the close relationship he enjoyed with these men. Telephone calls to them at home were not at all unusual. It went back to the beginning of the Company's history. Anchor Engineering Corporation had been engaged in a marina design. It was not a fabricating shop for heavy metal. The expertise in that area was brought in by Greean. When Greean and some of the others came in around 1968 or 1969, they gave the Company the capability for the bending and forming of heavy metal plate. A separate division of the Company was set up and the corporate name was changed to Dextra Industries, Inc. In the light of that background, he felt free to telephone men like Greean to let them know that he was no longer able financially or physically to continue with the operation of Dextra. As Ochs put it, "I told him I was seeking alternative methods of continuing this operation because I could no longer raise any more money. I have no houses to mortgage and no more bank loans to get."

To Henry Martin, Ochs put it as follows:

> Again,I discussed the Union in the sense that I could not, because of the Union benefits involved, continue the operations since I had no other source for money. In other words, my choice was to find a solution to dispose of my inventory, pay off my debts or go into bankruptcy, lose my building and lose my house.

The contradiction between these statements is apparent and I have noted that all of Ochs' statements, considered

together, amply support the conclusion that it was his intention to continue the business as a nonunion enterprise and thus evade the necessity of entering into a new collective-bargaining agreement with the Union. However, it is equally apparent that nothing contained in these statements supports the allegations that Ochs attempted to negotiate directly with the men or promised them benefits if they would abandon the Union.

Greean testified that Ochs never promised him anything in order to induce him to leave the Union, never interfered with his union activities, and never even suggested to him that he leave the Union. As a matter of fact, Ochs' experience with Greean had to have educated him to the fact that the men would not forfeit their union benefits and would only work in union shops. When Greean started with Dextra, he was already a member of the Union. Dextra was a nonunion shop. After Greean worked for Ochs for about a year, he decided to quit and switch to a union shop in order to keep his union benefits (hospitalization, pension). Ochs at that time promised him that when the Company moved from Syosset to the building he was putting up in Deer Park, the men could bring the Union in without opposition from him. That is what happened and Ochs could not have forgotten it.

The testimony of the employees establishes that

(a) Ochs made remarks to the employees about hiring nonunion labor and continuing operation with the six shopmen then employed acting as the foremen.

(b) He stated to some of the employees that he could obtain better health and pension insurance than that provided by the Union.

(c) He made inquiry respecting their birth dates and apparently consulted with an insurance or pension expert in his office.

These remarks by themselves do not establish a violation of the Act. There is no evidence that Ochs made them as part of an effort to induce the employees to sever their connection with the Union or otherwise abandon the Union. None of the employees testified that he asked them to leave the Union; there is explicit testimony that he never made such a suggestion to anybody at any time. Furthermore, Frenna testified that Ochs told him he needed the data regarding the men's birth dates to respond to an Internal Revenue Service inquiry. Frenna saw the list in the attache case of the visitor to Ochs' office, but Ochs did not introduce him to the visitor and said nothing about the nature of the business he was transacting with the visitor. There is no evidence in the record respecting the visitor's identity. Whatever Ochs was doing, he was keeping it a secret, which is patently not the way to persuade employees to follow any particular course.

Ochs' assertion that he could find a better pension system than the Union's sounds more argumentative than assertive of a known fact, and is linked to his general skepticism regarding the solvency of the union fund. It is certainly not linked to any promise made by him to any of the men.

I cannot believe that Ochs' suggestion about hiring a nonunion crew and making the shop employees supervisors was made or perceived as a serious proposal for several reasons. It seems to have been made in connection with the problem of constructing the annex to the building, rather than in the course of any discussion of the work of the bargaining unit. Such a proposal, of course, entails a substantial increase in payroll, both because of the larger work force and because, presumably, the men would earn more as foremen. The bottom line, however, is that Ochs knew his men: They were union men with a stake in the union benefit funds.

There is an additional consideration which brings me to the conclusion that Ochs did not commit these violations of the Act, and that is the basic inconsistency between the accusation and my findings with respect to the discharge of the employees. He is here charged with attempting unlawfully to interfere with the employees' rights under Section 7 of the Act by attempting to influence their conduct toward the Union. There was absolutely no need for him to do so. I have found that he pursued an altogether different plan, intentionally circumventing the Union by discharging the employees and, subsequently, subcontracting the work.

C. *Failure to Rehire the Employees: Dextra Deer Park*

It has already been noted that Dextra was a wholly owned subsidiary of Dextra Deer Park. The General Counsel contended that Dextra Deer Park and G & G were alter egos, and joint employers of the Dextra employees who had been discharged, and thus had an obligation to offer them reinstatement. The General Counsel's case rests on the basically undisputed proposition that Dextra Deer Park, in the period from June 30, 1979, to October 1, 1981, became something more than a real estate corporation, evolving into a "viable working corporation" (the General Counsel's description) or a "viable corporation" (Ochs' description) which took on the same kind of business as that which Dextra had handled, from the same customers, and subcontracted much of it out to G & G, which was operating in the premises and using the equipment owned by Dextra Deer Park which that corporation had formerly leased to Dextra.[4]

Ochs' testimony substantiated the General Counsel's position in many important respects. He testified that Dextra and Dextra Deer Park were owned and controlled by his wife and himself. Dextra Deer Park held the title to the property in Deer Park. Employees of Dextra and Dextra Deer Park were covered under one workmen's compensation insurance policy. Consolidated financial statements were prepared for the two corporations from 1971 through 1980. After the formal dissolution of Dextra, Ochs continued work on pending orders and took in new orders in the name of Dextra Deer Park, and occasionally mistakenly invoiced work in the name of Dextra. (He used the old Dextra printed invoice forms, typing in the words, "of Deer Park, Inc.") The number of Dextra customers whom he continued servicing through Dextra Deer Park was sufficiently large for

[4] The General Counsel originally contended that Dextra had transferred its assets and business to Dextra Deer Park, but the evidence showed that Dextra Deer Park had, in fact, owned the building and equipment and had leased it to Dextra.

him to have trouble remembering all their names without recourse to the corporate records. Ochs initially insisted that most of the customers who were serviced through Dextra Deer Park were new customers, apparently not cognizant of the fact that in his anxiety to avoid alter ego liability he was destroying the credibility of his contention that he was winding up the business. In any event, he conceded that there were some substantial accounts among the former Dextra customers which were taken over by Dextra Deer Park, such as the Long Island Lighting Company. Reviewing the accounts receivable ledger of Dextra Deer Park, Ochs testified that of those listed, 2 had never been customers of Dextra, 24 had been Dextra customers for whom Dextra Deer Park had done no work as of the time of the hearing, and 41 had been customers of both corporations. All jobs which were pending at the time of Dextra's dissolution were completed by Dextra Deer Park and Ochs allocated the proceeds between the two corporations.

Ruth Ochs, his wife, had acted as bookkeeper for both corporations. Examination of the Dextra Deer Park accounts receivable ledger revealed that pages from the Dextra ledger had been transferred to it. Ochs explained that this questionable procedure had been followed to preserve the credit information recorded on them.

The stationery of Dextra was used until the corporation was formally dissolved, and Dextra Deer Park work was on several occasions billed on those forms.

Ochs explained the consolidated balance sheets as a device to enhance the credit of Dextra, thus enabling it to obtain bank loans for its operations. While this unquestionably was their purpose, the evidence that his stratagem was used does not undermine, but rather reinforces, the inference that the operations were also consolidated.

The overwhelming evidence which is present in this case of interrelated operations, common management, common ownership and financial control, and centralized control of labor relations leads inexorably to the necessity to treat the two corporations as one employer.[5]

Accordingly, I find that Dextra Deer Park was an alter ego of Dextra and was obligated to rehire the employees whom Dextra had unlawfully discharged.

D. *Failure to Rehire the Employees: G & G Fabrication, Inc.*

The case against G & G as an alter ego or joint employer with Dextra and Dextra Deer Park is based on the showing which the General Counsel made that work was subcontracted to G & G, that G & G moved into the premises formerly occupied by Dextra and utilized the equipment located in the building, that it performed work for customers who had been serviced by Dextra and Dextra Deer Park and that it drew upon Dextra's inventory of unfabricated steel sheets in the course of performing some work subcontracted to it by Dextra or Dextra Deer Park.[6]

It appeared form the testimony of Elmer Gangloff that G & G started in the metal fabrication business in 1975, as a partnership of Elmer Gangloff and Harvey Gallagher. They are still the sole principals of the business. Gangloff testified in great detail respecting the manner in which, and the reasons why, G & G came to occupy the Deer Park building. As its business expanded, G & G's space requirements increased until by 1979 it needed 15,000 square feet for its operations. In that year, it acquired a customer which operated a fleet of extremely large vehicles, such as moving vans and 40-foot oil tank trucks, for which G & G was to do all painting and major repairs. G & G also anticipated building massive tank trucks and hydraulically operated car carriers. A large brake and a large shear are essential for such production. G & G thus needed premises with sufficient space to accommodate large vehicles and space suitable for its type of production, as well as a landlord tolerant of messy work in the building and of potential fire hazard.

Dextra Deer Park's property is a large building on one and 1-1/2 acres of land, with a very large shear and the largest brake on Long Island situated in it.[7] G & G and Dextra Deer Park were brought together for this transaction by one of several brokers whom G & G had consulted and the lease was negotiated for it by its own attorney.

Gangloff testified that 80 percent of the business of G & G is done on a subcontract basis, which is common in the metal fabrication industry. G & G had been doing work on a subcontract basis for Dextra and had subcontracted work to Dextra, since 1975. It was inevitable that it would continue to do work for Dextra after it occupied the building, since it had possession of the brake and shear. For the same reason, it acquired many of Dextra's former customers.

Ochs testified that during the period from 1970 to 1979, Dextra subcontracted work to between five and seven subcontractors and never gave all of its subcontracted work to G & G. However, there was a substantial ongoing relationship with G & G and a large volume of business was given to them. After September 1979, Dextra subcontracted at 75 to 80 percent of all the orders that came into it to G & G. He testified, nevertheless, that G & G was a completely independent operation. He asserted that he never consulted Gallagher or Gangloff or sought their opinion regarding financial matters, customers, or business; never sold them any interest in either Dextra or Dextra Deer Park or assigned any portion of the business of either corporation to them; that from 1975 through the end of August 1979, his only relationship with G & G was as a referrer of work to it; and that from September 1979 to August 1982, besides referring work to it, the only relationship with G & G

[5] *NLRB v. Transcontinental Theaters*, 568 F.2d 125 (9th Cir. 1978), denying enf. of 216 NLRB 1110 (1975).

[6] The General Counsel also contended that an unfavorable inference should be drawn from the fact that Dextra Deer Park and G & G offset each other's liabilities for work done and for rent and settled the balances. I cannot draw such an inference, however, as the practice appears to be nothing more than an expedient adopted by two companies doing a lot of business with each other which were hardpressed for cash (a circumstance which both Gangloff and Ochs readily admitted).

[7] This piece of equipment was described as a 400-ton press brake weighing 60,000 pounds.

was that of Dextra Deer Park's status as landlord. Initially, Ochs subcontracted work through Dextra while Dextra Deer Park was simply G & G's landlord; later, work was subcontracted through Dextra Deer Park as well. G & G was never consulted regarding the dissolution of Dextra and, in fact, Gangloff testified that he was unaware of it until the hearing in the present case. Conversely, Ochs never participated in business decisions of G & G.

The portions of the premises respectively occupied by G & G and the corporations controlled by Ochs were strictly separate. G & G had its own office space in the shop area which it leased on the first floor. The respective portions of the premises had separate entrances and egresses with separate locks, and no one from G & G had keys to the Dextra premises except the keys retained by Dextra Deer Park in its capacity as landlord.

The entire inventory of steel of Dextra Industries, Inc. was kept inside the premises in the southeast corner area of the building on the first floor. This was a portion of the premises leased to G & G and that violation of the lease was the subject of a lawsuit which was pending between G & G and Dextra Deer Park at the time of the hearing. It was not necessary for Dextra people to enter the premises to get at the inventory since it was being consumed in work done by G & G for Dextra. G & G Fabrication thus had possession of Dextra's inventory. According to Ochs, he "relied on their honesty and good will to report to me any and all materials used, and they used to give me a record of the plates that they used." I attach no great significance to the manner in which the inventory was handled, insofar as the corporate interrelationships are concerned, nor do I believe that the fact that G & G occupied the Dextra premises and did work for Dextra and Dextra Deer Park shows anything more than an arm's length relationship between G & G and the corporations controlled by Ochs. All of the facts which ignited and fueled the General Counsel's suspicions appear to have been satisfactorily explained. I discern no basis upon which any legal, financial, or other interrelationship can be found to have existed. There is no evidence that there was any consultation between Ochs and Gangloff and Gallagher respecting joint labor policy. The fact that G & G operates a union shop makes it difficult to believe that they would have refused to take on any of the former Dextra employees because they were union men. Operating with a full complement of employees of its own, and not rehiring the former Dextra personnel, it would have no occasion to negotiate with the Union representing the Dextra employees.

To read anything into the relationship between G & G and Dextra and Dextra Deer Park, beyond what the evidence so clearly indicated, is to indulge in speculation. Accordingly, I find that G & G and Dextra and Dextra Deer Park were not alter egos or joint employers of the men discharged by Dextra and that G & G was not obligated to offer them reinstatement or to negotiate with their Union.

As my factual determination requires dismissal of the complaint against G & G, its unmeritorious affirmative defense requires little discussion. The Union representing its employees was not a necessary party to these proceedings, which could be adjudicated in its absence. Nothing decided herein would have affected its rights unless I found that G & G was a joint employer, but even then, conflicting claims for representation could have been resolved under the auspices of the Board.

III. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The violations of the Act herein found to have been committed by the Respondent have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

CONCLUSIONS OF LAW

1. Respondents are employers engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. Respondent Dextra Industries, Inc. violated Section 8(a)(1) and (5) of the Act by failing and refusing to negotiate with the Union regarding the terms and conditions of a collective-bargaining agreement to replace the one that expired on June 30, 1979.
4. Respondent Dextra Industries, Inc. violated Section 8(a)(1), (3), and (5) of the Act by (a) discharging the following named employees: Hank Martin, Kevin Duffy, Michael Frenna, Thomas J. Greean, Sal Sfalanga, and Melvin Davis in order to avoid negotiating a new collective-bargaining agreement with the Union; (b) failing and refusing to reinstate or offer to reinstate the above-named employees to their former or substantially equivalent positions of employment, for the same reason; and (c) unilaterally subcontracting the work formerly performed by the employees and terminating their employment without bargaining with the Union about the decision to subcontract the work or about the impact of such subcontracting upon the employees.
5. Respondent Dextra Industries of Deer Park , Inc. violated Section 8(a)(1), (3), and (5) of the Act by failing and refusing, after October 31, 1981, to reinstate or offer to reinstate the employees, Hank Martin, Kevin Duffy, Michael Frenna, Thomas J. Greean, Sal Sfalanga, and Melvin Davis, to their former or substantially equivalent positions of employment.
6. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.
7. Respondent Dextra Industries, Inc. and Dextra Industries of Deer Park, Inc. did not engage in any unfair labor practices other than those found herein.
8. Respondent G & G Fabrication, Inc. has not engaged in the unfair labor practices alleged against it in the complaint herein.

THE REMEDY

I have found that Respondent Dextra never really suspended its operations, but continued them until its formal dissolution in October 1981, after which Respondent Dextra Deer Park, its alter ego, continued the oper-

ations, and that it continues to do so to the present day, though on a curtailed basis. Ochs testified that he is still undecided as to the future of the business, which is what he has been saying for 3 years. I shall therefore recommend that Dextra Deer Park reinstate the discharged employees to the extent that that is feasible, if necessary establishing a preferential hiring list, and that it be directed to negotiate with the Union in an effort to reach a collective-bargaining agreement and with respect to the impact upon the employees of the subcontracting of the work of the unit, attempting to reach such agreement as reflects the realities of the current situation, and that Dextra and Dextra Deer Park pay backpay.

Dextra was, and Dextra Deer Park remains, liable for reinstatement of the discharged employees and both are responsible to them for such losses of earnings as they may have incurred.[8] The corporations must be held liable for the monetary damages from the time they were incurred. The status of Dextra Deer Park as an alter ego of Dextra antedates the formal dissolution of the latter corporation and there is absolutely no question that both were controlled by Sidney Ochs. If liability of Dextra Deer Park were limited only to the period commencing from the time it openly avowed its role, a license would be given to employers to circumvent the Act by the simple device of substituting different alter egos from time to time.

Though Dextra is in dissolution, it has assets consisting of a bankruptcy claim against a former customer and a supply of unfabricated steel plate. The value of neither is established, but their existence is sufficient reason to make the order herein binding on Dextra as well as Dextra Deer Park. Therefore, I will recommend that Respondents Dextra and Dextra Deer Park, jointly and severally, be required to pay backpay from June 30, 1979, the date of the layoffs, until such time as any of the following four conditions may be satisfied: (a) Respondents, or whichever entity Sidney Ochs has last utilized for his business operations, and the Union reach an agreement with respect to the termination of operations;[9] (b) they bargain to a bona fide impasse; (c) the Union fails to commence negotiations within 5 days after receipt of Respondents' notice of their desire to bargain; or (d) the subsequent failure of the Union to bargain in good faith.

The backpay which I shall recommend to be paid to each employee shall be equal to the amount he normally would have earned as wages and other benefits from the date of discharge, June 30, 1979, to the date on which any of the foregoing contingencies occur, less net earnings during that period. The amount of backpay and interest thereon shall be computed in accordance with the decisions of the Board in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), *Florida Steel Corp.*, 231 NLRB 651 (1977), and *Isis Plumbing Co.*, 138 NLRB 716 (1962).

Of course, if the business of Dextra Deer Park permits the reinstatement of any or all of the employees, then the parties shall be directed to bargain collectively with respect to the terms and conditions of employment so as to arrive at an agreement to replace the collective-bargaining agreement which has expired.

The picture respecting the present condition of the business is murky. Ochs testified that operations have been sharply curtailed and that he has several orders on hand which, with the knowledge of his customers, are being kept "in limbo." He thus simultaneously concedes that he has not yet terminated operations completely and suggests that reinstatement is not feasible, for there is nothing left to bring the employees back to. The information available to the former employees and to the Union is, of course, limited to conditions as they existed several years ago.

In the face of such a paucity of reliable information, there can be no complaint if remedies are adopted which are sufficiently pliable to cover the situations embraced both in my findings of fact and in Ochs' own contentions, developed pragmatically on the basis of his own description of his present circumstances.

Respondents contend that they have suspended metal fabrication operations completely, but the gravamen of the complaint is that Dextra and Dextra Deer Park were alter egos which never went out of business completely, and I have found that to be the case. Nevertheless, the most appropriate remedies would appear to be those which have frequently been employed in situations in which employers have terminated business operations without negotiating with the unions concerning the impact upon their employees. I shall therefore recommend that Respondents, in addition to making the employees whole by payment of backpay, prepare a preferential hiring list from which the employees can be recalled and reinstated as business conditions permit, and that Respondents bargain collectively with the Union with respect to wages, hours, and other terms and conditions of employment in an effort to arrive at an agreement to replace the collective-bargaining agreement which has expired, or, in the alternative, with respect to the effects on the employees of the subcontracting of the work of the bargaining unit. I shall further recommend that Respondent Dextra Deer Park be directed to offer the employees, from such preferential hiring list, reinstatement to their former or equivalent positions.

The business of Respondents having been essentially a sole proprietorship, a direction that operations be resumed in the manner in which they had formerly been conducted would appear to be impractical, if Ochs is regarded as insincere, and unduly burdensome, if he is

[8] In many cases where backpay has been directed pending bargaining with respect to the effect of closing, the employer had given the employees no advance notice of the shutdown. See *Van's Packing Plant*, 211 NLRB 692 (1974). That basically is what happened in the present case, for Ochs was ambiguous with regard to his intentions until he actually laid the men off. For example, on April 18, 1979, he responded to the Union's request for a meeting to negotiate a new contract, dated April 12, by means of a letter which began with the following statement:

> Please be advised that it is our plan to discontinue operating a fabricating shop upon termination of this contract due to physical and financial reasons.

After asking the Union to advise the employees and stating that he would be happy to meet with the Union, Ochs concluded:

> As of this writing we have made no final decision as to the future of the company and the facilities it now uses for the conduct of its business. As soon as any pertinent information is available we will be happy to advise you.

[9] Backpay liability is not terminated merely by commencing bargaining. *National Family Opinion*, 246 NLRB 521 (1979).

credited with good faith and believed with respect to his assertion regarding his intentions.

Having found that Respondents have committed unfair labor practices, I shall recommend that they be directed to cease and desist from further infringements of employees' rights guaranteed by Section 7 of the Act. As the situation with respect to the business of Respondents is highly uncertain, I shall recommend that Respondents be required both to post the attached notice at the plant and office at 135 East Industry Court, Deer Park, New York, and to mail copies of it to the discharged employees.

[Recommended Order omitted from publication]

United Parcel Service, Inc. *and* Lodge 804, International Association of Machinists and Aerospace Workers, AFL–CIO. Case 9–CA–14987

30 January 1985

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS HUNTER AND DENNIS

On 23 September 1981 Administrative Law Judge Karl H. Buschmann issued the attached decision. The General Counsel and the Charging Party each filed exceptions with a supporting brief. The Respondent filed a cross-exception and a brief in support of that cross-exception and in response to the General Counsel's and the Charging Party's exceptions.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

[1] In adopting the judge's recommendation to dismiss the complaint we rely specifically on the evidence that stewards Tharp, Bryant, and DeZarn provided leadership to rank-and-file employees during an unprotected work stoppage. The Respondent may discipline stewards who instigate or provide leadership for a work stoppage in violation of a no-strike clause in the parties' applicable collective-bargaining agreement. See *Midwest Precision Castings Co.*, 244 NLRB 597 (1979); *Chrysler Corp.*, 232 NLRB 466 (1977).

DECISION

KARL H. BUSCHMANN, Administrative Law Judge. This case arose upon the filing of a charge by Lodge 804, International Association of Machinists and Aerospace Workers, AFL–CIO and a resulting complaint issued by the General Counsel charging United Parcel Service, Inc. with violations of Section 8(a)(1) and (3) of the National Labor Relations Act (the Act). More specifically, the complaint, as amended, charges that United Parcel Service, Inc., the Respondent, suspended its employee Cam Cantrell for 20 days without pay and discharged three employees, Gary Tharp, William Bryant, and Daniel DeZarn, because of their union activities, i.e., their participation as union stewards in an unauthorized strike.

Respondent's answer admits the jurisdictional elements of the complaint, as well as the suspension and discharges of the four individuals. However, it denies the commission of any unfair labor practices, and further states that the union stewards were discharged "for instigating, leading, prolonging and engaging in a strike in breach of contract which is unprotected activity under the Act."

A hearing was held on January 13 and 14, 1981, in Cincinnati, Ohio. The General Counsel and Respondent filed briefs on March 3 and 2, 1981, respectively. On consideration of the entire record[1] and from my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

The Respondent, United Parcel Service, Inc., is an Ohio corporation engaged in the transportation and delivery of goods by truck from various terminals located throughout the United States, including its Cincinnati, Ohio terminals. It is admittedly an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The Union, Lodge 804, International Association of Machinists and Aerospace Workers, AFL–CIO is admittedly a labor organization within the meaning of Section 2(5) of the Act. The Union has represented certain employees at Respondent's terminals pursuant to a collective-bargaining agreement effective November 7, 1979. It provides, inter alia:

> The Union, or its members, agree that during the term of this Agreement, it will not engage in or encourage any strike, picketing, work stoppage or impeding of work. The Company agrees that during the term of this Agreement, it will not lock out its employees. In the event of a violation of this article, the Union agrees that upon notification by the Company it will take immediate affirmative action with the employees involved to bring about an immediate resumption of normal work. [R. Exh. 2.]

Contrary to this provision, several employees of the Respondent engaged in a strike on March 5 and 6, 1980. The events leading up to this strike are not in dispute. During the morning of March 5, 1980, the Union and the Respondent held a grievance meeting at the Company's Third Street location. The Company's spokesmen were Robert Mulvaney, acting south-Ohio district automotive manager, Larry Thomas, south-Ohio district automotive manager and Robert Sions, south-Ohio district automotive fleet supervisor. The Union was represented by Business Agent Dave Patterson, Don Helcher, the grievant, and Union Stewards Gary Tharp and William Bryant. During the discussion, dealing with the lawfulness of Helcher's discharge and the right to be represented by the Union, Mulvaney admonished Patterson who had raised his voice that unless he modified his tone of voice "he would shut the meeting down." Patterson countered by stating that he would have the men out on an unfair labor practice strike, to which Mulvaney replied, "[W]hatever turns you on buster." Patterson promptly announced, "We're going to strike." He left the meeting, followed by Helcher, Tharp, and Bryant.

Patterson went through the shop telling employees to lock their boxes and "hit the street." All employees at the Third Street location who were members of the

[1] Respondent's unopposed motion to correct transcript is granted.

Union walked out. Within a half an hour, Patterson had distributed picket signs to the striking employees; among these were Tharp and Bryant.

Patterson then told Tharp to call Daniel DeZarn, the union steward at Respondent's Gest Street facility, to explain the events that had just occurred. Tharp called DeZarn about 10:30 a.m. A few minutes later, Patterson, Tharp, Bryant, and employee John Guth drove to the Gest Street facility and began to picket there. Within a few minutes, Ed Siebbenberg, Respondent's controller, approached the pickets and wanted to know what was printed on the signs. He spoke briefly to the pickets and left. Patterson returned to Third Street, leaving Tharp, Guth, and Bryant on the picket line at the Gest Street area.

In the meantime, DeZarn, the steward at the Gest Street area, who had known of the problem at Third Street only through the earlier telephone call from Tharp, did not know of the picketing activity in front of his building. At around 11 a.m. he clocked out, intending to go to the Third Street facility to obtain more details, at which time he saw the pickets. He obtained the necessary facts from them, and returned to his building to keep his coworkers, Mike Lickliter and James Wise, informed. Once inside, a confrontation occurred when DeZarn was confronted by his supervisor, Thomas Cade, who was accompanied by Myrna Ethridge, a supervisor in the maintenance department.

The record is unclear as to the exact sequence of events during this brief encounter. But it is evident that a brief scuffle ensued between Cade and DeZarn, primarily because Cade wanted to stop DeZarn who had clocked out from reentering the building. Nevertheless, DeZarn, warning his supervisor to keep out his way, walked to the work area of Lickliter, and told him that the Third Street shop was on strike. At Cade's persistent orders, DeZarn left the building and joined the pickets, followed about 15 minutes later by employees Lickliter and Wise.

Patterson, who had returned from the Gest Street shop to the Third Street facility, contacted Cam Cantrell, the union steward at Respondent's Dayton plant, and informed him of the breakdown in the Helcher grievance hearing and the resulting strikes in Cincinnati. Patterson told Cantrell that he would contact him again later. Patterson called Cantrell shortly after 12 noon to tell him that he was negotiating with the Company to reopen the Helcher hearing and that he would "pull Dayton and Columbus shops out" if he had not reached an agreement by 1 p.m. At 12:30 p.m., Chuck Stephens, Cantrell's supervisor, sent him to a repair shop on an errand. When Cantrell returned shortly after 2 p.m., he found all the employees in front of the shop office ready to walk out. He was told by the employees that Patterson had called and told them to leave the building. At that point, Stephens approached the group with the union contract and read the "no strike" clause to them. Nevertheless, the employees left the building. Two of them obtained picket signs and the five employees, including Cantrell, picketed the Dayton facility.

During the afternoon, Patterson officially notified the Company of the strike activity and the reasons for the walkout. Subsequently television news reporters interviewed the pickets at the Third and Gest Street facilities in an attempt to obtain the details about the strike. Tharp, DeZarn, and Bryant gave short interviews reflecting their belief that the strike had been authorized by the International. That evening the news on television actually contained excerpts of the interviews with Tharp and DeZarn. However, the International Union had not sanctioned the strike and had so informed Patterson. Accordingly, Patterson then attempted to end the strike. He initially called Cantrell in Dayton and told him that the strike was over and that he should "pull down the pickets." Cantrell followed Patterson's orders and told the striking employees to return to work. He also informed Stephens, his supervisor, what Patterson had told him. The Dayton strike ended the same day.

Patterson also attempted to end the strike at the Gest and Third Street facilities. He met repeatedly with Michael Vercheak, Respondent's labor relations manager, during the evening of March 5, 1980, in an effort to resolve the situation. Vercheak, aware that the strike was not sanctioned and that Patterson was then in a bad bargaining position, insisted on the following proposal (Tr. 314): "[P]ickets down, people report to work immediately, we'll talk, and the five named individuals—Tharp, DeZarn, Bryant, Cantrell, and Pete Martin—would be suspended pending investigation."

Although Patterson urged the strikers at the Gest and Third Street plants to return to their jobs, they refused unless the stewards also went back to work. While Patterson had agreed to the proposal, the strikers refused to return to work without their stewards.

Patterson sent Vercheak a telegram in which he notified the Company that he had instructed the striking employees to end their strike. Vercheak read that telegram to them and still they refused.

On the morning of March 6 the employees at Gest and Third Streets were still picketing and other employees were now refusing to cross the picket line. In an effort to have the pickets return to their jobs, Vercheak attempted to resolve the dispute with Bryant, DeZarn, and Tharp as well as with Patterson. But the employees were reluctant to return to their jobs without the stewards. Finally, when Vercheak agreed orally and in writing that no reprisals would be taken against the employees for their picketing, they were persuaded by Patterson and the stewards to end the strike at 11:30 on March 6.

The five stewards, Bryant, Cantrell, DeZarn, Tharp, and Martin, were suspended pending an investigation by the Respondent as to their conduct during the strike.

On March 11, the Company decided to discharge Tharp, Bryant, and DeZarn and officially notified them by letters of March 17 of their discharge "because of [their] active leadership role in commencing prolonging and participating in the work stoppage on March 5-6, 1980, in violation" of the no-strike clause of the contract. Grievances were filed but were not pursued to arbitration. The Company decided to suspend Cantrell for 30 days with loss of benefits for his role in the strike. After negotiations, the Union was able to reduce the 30 days to a 20-day suspension without pay and restoration of all

benefits (except the retirement benefits). The document was signed by the parties as evidence of the settlement.

Analysis

The discharges of the three union stewards, as well as the 20-day suspension of the fourth steward, were, according to the General Counsel, the result of the Company's discriminatory treatment of these employees solely because of their status as union stewards. While a company may lawfully discipline employees for their participation in a unlawful strike, an employer may not single out employees on the basis of their union office. Since a number of employees who participated in the walkout were employees who did not hold a union office, it can be inferred, argues the General Counsel, that the Company unlawfully discriminated against union officials when it selected only union stewards for disciplinary action. Moreover, it is the position of the General Counsel that the individuals concerned did not assume a leading role in the strike activity as asserted by the Respondent.

Respondent's argument is twofold. First, Respondent "had the right, as a matter of law, to discipline the four stewards for their participation in the strike and failure to exercise higher duty and responsibility as union officials to prevent the strike from occurring or continuing." Second, the actions of these four stewards in commencing, prolonging, and participating in the illegal strike exceeded those of other strikers and distinguished them. Accordingly, Respondent's position is that their union office notwithstanding, the stewards assumed a leading role which justified the disciplinary action.

The record is clear, the four individuals participated in the walkout at Respondent's several facilities in violation of the "no strike" provision in the contract. There is also no dispute that the strike did not amount to an unfair labor practice strike or otherwise constitute protected activity. Accordingly, any or all of the strikers could lawfully have been disciplined by the Respondent. And at first blush, it would seem that as a result of the contractual language requiring the Union to "take immediate affirmative action with the employees involved to bring about an immediate resumption of normal work" union stewards could be held to a higher duty as agents of the Union.

However, this issue was squarely decided in *Precision Castings Co.*, 233 NLRB 183 (1977). There, the Board rejected the notion of a higher duty of union stewards and held that "discrimination directed against an employee on the basis of his or her holding union office is contrary to the plain meaning of Section 8(a)(3) and would frustrate the policies of the Act if allowed to stand" (233 NLRB at 184). In subsequent decisions, the Board has adhered to that standard. See *Babcock & Wilcox Co.*, 249 NLRB 739 (1980); *Metropolitan Edison Co.*, 252 NLRB 1030 (1980).[2]

With respect to Respondent's second argument, the record shows that the three stewards who were discharged did more than participate in the strike or fail to take positive steps in stopping it. Among the 10 or 15 employees involved in the strike, Bryant, Tharp, and DeZarn were the most prominent. Although Patterson was the real instigator and the stewards were the "pawns" caught in the middle, they nevertheless played the role of union stewards when they relayed Patterson's messages, spoke as strikers' representatives to the press, picketed at another location in addition to their own duty station, and participated in the strike negotiations with management. More particularly, the record shows that Tharp, at Patterson's orders, called DeZarn over the telephone with instructions and details concerning the strike. Further, while he was among the striking employees at Third Street, he went with Patterson[3] to the Company's Gest Street facility and engaged in picketing "back and forth between Third Street and Gest Street all day, on and off." He also spoke to a television news reporter at Gest Street and subsequently appeared on television explaining the reasons for the strike stating that it was not a wildcat strike but a sanctioned strike. In addition, Tharp assumed a leading role during the picketing to guard against problems; for example, he told employees to keep walking while in the picket line. He was also among the three stewards (in addition to DeZarn and Bryant) who first discussed and then agreed to Vercheak's ultimatum that the men return to work and that the stewards be suspended.

With respect to DeZarn, the record shows that as soon as he left his building after clocking out, he talked to the union pickets and immediately returned to notify the two employees at the Gest Street plant who [illegible] ly joined the strike; he was also inter[illegible] by a television news reporter about the strike and subsequently appeared on two television news programs in which he expressed his hope that the teamsters would honor the picket line, and where he inaccurately explained the reason for the strike as follows: "We had a man was [sic] fired and they aren't willing to sit down and talk about it." DeZarn, with the other two stewards, discussed, considered, and finally accepted Vercheak's conditions for settling the strike.

Bryant was one of the stewards who also engaged in picketing both the Third Street and the Gest Street facilities. He participated in the negotiations affecting the strike; for example, at one point, he told Siebbenberg who wanted to read the message on the picket signs that they "wanted to talk with someone to try to get the problem resolved." He also told Vercheak, in response to his offer to settle the strike, that "they went out together, they'll go back together." Bryant also admitted giving the television news reporter an interview. Apparently none of his remarks were broadcast.

From the foregoing, it is apparent that the participation of the three stewards in the strike went beyond simple participation and refusal to urge the men to return to work. Their role, though substantially performed at Patterson's behest, certainly assisted and affected the strike activity of the employees. They acted as union

[2] Courts have disagreed with this position. *Gould Corp.*, 237 NLRB 981 (1978), enf. denied 612 F.2d 728 (3d Cir. 1979); *Indiana & Michigan Electric*, 599 F.2d 227 (7th Cir. 1979).

[3] The only employee who picketed at both locations and who was not disciplined was John Guth. However, that was the extent of his participation in the strike.

representatives during the strike and failed to act as union representatives in conformity with their union contract. Accordingly, I find that Respondent did not unlawfully discriminate against the three stewards in violation of Section 8(a)(3) and (1), and that Respondent's conduct was not coercive of the employees' rights under Section 7 of the Act.

With respect to the suspension of Cam Cantrell, the record contains a settlement of the dispute. The settlement is indicative of Respondent's effort to gauge the severity of the discipline to the extent of the particular employee's participation in the strike. It is substantially undisputed that Cantrell's "leading" role in the walkout amounted to no more than relaying Patterson's strike instructions to employees and the display of a homemade picket sign in his car immediately in front of Respondent's property. He did not engage in picketing at sites other than his work station, and he did not grant a television interview on behalf of the Union.

In any case, dispositive of this issue is the settlement signed by Cantrell, as well as management and union representatives. It is a short statement in handwriting which clearly states: "All legal action or grievance machinery action by C. Cantrel [sic] is dropped as a part to the above agreement." Even though the signatories failed specifically to articulate in this waiver the right to file charges with the Board, it can be inferred, considering the brevity of the statement as a whole and its basic informality. The parties obviously intended that this settlement would bar any further dispute or procedural consequences. As already stated, there is no further evidence that the settlement was unfair or arbitrary in the light of the surrounding circumstances. I would therefore defer to the settlement.

CONCLUSIONS OF LAW

1. United Parcel Service, Inc. is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union, Lodge 804, International Association of Machinists and Aerospace Workers, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent did not commit any unfair labor practices alleged in the complaint.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[4]

ORDER

It is ordered that the complaint is dismissed in its entirety.

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[4] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

Chicago Metallic Corporation *and* Sheet Metal Workers' International Association, Local Union 170, AFL-CIO. Cases 21-CA-20824 and 21-RC-16865

30 January 1985

DECISION, ORDER, AND CERTIFICATION OF REPRESENTATIVE

BY CHAIRMAN DOTSON AND MEMBERS HUNTER AND DENNIS

On 26 September 1984 Administrative Law Judge Jesse Kleiman issued the attached decision. The Respondent, Chicago Metallic Corporation, filed exceptions and a supporting brief.

The Respondent excepts to the judge's findings that employee Ralph Picazzo was not a supervisor, that the Respondent violated Section 8(a)(1) of the National Labor Relations Act by threatening Picazzo with discharge, and that the Respondent's objections to the election should be overruled. The Respondent does not except to the judge's finding that Picazzo was not an agent of the Union. Additionally, no exception was filed to the judge's conclusion that the Respondent's discharge of Picazzo did not violate Section 8(a)(3) of the Act.[1]

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[2] and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Chicago Metallic Corporation, Vernon, California, its officers, agents, successors, and assigns, shall take the actions set forth in the Order.

CERTIFICATION OF REPRESENTATIVE

IT IS CERTIFIED that a majority of the valid ballots have been cast for Sheet Metal Workers' International Association, Local Union 170, AFL-CIO, and that it is the exclusive collective-bargaining representative of the employees in the following appropriate unit:

> All production and maintenance employees and shipping and receiving employees, including leadpersons, employed by Chicago Metallic Corporation at its facility at 5501 Downey Road, Vernon, California, excluding all other employees, office clerical employees, managerial employees, confidential employees, professional employees and guards and supervisors as defined in the Act.

DECISION

STATEMENT OF THE CASE

JESSE KLEIMAN, Administrative Law Judge. On a charge filed in Case 21-CA-20824 on November 16, 1981, by Sheet Metal Workers' International Association, Local Union 170, AFL-CIO (the Union) the General Counsel of the National Labor Relations Board, by the Regional Director for Regional 21, Los Angeles, California, issued a complaint and notice of hearing on December 22, 1981, against Chicago Metallic Corporation (the Respondent) alleging that the Respondent had engaged in certain unfair labor practices within the meaning of Section 8(a)(1) and (3) of the National Labor Relations Act. On December 29, 1981, the Respondent, by counsel, filed its answer denying the material allegations in the complaint.[1]

Previously, on September 16, 1981, the Union had filed a petition for certification of representative with the Board in Case 21-RC-16865 seeking an election among all the Respondent's employees in an appropriate unit. Pursuant to a Stipulation for Certification Upon Consent Election executed by the Respondent and the Union on October 1, 1981, and approved by the Regional Director for Region 21 on October 2, 1981, a secret-ballot election was conducted on November 5, 1981, among all the Respondent's "production and maintenance employees and shipping and receiving employees, including leadpersons, employed by the Respondent at its facility located at 5501 Downey Road, Vernon, California, excluding all other employees, office clerical employees, managerial employees, confidential employees, professional employees, and guards and supervisors as defined in the Act."[2]

Jack Jimenez, the Union's assistant business manager, testified that immediately preceding the Board election on November 5, 1981, a Board agent conducted a preelection conference on company premises. Present at the conference were Donald Moore, the Respondent's plant manager, and Kenneth E. Ristou, Jr., the Respondent's legal counsel, representing the Respondent, and Jimenez

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[1] We have not considered, and express no views concerning, the judge's findings and conclusions as to which no party filed exceptions. See Sec. 102.46(b) and (h) of the Board's Rules and Regulations, 29 CFR Sec. 102.46(b) and (h).

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[1] In its answer the Respondent raised the following "Separate and Additional Defenses": That the allegations of the complaint failed to state a cause of action or proper charge against the Respondent; that at all times relevant herein, Ralph Picazzo was a supervisor within the meaning of Sec. 2(11) of the Act; and that Picazzo's discharge was for good cause.

[2] Uncontroverted testimony herein shows that "leadpersons" were included in the bargaining unit at the insistence of the Respondent and with the Union's acceptance thereof.

and Bill Moyer, president of the Union, representing the Union. Jimenez related that the Union chose Ralph Picazzo and Jerry Colvard as its election observers,[3] and the Respondent selected Mario Gonzales Diaz and Edith Stewart as the Employer's election observers.[4] Jimenez continued that, after the observers were selected by the respective parties, the Board agent asked the representatives of the Respondent and the Union if any of the persons chosen as election observers were supervisors. Jimenez added that he replied, "Not as far as I know," and that the Respondent's representatives, including its legal counsel, failed to reply to this question at all.[5] Moreover, on October 8, 1981, prior to the election, the Respondent submitted a voter eligibility list (*Excelsior* list) to the Board which included the following employees' names: George Kreuger (production leadman), Ralph Picazzo (assistant production leadman and maintenance leadman), Jerry Colvard (shipping and receiving warehouse leadman), Robert Gangle (toolroom leadman), and Pat Patterson (production leadman-night shift).

The official tally of ballots showed that 19 votes were cast of favor in the Union, 10 votes against the Union, and 1 ballot was challenged.[6] On November 12, 1981, the Respondent filed timely objections to the election. Upon investigation the Regional Director concluded that the Respondent's Objections 1, 2, 4, 6, and 10 should be overruled. With regard to Objections 3, 5, 7, 8, and 9 the Regional Director found:

> These objections relate to threats and other coercive conduct allegedly engaged in by Ralph Picazzo, whom the Employer asserts to be a supervisor within the meaning of Section 2(11) of the Act. Investigation of these objections revealed substantial and material issues of fact which the undersigned concludes may best be resolved in a hearing. On December 22, 1981, the undersigned issued a Complaint and Notice of Hearing in Case 21–CA–20824, alleging *inter alia*, that the Employer discharged Picazzo on or about November 10, 1981, because he engaged in union or protected concerted activities. Inasmuch as the issues raised by Objections 3, 5, 7, 8, and 9 are closely related to the issues involved in Case 21–CA–20824, the undersigned concludes that these objections can best be resolved in a hearing with the related issues of the complaint.[7]

On January 19, 1982, the Regional Director duly issued an order consolidating Cases 21–CA–20824 and 21–RC–16865 "for the purposes of hearing, ruling and decision by an Administrative Law Judge and that, thereafter, Case 21–CA–16865 be transferred to and continued before the Board in Washington, D.C." No exceptions to the Regional Director's report or any request for special permission to appeal from his order having been filed by either party within the time provided therefor, the Board by Order dated February 8, 1982, adopted the Regional Director's recommendations as contained in his report as set forth above.[8]

A hearing in the consolidated cases was held before me in Los Angeles, California, on July 13, 1982. At the close of the General Counsel's case the Respondent moved to dismiss the complaint for failure of proof. I denied this motion. All parties were afforded full opportunity to appear, to introduce evidence, to examine and cross-examine witnesses, to argue orally on the record, and to file briefs. Thereafter, the General Counsel, the Respondent, and the Charging Party filed briefs. The Respondent in its brief renewed its request for dismissal of the complaint in its entirety and, additionally, requested that "the election results in Case No. 21–RC–16865 be voided." For the reasons hereinafter set forth I grant the Respondent's motion to dismiss the complaint only in part and recommend that the election results in Case 21–RC–16865 be certified.

On the entire record and the briefs of the parties, and on my observation of the witnesses, I make the following

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT

The Respondent, at all times material herein, has been a corporation engaged in the manufacture, sale, and distribution of ceiling systems[9] and operates a plant facility located at 5501 Downey Road, Vernon, California, for this purpose.[10] In the course and conduct of the Respondent's business operations during the preceding 12 months, these operations being representative of its operations at all times material herein, the Respondent sold and shipped goods and products valued in excess of $50,000 directly to customers located outside the State of California. The complaint alleges, the Respondent admits, and I find that the Respondent is now, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The complaint further alleges that, at all times material herein, the Respondent's plant manager, Donald Moore, and its plant superintendent, Ron Williams, have been and are now supervisors within the meaning of Section 2(11) of the Act and agents of the Respondent acting on its behalf within the meaning of Section 2(2) and (13) of the Act. The Respondent admits these allegations. I therefore find that the above-named persons are supervisors and agents of the Respondent within the meaning of Section 2(11), and 2(2) and 2(13) of the Act, respectively.

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[3] Ralph Picazzo was assistant leadman in the production department and Jerry Colvard was the warehouse leadman. Jimenez testified that Colvard had at first declined to be an observer because he was against union representation and had campaigned against the Union, but Jimenez prevailed upon him to act as a union observer in the interest of fairness.

[4] Mario Gonzalez Diaz was a production employee, and Edith Stewart a secretary, both employed by the Respondent at the time.

[5] Picazzo testified similarly about this.

[6] At the election the Respondent challenged only the ballot of Ralph Picazzo for the reason that Picazzo was alleged to be a supervisory employee. However, this challenged ballot was insufficient in number to affect the results of the election.

[7] See G.C. Exh. 1(g).

[8] See G.C. Exh. 1(i).

[9] The Respondent manufactures "cross-T's and main runners" for acoustic ceilings.

[10] The Respondent's corporate "national headquarters" are in Chicago, Illinois.

II. THE LABOR ORGANIZATION INVOLVED

The complaint alleges, the Respondent admits, and I find that Sheet Metal Workers' International Association, Local 170, AFL–CIO, is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

The complaint alleges that the Respondent violated Section 8(a)(1) and (3) of the Act by threatening its employees with discharge if they continued to campaign on behalf of the Union, and by discharging employee Ralph Picazzo and failing and refusing to reinstate him because he engaged in union or other protected concerted activities for the purpose of collective bargaining or other mutual aid or protection. The Respondent denies these allegations.

A. *The Evidence*

1. The alleged supervisory status of Ralph Picazzo

Picazzo commenced his employment with the Respondent in June 1977 and was discharged by the Respondent on November 10, 1981. For approximately the last year of his employment with the Respondent, Picazzo held the position of day-shift assistant leadman in the production department[11] and leadman in the maintenance department,[12] having been transferred to this job from his previous position of leadman on the night shift.[13] As assistant leadman, Picazzo received an hourly wage rate of $10.80, higher than the other production employees except for those employees with substantially greater seniority than he,[14] the same "fringe benefits" including medical care coverage as did the other production employees, and he "punched a time clock" as was required of all production and maintenance employees with the exception of the plant manager, Donald Moore, and the plant superintendent, Ron Williams.

Picazzo continued that his duties as assistant leadman were "to assist George Kreuger [leadman] in his basic duties,[15] and also to head the maintenance department." He stated that "Kreuger's duties were to maintain production, which is to maintain a schedule showing the type of bar and which machine is going to run it, and also who was going to operate the machine." Picazzo related that the work schedules were prepared weekly and solely by Krueger, and that he played no part in their preparation. Picazzo continued that Kreuger also distributed the paychecks to employees, that he and Kreuger usually ate lunch together with other production employees in the lunch area, that neither he nor Kreuger had their own office, desk, or telephone as did Moore and Williams,[16] and that Williams maintained and kept the timecards. Picazzo added that he worked mostly, "Near the quality control area," from where he could observe the entire production floor area, the employees who were or were not working, and any "roll forming machines" which experienced any problems or had broken down during operation.[17]

Picazzo testified,

> My main duties were to assist George Kreuger in maintaining the production of the machines. In other words, if there was a problem with the rolls fluctuating . . . or the face of the width being too wide or too narrow, I would proceed to the machine and adjust the rolls to bring them to specifications . . . . Keep the metal inventory up. In other words, what I did was just check to make sure that there was enough metal available. And of course, the evaluations, the weekly evaluations I used to have.[18]

Concerning these evaluations,[19] Picazzo testified that he reviewed the work performance of the machine oper-

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[11] Besides George Kreuger, the day-shift leadman, and Picazzo, the assistant leadman, there are 18 employees in the production department. The day-shift hours are from 6 a.m. to 2:30 p.m.

[12] The maintenance department consists of three employees besides Picazzo, including an electrician, a hydraulic pump repairman, and a welder. Their duties are to maintain and repair the "roll forming machines used to manufacture" the Respondent's products. With regard to his duties concerning the maintenance department employees, Picazzo testified that although he "headed" the maintenance department, he only worked with the maintenance employees when they needed assistance, when the work required to be done "necessitated more than one person," this occurring once or twice weekly with each of these workmen.

[13] The Respondent in its brief states that Picazzo, as the night-shift leadman, "was the 'highest individual in the plant.' Picazzo had four employees working under him on this shift, and had the responsibility for security of the plant, work problems, and any emergency that might occur during this time. When a disciplinary problem would arise, it was Picazzo who acted as 'the eyes and ears of management' by bringing it to the attention of Williams or Moore. Thus, when Picazzo caught [four] of the night-shift employees drinking, he immediately reported the situation to Williams." The evidence herein shows that after Picazzo reported the drinking incident to Williams, no disciplinary action was taken by Picazzo against these employees but instead Williams appeared at the plant later that evening and suspended these employees and sent them home. While Picazzo testified that upon his transfer from night-shift leadman to day-shift assistant leadman, his duties remained "roughly the same," he also testified that when he became the assistant leadman he assumed the new duties of evaluating employees, maintaining the upkeep of the metal inventory, and the training and evaluation of newly hired employees.

[14] The Respondent's starting hourly salaries at the time were: Operator I—$7.50 to $10; Maintenance I—$7 to $10; Helper—$6.

[15] While Picazzo testified that he worked "under Kreuger," he also testified that Plant Superintendent Williams was his immediate supervisor and the person to whom he reported.

[16] Picazzo testified that the warehouse leadman, Jerry Colvard, also had his own office.

[17] Picazzo testified that he would "look over the schedule. Fill out my evaluation forms and wait to see if any machine were going to go down."

[18] The Respondent uses "roll forming machines" in the manufacture of the cross-Ts and main runners for acoustic ceilings which are its main production items. These machines are operated by a machine operator and a helper both of whose work Picazzo evaluates. Picazzo related that he would check the finished bars produced on a machine as to specified tolerances with calipers and a micrometer as part of his duties as assistant leadman. In the event Picazzo discovered that the bars produced did not meet specifications, he would report this to Williams who would then decide whether or not the work had to be done over. Picazzo added that on occasion he, himself, worked on the roll forming machines as an operator, but that this happened infrequently.

[19] Picazzo testified that Kreuger had prepared the employee evaluations prior to his becoming assistant leadman and thereafter Picazzo did this "to take some of the work load from George Kreuger." Picazzo added that he did not evaluate the maintenance employees, only the production employees.

ators and helpers on each of the different machines weekly evaluating them as to quality and quantity of their work by observing them at their jobs, after which he would grade them on a work evaluation form. Picazzo stated that copies of these evaluation forms were kept in the employees' personal files, by Plant Manager Moore in a separate file, and by himself in a personal notebook which Williams told him to keep and maintain.[20] Picazzo related that while he was unaware of the use to which his employee work evaluations were being put to by the Respondent, he confessed that he had not prepared these evaluations "conscientiously," but instead had just put down "anything that came to mind."[21] Picazzo added that Williams also evaluated the production employees' work performances for the purposes of "a three-month wage review."[22]

Picazzo testified that he had no authority to hire, fire, lay off, discipline, or promote employees, nor any authority to effectively recommend the same, such authority being vested in Plant Manager Moore and Plant Superintendent Williams. Picazzo recounted that while he also had no independent authority to suspend or discipline employees, nor had he ever done so, yet he did prepare and issue written disciplinary warnings and notices to employees, including suspension notices, but only upon the occasions when he was directed to do so by Moore, Williams, and at times Kreuger. According to Picazzo, Williams would instruct him to issue a warning or disciplinary notice to an employee including recommendations as to the discipline to be imposed, whereupon Picazzo would prepare a "write-up form" with the employee's name, the reason for the warning or discipline, the actual discipline to be imposed, and the date. Picazzo would then obtain Williams' approval as to the wording and acceptability thereof, after which both he and Williams would sign the form, with Picazzo's signature appearing thereon, "in the spot where it said 'company supervisor.'"[23] Picazzo would then issue the writeup form to the employee, and obtain the employee's signature on the form. Whenever an employee disputed the merits of the disciplinary notice or action signified, Picazzo would refer them to Williams or Moore for any further consideration of the matter.[24]

Picazzo continued that he did, on occasion, transfer employees from one work assignment to another, but again only when instructed to do so by Williams. Picazzo stated that he also distributed work assignments to the production employees based on the work schedules prepared by Kreuger,[25] and explained to these employees, if necessary, just what was required of them in the performance of their work. He testified that Williams made the decision as to the need for overtime work and the number of employees required to accomplish this. While Williams also made the decision as to which employees were not to receive such overtime work Picazzo, apparently at his discretion, made the actual overtime work assignments from among the remaining eligible employees. However, according to Picazzo, overtime work is voluntary and he merely asked employees if they wanted to work overtime and assigned those who said they did to such work unless Williams told him not to do so. The evidence additionally shows that Picazzo also trained new employees in the operation of the "roll forming machines," during which time he also evaluated their work performances,[26] functioned as an interpreter on occasion for Moore or Williams when they spoke to any of the Spanish-speaking employees, and served as the Respondent's permanent representative on the "plant safety committee."[27] Picazzo also attended management meetings during which production matters at the plant and plant expansion problems were discussed.[28]

Donald Moore, the Respondent's plant manager, testified that the position of "Leadman (Assistant)" was originated in November 1979 and approved in August 1980 at a time when the Respondent was expanding its Vernon, California facility, and was created to "[assist] the current leadman in his job activities." Moore stated that he prepared a job description for this position, setting forth duties thereof, and that he perceived this position as "basically equal" to the leadman but "assisting" him, with their respective duties being "a joint function

[20] Picazzo also kept copies of disciplinary notices he issued in this notebook, and he recorded overtime work assignments therein, as well.

[21] However, Picazzo admitted that on one occasion when he had failed to evaluate the work performances of employees for a period of time, he was told that Moore had become "upset" because he had discontinued such evaluations. Moreover, while Picazzo consistently and continuously maintained, throughout his testimony, that he was always told by either Moore or Williams as to what duties he had to perform and how to accomplish these duties, he also admitted that as to these work evaluations, he prepared them by himself, in his own way, using his own phraseology. Picazzo added that as far as he knew his evaluations had nothing to do with the "well-being of employees," and that, on one occasion, Kreuger had jokingly said that he had seen the evaluations in a trashcan.

[22] Moore also testified that Williams evaluates the production and maintenance employees for purposes of wage increases and merit increases, with such increases then being subject to Moore's approval.

[23] Picazzo testified that Williams instructed him to sign the form as "company supervisor." He also explained that on occasion Moore, Williams, or Kreuger would not be available to sign the form at which time only his signature appeared thereon along with the employee involved.

[24] Picazzo testified that, as assistant leadman, he issued "many" warning and disciplinary notices to employees. See R. Exhs. 1–20. Concerning these exhibits the evidence shows that Picazzo prepared and accomplished most of the writing on these forms except for the signatures other than his own.

[25] In an affidavit given to a Board agent during the investigative stage of these proceedings, Picazzo stated,

> Regarding assignments of employees to work in the production area, Ron Williams, George Kreuger and I would get together in the morning and decide what work had to be done and who was going to operate which machine.

[26] Picazzo denied that he discussed with Moore or Williams whether or not these new employees were "good employees."

[27] Picazzo testified that when he was assigned by Moore to the safety committee he was never specifically told what his duties were, but only to "sit in." He stated that Moore told him that these meetings were for the purpose of "cutting down accidents and maintenance safety on the job." He added that, at the safety meetings, employees made suggestions about safety to Bob Gangel, who "headed" the committee and the meetings, and who determined which repairs were to be made. According to Picazzo, his function was merely to be seen at these meetings.

[28] Picazzo testified that at the management meetings he attended, while there where discussions about production and plant expansion problems, he was never asked for his opinion or to provide any input into these discussions.

due to the expansion of our facility." Moore continued that he reviewed the job description and the duties set forth therein with Ralph Picazzo shortly after Picazzo became the assistant leadman,[29] and again went over the various aspects of it approximately 3 months later, when Picazzo requested "clarification in some areas, and we reviewed it again."

Moore related that subsequently he held a meeting with Ron Williams, George Kreuger, and Picazzo regarding the assistant leadman's position, "to redefine the direction, so that there wasn't such a drastic overlap" in the duties of Kreuger and Picazzo. Moore stated that the areas of responsibility worked out at this meeting were: George Kreuger — production coordination, machine assignments, quality control, setup control, and machine tooling directions; Ralph Picazzo —machine maintenance, routine maintenance, safety committee, emergency procedures, emergency operations. According to Moore, both Kreuger and Picazzo were to be jointly involved in training employees, proper housekeeping, plant and employee security, employee discipline, and an improvement committee to recommend "procedural changes, training personnel, discipline, cleanliness, housekeeping, all of the things that make a plant a nice place to work."[30] Moore added that he considered Kreuger, Pat Patterson, Bob Gangel, and Picazzo all supervisors.

Picazzo denied ever seeing a copy of the final job description although he acknowledged that, shortly after he became the assistant leadman, he met with Moore who "went over roughly just more or less what he wanted me to do as assistant leadman under George Kreuger, which was mainly to assist with George, and to head over the maintenance department." According to Picazzo, Moore also told him to "maintain the operation of the machinery." Picazzo also denied that Moore had ever discussed an "improvement committee" with him.

In support of the Respondent's contention that Picazzo is a statutory supervisor, Moore testified that, approximately 4 months before the election, while Ron Williams was on vacation, Kreuger and Picazzo had come to his office and Kreuger told Moore that "It's Mr. O'Shaughnessey again." Moore related that he asked them what the problem was and Picazzo responded that O'Shaughnessey "had left his machine unattended." Moore stated that since O'Shaughnessey had violated "a plant rule of some significance," Kreuger and Picazzo "both felt that it was time to make a move on O'Shaughnessey . . . time that we did something about this." Moore continued that after he checked O'Shaughnessey's "record" and found that "he was on the verge of firing anyway, basically because of his history," he told Kreuger and Picazzo, "I see no reason not to fire him at this point. I think he has been given every opportunity," O'Shaughnessey was subsequently discharged.[31] Moore maintained that leadmen had the discretion to decide disciplinary action against employees.

Picazzo's version of this incident differed from Moore's. Picazzo testified that Kreuger had spoken to him in Williams' office informing him that, earlier that morning, Moore had told Kreuger that he "wanted Tom O'Shaughnessey out today." Picazzo stated that after he advised Kreuger that O'Shaughnessey had "just left his machine," Kreuger directed Picazzo to "get him for that." Picazzo continued that he then prepared and issued a warning notice to O'Shaughnessey recommending "termination" as Kreuger had directed. He related that when O'Shaughnessey received the notice he tore it up and wanted to see Moore about this. Picazzo denied that he had ever met with Moore to discuss O'Shaughnessey's discharge or that he was present when the discharge took place. Picazzo added that his only involvement in the decision to terminate O'Shaughnessey was that, "I was told to write him up."

Steve Kosiek, employed by the Respondent as a machine "helper," testified that he had observed Picazzo in the performance of his job and that Picazzo's duties were "writing up evaluations for employees' warning slips, and just generally standing there combing the area making sure that people were doing what they were supposed to be doing."[32] According to Kosiek, the procedure for the issuance of "warning slips" was that Ron Williams would tell Picazzo "exactly what the person had done," whereupon Picazzo would prepare the written notice, give it to the employee involved, explain the reason for its issuance and the rule infraction, obtain the employee's signature on the notice, sign the form himself, and take the notice back to Williams for approval, and the notice was then taken to the office. Kosiek related that he had actually received "warning slips" from Picazzo as an employee which were initiated by Williams and prepared and issued by Picazzo as described above. He stated that Picazzo would also tell employees, upon giving them the warning notice, that "If they didn't want to get another of these they better not do it again." Kosiek added that Picazzo also spent "a lot of time" talking to Williams and Kreuger "out there, right out on the floor." Kosiek reiterated that Picazzo's work entailed "writing up" employee work evaluations, "writing up" disciplinary notices and "handing them to people and explaining the rules" and "standing around on the floor making sure the men were working properly."

[29] Picazzo was the first person to hold the position of assistant leadman.

[30] While Moore testified that the job description for assistant leadman encompassed the duties which he wanted Picazzo to perform in that position, and while he offered his belief that to the best of his knowledge these were the duties being performed by Picazzo, he also admitted uncertainty as to whether the job description accurately reflected those duties actually performed by Picazzo when Picazzo assumed this position.

[31] Moore's testimony as to who actually recommended O'Shaughnessey's discharge was somewhat equivocal and guarded. At first Moore testified that both Kreuger and Picazzo had said that something ought to be done about O'Shaughnessey, with Moore's testimony strongly inferring, that he himself had made the determination to fire O'Shaughnessey. However, after what appeared to be an attempt by counsel for the Respondent, through leading questions and remarks, to rebut this inference, Moore now denied having made this decision, remembered that the word "termination" had been used although he could not remember by whom, and maintained that he had "just supported their decision." Moreover, Moore's testimony concerning the circumstances under which an employee can be terminated appeared guarded and at times evasive.

[32] At this time Kosiek was employed by the Respondent "in quality control," checking the work produced by the machine operators and helpers. He testified as a witness for the General Counsel.

Mark Freeland, formerly employed by the Respondent as a warehouseman, testified[33] that Picazzo had issued several written warning notices to him during his employment with the Respondent[34] and that it was "more than likely" that Picazzo had cleared the language on such notices with Williams before he gave it to the employee. He related that Picazzo had no authority to change any of the language in the warning notice without Williams' approval. Freeland continued that Picazzo would give him the warning notice to read, ask him to sign it, and then if Freeland had any question about the warning notice or "disagreed with the writeup," he assumed that he could take it up with Williams or Kreuger, "or someone else, like a step above him, so to speak." While Freeland stated that Picazzo had told him on one occasion that if he received another "write-up" for absenteeism, he would be fired,[35] he also testified that both Williams and Kreuger had told him the same thing on several occasions.[36] Freeland added that Picazzo did not hire, fire, promote, suspend, lay off, recall, reward, or transfer employees, "it wasn't his job."

2. The discharge of Ralph Picazzo

Picazzo testified that soon after the Union had filed its petition with the Board, he was informed by other employees at the plant that the Union was attempting to organize the Respondent's employees for purposes of collective bargaining. Picazzo stated that, thereafter, he discussed "the issue of the union with other employees, attended union meetings, and actively campaigned" for the Union among the plant employees "on an individual basis."[37] Picazzo related that on October 29, 1981,

> Don Moore was entering the production area to pass around anti-union propaganda. He then approached me and told me that if I continued to campaign for the Union, that he would have me fired, and if I did not believe that, just to continue and he would see me in court.[38]

Picazzo continued that later that day,

> I was behind machine number seven, and [Moore] was coming out of the maintenance department. And he approached me again smiling and said that he really didn't mean it quite that way. But that if, in fact, I was campaigning for the Union, that he could have me fired.[39]

Picazzo recounted that on Friday after the Board election held on November 5, 1981, he was in the production area with Moore, Williams, and Kreuger, when Jerry Colvard, the warehouse leadman, came over and told Picazzo "to keep away from his men, that to stay away from them, and he didn't want to see me around them anymore." Picazzo stated that later that day he had a conversation with Moore in Moore's office as follows:

> I asked Don Moore what the commotion was all about. He told me it was none of my business. I told him I was not referring to the conversation he had just had with Colvard, I was referring to what went on in the production area. He says, "you know very well what that's all about." And I said, "No, I don't. I wish you would explain!" He told me then, he says, "Come on Ralph, you understand. You know what is going on." He says, "You never really were on my side." I told him, "Yes, I was." He says, "No. I don't believe you!" I says, "Well, if that is the way you feel, then I am sorry," and I left.

Picazzo testified that on November 10, 1981, he was called into Moore's office. Ron Williams was also present in the office. Picazzo continued,

> [Moore] then told me that he was sorry that it had to end this way, but he could not condone intimidating or threatening employees.
>
> I then asked him who was it I supposedly intimidated.
>
> He said that was best left unknown.
>
> I asked him what was it that I supposedly said.
>
> He said that was best left unknown.
>
> And I asked him also when did this take place.
>
> He said that was best left unknown. He then told me that for his satisfaction, what was it that he had supposedly done wrong.
>
> I told him there was nothing he had done wrong. But also I had done nothing wrong. But evidently someone had told him something, and he chose to take their word over mine.
>
> Upon this, he then stated that he would not in any way block my unemployment, and that if I wanted to sometime in the near future I could come

[33] Freeland resigned from the Respondent's employ in February 1982 after a dispute with his stepbrothers, Jerry Colvard, the warehouse leadman, and Larry Colvard, another employee. Freeland testified as a witness for the Respondent.

[34] Picazzo testified that on one occasion Williams instructed him to "write [Freeland] up, stating he was suspended." His testimony as to whether or not Williams had told him to suspend Freeland for "one to three days" seemed equivocal.

[35] Freeland testified that, a week or two before the election, Picazzo had warned him about his failure to wear protective goggles on the job as required by plant safety rules telling Freeland that, "because of my record of write-ups that if I didn't watch myself and be sure to do everything right as in wearing goggles that I would be written up and more than likely fired." Freeland added that Picazzo did not issue a warning notice to him on this occasion although Picazzo was aware that Freeland was "an assured no vote against the union."

[36] Moore testified that Freeland had received several warning notices. However, Moore's description of the Respondent's computer printout system regarding the recording of warning notices was somewhat confusing.

[37] Jimenez, the Union's business manager, testified that Picazzo never obtained any employee signatures on authorization cards for the Union except for his own.

[38] The Respondent admits having campaigned against the Union prior to the election.

[39] Picazzo testified that the only time he had any discussions with Moore about his campaigning for the Union was on October 29, 1981. He added that Moore had never mentioned anything to him about his allegedly "campaigning on company time."

back and he would give me a letter of recommendation. He then handed me a check, and then I left.[40]

Picazzo denied that, prior to the election or thereafter, he had threatened any employee with "economic or physical harm" if they told management about his "statements regarding the Union," or if they "did not support the Union." He also denied that Moore had given any reason for his refusal to disclose the names of the employees who had alleged that Picazzo had threatened and intimidated them, more particularly, that the reason for this was that Moore was afraid that Picazzo or his associates would take reprisals against such employees once Picazzo knew who they were. Picazzo testified that Moore gave him no opportunity to respond by way of explanation concerning the allegations against him, and he in turn made no effort to explain anything about this to Moore at the time, because when Moore refused to divulge any information as to the "who, why and when" of his alleged threats and intimidation of employees, Picazzo was at a loss as to what he was supposed to have done. Picazzo added that Moore had never asked him about the conversations he had had with employees during which he allegedly had threatened and intimidated them, these conversations, as discussed hereinafter, having involved Brent Yankee, Larry Colvard, and Mark Freeland.

Moore testified that about 10 days before the Board's election held on November 5, 1981, Jerry Colvard, the warehouse leadman, and Steve Kosiek, a warehouse employee, came to his office and Kosiek told Moore that "Ralph Picazzo was the one that was pushing for the union." Moore stated that Colvard asked him "what can we do about it," and Moore replied, "I don't think we can do anything about it." Moore related that Colvard and Kosiek also said that Picazzo "was campaigning for the union on company time, and that he was the source of the problem." Moore recounted that "Now, what they meant by problem, I don't know . . . . I did not believe it at that time . . . I didn't consider that Ralph was a problem . . . . I kind of figured that the company had been kind of nice to him, and I didn't expect it from him." Moore continued that until he was apprised of this, he was unaware that Picazzo was a union supporter, not knowing "who was pushing the union," and was surprised to find out that Picazzo was the one doing so. Moore added that, during this conversation, neither Colvard nor Kosiek mentioned anything about Picazzo having threatened or intimidated any employees. According to Moore, soon thereafter, approximately a week before the election,

> I approached Ralph and warned him that apparently from the indications I had heard he was campaigning for the union on company time, and told him that I would appreciate it if he would desist or refuse to do that, and he could be subject to dismissal if he continued.[41]

Kosiek denied that, prior to the election, he had gone with Jerry Colvard to Moore's office to complain or report about Picazzo's union activities. However, he did testify that approximately 10 days before the election, he had gone to see Moore about "some questions about the union that I thought he could answer for me." Kosiek stated that Karl Bernsten, the janitor, was present in Moore's office and was upset and complaining about "the hassle that was going on" concerning the question of union representation, and Bernsten was "fed up . . . and ready to just walk out the door, period." He related that Jerry Colvard did appear in Moore's office "momentarily" but had said nothing and left. While Kosiek could not recall what was actually said during this conversation, his testimony strongly implies that he and Bernsten did mention to Moore that Picazzo was campaigning on behalf of the Union, although Picazzo's name was never actually mentioned. Kosiek recounted that they all knew that they were "talking about Ralph." He added that Moore appeared "shocked" about this revelation, and that the conversation lasted "just a few minutes."

Moore related that approximately 3 or 4 days after Colvard and Kosiek had first registered their complaints with him against Picazzo, Colvard again came to see Moore and "reiterated the same claim" regarding Picazzo's continuing to campaign for the Union on company time. He continued,

> [Colvard] recorded his concern, hoping that we would not have a union. His indication was that this was not his dominant desire. I basically explained the situation that we had to go through the due process. And that was not enough to satisfy Jerry, he still felt helpless as I did.[42]

Moore seemed a little confused about this conversation.[43] At first he testified that Colvard had said nothing about Picazzo having threatened employees. He then testified that Colvard had told him that

> Ralph has been threatening my people . . . indicating that they should vote for the union, or else . . . that they would have a problem after the union got in . . . . Basically they were told to get on the side of the union. And if they didn't, they would be sorry, because once the union got in they wouldn't have a job.

Moore added that he asked Colvard "where his information was coming from," and Colvard answered, "from Mark [Freeland] and Larry [Colvard]."

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[40] At Picazzo's unemployment compensation hearing, the Respondent contested Picazzo's entitlement to compensation on the grounds that Picazzo had been discharged for threatening and intimidating its employees. However, at his hearing the Respondent again did not identify any of the employees who were alleged to have been threatened and intimidated by Picazzo.

[41] Moore stated that Picazzo did not deny this.

[42] Moore testified that Jerry Colvard had indicated to him on a number of occasions his strong feelings "not to have the union voted in."

[43] However, this may have been caused by counsel for General Counsel's use of a time frame to pinpoint when this conversation occurred which appeared to confuse the witness.

Moore testified that he then sought out Larry Colvard and asked him to "tell me first-hand what he had been telling Jerry." Moore stated that Colvard said,

> "He has got me all shook up" . . . that Ralph [Picazzo] had told him that if he did not get on the side of the Union that he was going to have some problems . . . . "What problems he plans, I don't know. I have got enough now."

Moore added that he told Colvard to "take it easy, I think things will turn out all right."

Moore continued that he also spoke to Mark Freeland,

> I asked him what he had been telling Jerry that Ralph had said, I would like to hear it first-hand. I think he asked me what Jerry told me. And I reiterated that . . . . Basically to get on the side of the union or there was going to be a problem. [Freeland] says, "That is what [Picazzo] told me!" I believe Mark said that Ralph would get to him somehow . . . . Well, as best as I recall it had something to do with his job security . . . . He indicated to me that he may not have a job, whichever way the election went.

Moore stated that Colvard and Freeland were "a little bit afraid of losing their jobs," and he told each of them that any discharges of employees required discussion with management before such discharge could be implemented. Moore related that he had spoken to Colvard and Freeland in order to investigate the "rumors" he had been hearing about the plant concerning Picazzo intimidating and threatening employees while campaigning for the Union.[44]

Moore testified that about 3 or 4 days before the election he had another conversation with Picazzo relating to Picazzo's "campaigning for the union on company time, but it was, I guess you would call it a little more heated, because I was annoyed because he was continuing to campaign for the union on company time." Moore related that he told Picazzo,

> "Ralph, we understand you are still campaigning for the union on company time. I request that you discontinue that activity." And I indicated that he would be subject to termination, and that I didn't feel it was right what he was doing.

Moore stated that while he did not tell this to Picazzo, he felt that Picazzo, "as a supervisor," was not obliged to campaign for the Union on company time. He added that Picazzo again offered no response to Moore's accusation.

Moore testified that approximately 2 or 3 days before the election Jerry Colvard came to his office and told him that employee Brent Yankee "has just been threatened, also" by Picazzo.[45] Moore stated that since Yankee did not report this incident to him that day, he called the Respondent's attorney to apprise him of what had occurred whereupon it was decided that Moore would speak to Yankee about this "to confirm the threat." Moore recounted that the following morning, he visited Brent Yankee at his home and asked Yankee to relate what had happened between him and Picazzo the previous day. Moore continued,

> Brent said that [Picazzo] approached him indicating some sort of meeting. I forget the context of the meeting. And that [Yankee] should be there, and that if he said anything to anyone about this talk that Ralph and Brent were having that he would kill him—kill Brent . . . . Brent further indicated that when Ralph said this, he turned away for a second, looked back and smiled to see if Ralph was kidding, and [Picazzo] either said, "I'm not kidding," or "I am serious," or words to that effect.

Moore recounted that, at his request, Yankee prepared and executed a written statement of what had occurred between Picazzo and himself, and gave it to Moore, with Yankee telling Moore that "I am afraid to come to work." Moore added that he told Yankee that if he did not feel up to reporting for work that day, he should "call in by the standard procedure," whereupon Moore left Yankee's house. According to Moore he then discussed this whole incident with the Respondent's "general manager in Chicago" and the Respondent's attorney, which resulted in the posting of a security guard during Yankee's shift at the plant.

Moore testified that about 3 or 4 days after the election held on November 5, 1981, Jerry Colvard came to his office and advised him that Picazzo had again threatened employees Mark Freeland and Larry Colvard, telling them "that now that the election had been won, there was going to [be] some fun around here and some heads are going to be busted for those that didn't get on the side of the union." He stated that Bernsten, the janitor, came into his office "a minute or two later," and a third person, whom he could not remember, was "standing virtually in the doorway" when Colvard told him what had occurred. With more particularity Moore recounted that Colvard had stated that Freeland told him that Picazzo had said, "Now that the union is in, those that didn't get . . . on the side of the union, some heads are going to be busted." Moore related that Bernsten, with tears in his eyes, said, "They have got me all shook up and I want to quit," whereupon Moore told Bernsten, "Things will still work out. You will still have a place to work." Moore indicated that Colvard said, "This is a damn shame," and left Moore's office and Moore now offered Bernsten the option of leaving work early since he appeared upset, but Bernsten refused the offer. Moore continued that later that same day he discussed this incident with Ron Williams asking Williams, "What do we

[44] Moore testified that he never investigated the circumstances of Picazzo's alleged activities on behalf of the Union, only as to the threats Picazzo was rumored to have made to employees. He added that other than the reports about Picazzo's union activities, he had heard no other "rumors" as to other employees campaigning for the Union or threatening employees at the plant.

[45] Moore testified that he had been told that this "confrontation" occurred while Yankee was "working on his machine" and at approximately 2:30 p.m.

do now, Ron," to which Williams replied, "I don't know." Moore testified that he also spoke to Larry Colvard and Mark Freeland about Picazzo's threat of "heads being busted" and that "they were both fearful of harm, bodily harm." Moore added that after he called his attorney for "consultation," since he felt that Picazzo should now be terminated, he then made a final decision to discharge Picazzo while at home on the "evening of November the 9th" 1981.

Moore testified that he discharged Picazzo on November 10, 1981. Moore related that Picazzo was called to his office about 2:15 in the afternoon and, with Williams also present, he told Picazzo,

> Inasmuch as you have continued to push for the union on company time and threatened and coerced employees, we find it necessary to terminate you at this time.

Moore stated that Picazzo responded, "I have been expecting it." Moore related that he now told Picazzo,

> I am sorry it turned out this way. I hope you will understand my position. I indicated also that I would do nothing to stand in the way of his unemployment, and also volunteered a letter of recommendation, if he felt it was necessary at any time.

Moore continued that he presented Picazzo with his final check and Picazzo then left his office. Moore added that Picazzo was an efficient employee with above-average technical and mechanical ability, an excellent attendance and punctuality record, and with work habits "well above average." Moore maintained that the Respondent would not have discharged Picazzo had he merely been campaigning for the Union, but did so because Picazzo had threatened and intimidated employees. Moreover, Moore admitted that after learning of Picazzo's union activities, he did not issue any directives precluding supervisors from campaigning for or against the Union during working hours, nor did he at management meetings with supervisors direct them not to do this.

Brent Yankee, a witness for the Respondent and employed by the Respondent as a machine operator, testified that 3 or 4 days before the election Ralph Picazzo, the day-shift leadman, approached him while he was working at his roll forming machine and said, "You know, the union is trying to get in," to which Yankee responded that he knew about this but that no one had discussed the Union with him or invited him to attend any union meetings.[46] Yankee stated that Picazzo said that "he was wondering . . . what way I was going to be voting." Yankee continued,

> And he just started telling me that it would be better to vote for the union. We would be getting some benefits, but I wouldn't know until after we voted. He said, "We'll have a meeting after you vote." . . . he went into detail on telling me, you know, that he couldn't tell me the benefits now because they're not written out yet, but he says, you know, after the vote, everything will be drawn down and we'll have the meeting to let you know what you're going to get.[47]
>
> I told him it didn't sound too good to me the way he was putting it across to me because of the idea that, you know, he was going to give me a promise, what they were going to give me after the election . . . . I told Ralph that the way it sounded, he was getting paid off, and he said yeah, he was. I also said something about making the money for the mortgage because I knew he had just been turned down for a mortgage.[48]
>
> He goes, "well, if you tell anyone what I've told you, I'll get you, I'll kill you. I'd kill you if you tell anyone of what I've told you" . . . I go, "you didn't mean that." And he said, "I'll get you. I'll kill you." And he just walked away, split.[49]

Yankee added, "I don't think he was serious. I can't recollect that he was, but when anyone throws a threat, I assume that you know, I've got to tell someone about it or, you know, report—"[50] According to Yankee, while his helper Vincent Negron was present near the machine when this occurred, and could not hear what was said between him and Picazzo at the time, Negron did overhear him subsequently tell Patterson what Picazzo had stated.

Yankee testified that he decided to tell his leadman, Pat Patterson, about Picazzo's threat to kill him and what Picazzo had told him about the benefits and, after doing so, asked Patterson not to tell anyone else about this incident, "I asked Pat to be quiet about it and Pat says, '"Yeah, I will."' Yankee related that he had asked Patterson not to repeat what he had told him because, "I know Ralph: He used to be my leadman. I don't know if he would do anything, but people can get greedy sometimes . . . . Yeah, I didn't want to get no one hurt at

[46] Yankee related, "I just heard, you know—from what I understood, the way everybody was acting . . . a lot of people were voting, yes, because they wanted a union. That's the way I took it . . . . I work night shift and night shift is small and when I was coming in they were leaving. So I didn't really get to sit down and . . . I was left out of everything more or less."

[47] Yankee testified that Picazzo did mention that if the Union won the election, the employees would only be assigned duties consistent with their particular jobs, and receive certain benefits "medical and all that . . . he didn't go into heavy detail but he says it'll be benefits better than what we have now at this time, but we got to pay for it, per month." Yankee also remembered that he had asked Picazzo if there was going to be a union meeting before the election was held and Picazzo said, "No."

[48] Yankee testified that Picazzo had said, "Yeah . . . in a funny way, like, I don't know for sure, you know, what way he meant," whether Picazzo was acknowledging being "paid off" as a fact or was questioning Yankee's seriousness in asking such a question at all. Yankee stated, "I didn't know if he was serious about it, but I wasn't really concerned. The only thing I was really concerned about was the threat."

[49] Yankee also testified on cross-examination that Picazzo "was going on telling about the benefits and stuff and he goes, Oh, and if you tell anyone what I said, I'll kill you! And when he started saying that stuff, that's when I came back and started bringing up stuff, are you getting paid off for this? You're making promises, you say you're going to make a promise after I write down my vote? You know, what is this?" He related that Picazzo came back later that day and asked him for 25 cents, "And he acted like nothing happened."

[50] Yankee also testified that while he did not think that Picazzo's threat was seriously made, "I didn't want to think that," but Picazzo had "acted like he was serious, somewhat."

all."[51] Yankee added that later that evening, Patterson approached him and said, "I had to tell Don [Moore]."

Yankee testified that the next day Moore came to his home and advised him that Patterson had told him about the incident between him and Picazzo, and Moore was "disturbed by what had happened" and Moore asked him to explain what had occurred. Yankee stated that after he had done so, Moore asked him if "he would be willing to sign a statement if it was all true, sign a statement to back it up." Yankee related that he agreed to do so and told Moore additionally that, "I didn't expect Pat to tell anyone. I wanted to keep quiet because I didn't want to have anyone get in trouble. I just wanted to keep my job. I told [Moore] the only reason I brought it up to Pat is because when the threat came up to me, I just felt that I needed to tell someone." Yankee recounted that he then "wrote it and signed it at the house." Yankee continued that the conversation he had had with Picazzo influenced his vote at the election because, although "[I] was telling everyone I was going to vote no . . . I was wondering, 'It might be better. Who knows?'" but after this conversation with Picazzo, "I knew 100 percent that I wasn't going to do it." Yankee added that because he was not being invited to union meetings, he felt that he was not liked, and that was another reason for his voting against the Union.[52]

Concerning this Larry Colvard testified that 2 or 3 days before the election Brent Yankee had told him that Picazzo threatened him saying, "I'm going to kill you." Colvard stated that he went directly to his brother Jerry Colvard and told him, "Well, another one's been threatened." Colvard added that, "Because already up to that time, if I'm not mistaken, Brent's car window had been smashed out, stuff like this. There was little things written on the bathroom walls about us. All over. It was just the atmosphere of the company."[53] Freeland also testified about this incident. Freeland stated that sometime during the week before the election Brent Yankee had told him,

> . . . that Ralph had threatened him about saying things to his supervisors, because word had gotten out about the things that were being said, and Brent was rather shaken up at the time. It was hard to really get a clear story out of him. He said—he said something about threatening violence, and there was another person there who thought the same thing, because it was one of those situations where it is hard to believe what you are hearing. That is what he referred to me.[54]

Freeland related that Yankee had told him that the reason Picazzo "had talked to him" was because "somebody had said something to one of the supervisors" about Picazzo speaking to employees about the Union.

Picazzo recalled that he had had a conversation with Brent Yankee 2 days prior to the election with regard to union benefits, "Something of that nature, yes."[55] Picazzo testified:

> I approached Brent Yankee. We were pretty chummy. I asked him what was going on, how he had been, and he said fine. Hadn't seen him in a long time, because he works on the second shift, and he then proceeded to take over the conversation, discussing the problems he had had with his former girlfriend, or a future girlfriend,[56] and somewhere along the line, he asked me how I had felt about the way the situation was going with the union, and I had told him, well apparently everything looks all right. He then asked about benefits . . . could you tell me more or less what we tend to gain?
>
> Well, I then explained to him . . . as far as I know, I couldn't really say, because I did not know about any possible benefits. All I told him was that if the election went either way, if it went for, that there would be negotiations, but I made no promises whatsoever, and also he did, kidding around, ask me if I was being paid by the union, and I told him—my response was, are you kidding?
>
> Anyway, he then asked me . . . are there going to be any more meetings, and I says, as far as I know, I don't think so. He says, well, there must be at least one more meeting, you know, right before the election. I says, as far as I know, I don't know of any.
>
> And then in my closing statement, I told him, be careful who you talk to.

Picazzo stated that he had made this latter remark because there were rumors circulating among the employees that "heads will roll," certain people would be losing their jobs, with a "general belief that apparently Don Moore was going to get even." Picazzo added,

> Okay, there were certain rumors as to an employee by the name of Jerry Colvard that they believed that his stand opposing the union coming into the plant, and that also that they felt also that Don Moore was only using him until the election was over, in which case there was a possible chance he may be terminated . . . . there was rumors to a certain list of certain names of certain employees which were pending termination . . . [by] Mr. Moore.

[51] Yankee also testified that he asked Patterson "to keep it quiet because I didn't want to get in a hassle over it; you know, a fight or anything you know, with the other guys, and get my car broken, my windows broken, like I did have happen after I did—after Pat mentioned it I ended up getting my windows broken and stuff."

[52] Yankee testified that Pat Patterson, his leadman, while they were at a bar together after work, recommended that he vote against the Union.

[53] Colvard testified that written on the bathroom walls was the phrase, "Death to the Dog Brothers," an obvious reference to the Colvard brothers.

[54] Freeland remembered that the other employee present was named Vince.

[55] Picazzo testified that Vincent Negron, Yankee's helper, was also present and that this conversation occurred at Yankee's machine.

[56] Yankee was unsure if during the conversation with Picazzo he had discussed problems with his girlfriend.

While Picazzo admitted that he may have passed along some of these rumors, he denied having started them.[57]

Picazzo denied that he had ever threatened to kill Yankee, either seriously or jokingly, if Yankee told anyone about what Picazzo had said to him. Picazzo also testified that neither Moore, the Colvard brothers, Freeland, nor Brent Yankee himself had ever accused Picazzo to his face of threatening to kill Yankee.

Larry Colvard, employed by the Respondent as a forklift driver until May 26, 1982,[58] testified that Picazzo had, on occasion, discussed the Union with him and that "as the election drew near [these discussions] would get more and more frequent. The last week was every day, maybe once, twice." He stated that Picazzo would say, "Good things about what the union's going to do for him but what Chicago Metallic hasn't. That's the best way to sum it up."[59] Colvard added that he felt threatened by Picazzo,

> Only for the fact that when he was talking to me and if somebody more high powered than he would come up, he would automatically clam up. There would be no more. And then it became to where he said . . . what would happen to my older brother, which is a supervisor there. He told me directly that when the union was in, Jerry was gone . . . which is my brother—and I figured that if he's got enough power to get my brother out of there, he got enough power to get me out of there. I'd only been there two months.[60]

Colvard continued that about "one or two, three maybe" days after the election, while having a "blinking red light" repaired on his forklift by the electrician, Picazzo came over and asked what they were doing and then said,

> Yeah, it's going to be fun around here now. I'm going to enjoy this a lot. Heads are going to roll. The guys who talk for the company are going to get their heads busted.

Colvard related that Charles Young, the electrician, was present when Picazzo had made this statement and that soon thereafter he told his brother Jerry Colvard, the warehouse supervisor, about what Picazzo had said.

Picazzo testified that, after the election, he had a conversation with Larry Colvard, at which Chuck Young was present and to the best of his recollection, although he really did not recall what was said,

> It was mainly along the same frame. These employees were asking me about certain allegations, or certain people that were passing on these rumors, and they were asking how I felt about them, and I told them . . . as to my knowledge that I did not know . . . as to how valid these rumors were.[61]

Picazzo denied that he had told Colvard that after the election his brother, Jerry Colvard, would be gone, or that if the Union won the election, Jerry Colvard would be fired. However, he did admit telling Larry Colvard and/or other employees "of a rumor" concerning Jerry Colvard, as he previously testified.

Mark Freeland testified that he and Picazzo had spoken together about the Union on a daily basis for 2 or 3 weeks before the election.[62] He stated that Picazzo talked about the benefits to employees if the Union won the election such as, pay raises, medical and dental coverage, and about the "downfalls" of union representation, as such initiation fees and dues. Freeeland related that Picazzo had mentioned his brother Jerry Colvard in a conversation,

> He said that if the union [was] to go through, that there was a possibility that rather than making Jerry a management position, considering he was the traffic manager, that they would fire him, because they wouldn't want to pay him the wages that he would deserve, you know, holding the title, so that he would probably be fired after the union came in.

Freeland added that Picazzo also told him,

> That it would be wiser to go ahead and go with the flow of the union, as not to buck it, because after—he was very sure that it would go through, and that after it did, if you was a no vote, that you would be making waves, and everything, and it would be rough for you.

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[57] Picazzo testified that "somewhere between September and October 1981," prior to the filing of the Union's petition he had seen a typed list of employees' names in Ron Williams' office, showing "any days they were absent and tardy, any discrepancies of that nature." Picazzo stated that there was a yellow line drawn through some of these names and that Williams told him that there were "marginal employees," who "were to be watched." Picazzo added that Kreuger was also present when this occurred.

[58] Colvard testified as a witness for the Respondent. At the time of the hearing Colvard was not working, having "been hurt on the job."

[59] While Colvard initially testified that he had never told Picazzo that he was for or against the Union, after being shown his sworn affidavit given to a Board agent on December 1, 1981, in which he stated, "Whenever Ralph talked to me, I told him I was opposed to the Union," Colvard now testified, "I probably told everybody I was opposed to it at one time."

[60] While Colvard stated in his affidavit that "[Picazzo] did not directly threaten me with any reprisals if I did not support the union and I did not hear him threaten any other employees," Colvard maintained he felt threatened by Picazzo "even if he never said a word . . . he did enough that I thought about it . . . . I was worried about my job . . . my job security was threatened." Colvard also stated in his affidavit that prior to the election, Picazzo had told him, "If the Union wins [Jerry Colvard] will be gone." He added that Picazzo "made it sound like the company would, because they figure—he figured that since Jerry was still a wage-earner and not a salary man that they wouldn't put him on salary, and the Union wouldn't want him to be—wouldn't let a company man stay in their union, or something, for some way of that, so that that is why he would get canned."

[61] Larry Colvard denied that prior to the election there had been any rumor around the plant that a number of employees were going to be fired. He also denied asking Picazzo if his brother Jerry's name was on a list of employees to be so discharged.

[62] Freeland testified that it was common knowledge among the employees that Jerry Colvard, Larry Colvard, and he were all against the Union. He added that during their conversations together, sometimes including Larry Colvard as well, Picazzo would tell him not to relate any of this to Moore, Williams, or Jerry Colvard, but Picazzo did not threaten reprisals if they did so.

Freeland testified that the day after the election he approached Picazzo and since the union had won the election, asked Picazzo, in effect, what he could do to get on the Union's good side, and Picazzo responded,

> He said I was a fuck-up, and that I better watch my ass, because I was on the wrong side of the fence, and things could get rough, you know, as far as my job went, because I was a no vote, and I just was not for the union at all.

Freeland recounted that he repeated what Picazzo had said to him in this conversation, to his "boss, who is Jerry, my brother."

Picazzo testified that before the election, he had a conversation with Mark Freeland concerning Jerry Colvard wherein Freeland "wanted to know if there was anything valid to the rumors that were being passed around as to the standing of his brother Jerry Colvard's working position." Picazzo stated, "I told him as far as I know, it is just a rumor, that I did not know if it was true or not." Picazzo could recall nothing else that was said during this conversation. Again, Picazzo denied that he had told Freeland that, after the election, Jerry Colvard would be gone. Picazzo continued that a day after the election he had another conversation with Freeland as follows,

> Well, he seemed mighty disappointed as to the turn of the way the election had gone, and he just wanted to know what was to be expected, and I told him as I told everyone else that now we just have to wait and see, you know, what happens afterwards. It is totally up . . . to the negotiations.

Picazzo added that he had never told Freeland that he was a "fuck-up," nor ever threatened Freeland with the loss of his job if he did not support the Union.

The Charging Party called two rebuttal witnesses, Reuben Vasquez and Dale Scott. Vasquez, employed by the Respondent as a machine operator, testified that he was on "medical leave" the 3 or 4 weeks before the election, and that during this period a number of union meetings were held at his home. He stated that at these meetings no employee complained that Picazzo was threatening or intimidating them concerning their support for or against the Union.[63]

Scott, employed by the Respondent as a welder, testified that in the weeks prior to the election on November 5, 1981, there were rumors circulating around the plant concerning Jerry Colvard and that, "There was a few people taking bets on how long he was going to last after [the election] was over with, was about it." Scott stated that no employees during this period complained to him that Picazzo was threatening or intimidating them, nor had he heard any rumors to this effect, "Not around me." However, Scott related that he had heard that "somebody went up the front office, said there was threats going on, and it spread all over the shop," but he did not hear Picazzo's name "tied in with the threats." Scott added that he had also heard that the employees threatened were Brent Yankee, Larry Colvard, and Mark Freeland, but again, not as to the name of the person making such threats.

The evidence also shows that the Respondent has a no-solicitation rule in its employees' handbook. This rule provides:

> Past experience has shown that solicitations and collections always get out of hand. For this reason, collections, soliciting of any kind, the selling of tickets or merchandise, or the circulations of petitions on company property are forbidden during working hours. Additionally, there will be no distribution of literature in working areas during either working or nonworking hours. Further, there will be no oral solicitation during working hours in any plant area.

However, the rule itself is not posted in the plant.

B. *Analysis and Conclusions*

1. The supervisory status of Ralph Picazzo

Section 2(11) of the Act provides:

> The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibility to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

Supervisors are excluded from coverage of the Act.[64] In enacting Section 2(11), Congress emphasized its intention that only truly supervisory personnel vested with "genuine management prerogatives" should be considered supervisors, and not "straw bosses, leadmen, set-up men and other minor supervisory employees."[65]

The status of a supervisor under the Act is determined by an individual's duties, not by his title or job classification.[66] It is well settled that an employee cannot be

[63] However, Picazzo was complaining on behalf of the Union. Presumably, the employees who attended the union meetings would either be for the Union, leaning towards supporting the Union, or undecided as to union representation, but presumably definitely not for the Employer and against the Union. Therefore the chances of their either being intimidated by Picazzo if he were engaging in such conduct, or complaining about it to the Union at these meetings, would be slight at best.

[64] Sec. 2(3) of the Act provides:

> The term "employee" shall include any employee . . . but shall not include . . . any individual employed as . . . a supervisor . . . .

Sec. 14(a) of the Act provides:

> Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization, but no employer subject to the Act shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local relating to collective bargaining.

See *Florida Power & Light Co. v. Electrical Workers IBEW Local 641*, 417 U.S. 790 (1974); *Beasley v. Food Fair of North Carolina*, 416 U.S. 653 (1974).

[65] S. Rep. No. 105, 80th Cong., 1 Sess. 4 (1947).

[66] *New Fern Restorium Co.*, 175 NLRB 871 (1969); *Food Store Employees Local 347 (G.C. Murphy Co.) v. NLRB*, 422 F.2d 685 (D.C. Cir. 1969); *NLRB v. Bardahl Oil Co.*, 399 F.2d 365 (8th Cir. 1968).

transformed into a supervisor merely by the vesting of a title and theoretical power to perform one or more of the enumerated functions in Section 2(11) of the Act.[67] To qualify as a supervisor, it is not necessary that an individual possess all of these powers. Rather, possession of any one of them is sufficient to confer supervisory status.[68] However, consistent with the statutory language and legislative intent, it is well recognized that Section 2(11)'s disjunctive listing of supervisory indicia does not alter the essential conjunctive requirement that a supervisor must exercise independent judgment in performing the enumerated functions.[69] Indeed, as the court stated in *Beverly Enterprises v. NLRB*, 661 F.2d 1095, 1098 (6th Cir. 1981):

> . . . regardless of the specific kind of supervisory authority at issue, its exercise must involve the use of true independent judgment in the employer's interest before such exercise of authority becomes that of a supervisor.

Thus, the exercise of some supervisory authority in a merely routine, clerical, perfunctory, or sporadic manner does not elevate an employee into the supervisory ranks, "the test must be the significance of his judgment and directions."[70] Consequently, an employee does not become a supervisor merely because he gives some instructions or minor orders to other employees.[71] Nor does an employee become a supervisor because he has greater skills and job responsibilities or more duties than fellow employees.[72] Additionally, the existence of independent judgment alone will not suffice for, "the decisive question is whether [the employee has] been found to possess authority to use independent judgment with respect to the exercise . . . of some one or more of the specific authorities listed in Section 2(11) of the Act."[73] In short, "some kinship to management, some empathetic relationship between employer and employee must exist before the latter becomes a supervisor for the former."[74] Moreover, in connection with the authority to recommend actions, Section 2(11) of the Act requires that the recommendations must be effective.

The burden of proving that an employee is a "supervisor" within the meaning of the Act rests on the party alleging that such status exists.[75] In making determinations regarding supervisory status, "the Board has a duty to employees to be alert not to construe supervisory status too broadly because the employee who is deemed a supervisor is denied employee rights which the Act is intended to protect."[76]

The Respondent asserts that Picazzo is a supervisor within the meaning of Section 2(11) of the Act and is thereby outside the Act's purview and protection. The General Counsel maintains that Ralph Picazzo is not a supervisor within the meaning of Section 2(11) of the Act, adding,

> Section 7 of the Act provides that "employees" have certain protected rights and an employer commits unfair labor practices under Section 8(a) of the Act where it infringes upon those "employee" rights. Although the Board had held that certain employer conduct with respect to "supervisors" constitutes a violation of Section 8(a) of the Act, *Parker Robb Chevrolet, Inc.*, 262 NLRB 402, Counsel for the General concedes that Respondent has not engaged in such conduct with respect to Picazzo. Thus, Picazzo is only entitled to the protection of the Act if he is not a "supervisor" within the meaning of the Act.

At the time of his discharge, Picazzo held the position of assistant leadman and therefore the initial issue to be resolved herein is whether, in the performance of his duties, Picazzo was a statutory supervisor when terminated.

At the outset it should be noted that, with regard to the issue of Picazzo's supervisory status, I credit the testimony of Picazzo over that of Moore. While it is true that Picazzo's testimony did reflect instances of uncertainty and evasiveness and was somewhat guarded at times, Moore's testimony on occasion also exhibited these same characteristics and, importantly, Picazzo's testimony on this issue was supported somewhat by Steve Kosiek and Mark Freeland, who testified as witnesses for the General Counsel and the Respondent, respectively, and whose testimony I believe.[77] Moreover, and significantly as to this issue, Ron Williams and George Kreuger, the witnesses best able to testify as to Picazzo's actual duties and authority as assistant leadman in general, and the effectiveness of his recommendations in particular, were not called as witnesses to testify. From the failure of the Respondent to offer Williams' and Kreuger's testimony regarding Picazzo's duties and au-

[67] *Advanced Mining Group*, 260 NLRB 486 (1982); *Magnolia Manor Nursing Home*, 260 NLRB 377 (1982); *NLRB v. Southern Bleachery & Print Works*, 257 F.2d 235 (4th Cir. 1958), cert. denied 359 U.S. 911 (1959).

[68] *NLRB v. Ajax Tool Works*, 713 F.2d 1307 (7th Cir. 1983); *NLRB v. Bergen Transfer & Storage Co.*, 678 F.2d 679 (7th Cir. 1982); *NLRB v. Joe & Dodie's Tavern*, 666 F.2d 383 (9th Cir 1982).

[69] *NLRB v. Wilson-Crissman Cadillac*, 659 F.2d 728 (6th Cir. 1981); *Poultry Enterprises v. NLRB*, 216 F.2d 798 (5th Cir. 1954).

[70] *NLRB v. Wilson-Crissman Cadillac*, supra; *Hydro Conduit Corp.*, 254 NLRB 433 (1981); *Federal Compress & Warehouse Co. v. NLRB*, 398 F.2d 631 (6th Cir. 1968).

[71] *NLRB v. Wilson-Crissman Cadillac*, supra; *NLRB v. Doctors' Hospital of Modesto*, 489 F.2d 772 (9th Cir. 1973).

[72] *Federal Compress & Warehouse Co. v. NLRB*, 398 F.2d 631 (6th Cir. 1968); *NLRB v. Merchants Police, Inc.*, 313 F.2d 310 (7th Cir. 1963).

[73] *Advanced Mining Group*, 260 NLRB 486 (1982); *NLRB v. Brown & Sharpe Mfg. Co.*, 169 F.2d 331 (1st Cir. 1948).

[74] *Advanced Mining Group*, supra; *NLRB v. Security Guard Service*, 384 F.2d 143 (5th Cir. 1967).

[75] *RAHCO, Inc.*, 265 NLRB 235 (1982); *Tucson Gas & Electric Co.*, 241 NLRB 181 (1979); *Commercial Movers*, 240 NLRB 288 (1979).

[76] *RAHCO, Inc.*, 265 NLRB 235 (1982); *Westinghouse Electric Corp. v. NLRB*, 424 F.2d 1151 (7th Cir. 1979), cert. denied 400 U.S. 831 (1970).

[77] Kosiek was still employed by the Respondent at the time he testified herein and the Board has long held that testimony against the interests of one's employer while still in its employ is entitled to added support. See *Shop-Rite Supermarket*, 231 NLRB 500 (1977). Freeland, on the other hand, was no longer employed by the Respondent when he testified herein, having left the Respondent's employ over an argument with his stepbrothers, employees Jerry and Larry Colvard. Testifying as a witness for the Respondent, his testimony on the issue of Picazzo's duties, in part supportive of Picazzo's testimony, is more likely to be true.

thority, I draw the inference that their testimony would have been adverse or unfavorable to the Respondent's case and its contentions herein.[78]

The Respondent in its brief asserts,

> . . . it is clear that the assistant lead is a supervisor. As conceived, the job requires decision-making in various areas of supervisory concern, including work assignments, discipline, scheduling and employee evaluations. In addition, the assistant lead is relied upon by management to oversee quality control and safety. And while Picazzo may not have consistently performed each of these duties, the mere fact that he had authority to do so is sufficient to establish his supervisory status. *Hirsch Broadcasting Co.*, 116 NLRB 1780, 1783 (1956).

I do not agree. And while the Respondent further asserts that "From Picazzo's own testimony, it is clear that his job description [R. Exh. 25] serves as a practical summary of his job," as will be discussed hereinafter, this does not reflect nor consider various important and significant differences between the job description and the actual duties performed by Picazzo.[79]

Moreover, despite the written job description, the evidence herein indicates that there was some confusion concerning just what Picazzo's duties actually were to be, as illustrated by Moore's own testimony that, after initially meeting with Picazzo to explain the duties of the position of assistant leadman, Picazzo had subsequently come to him for "clarification" of such duties; and further, that Moore had been required thereafter to hold a meeting with Williams, Kreuger, and Picazzo, "to redefine the direction so that there wasn't such a drastic overlap" in the duties of Kreuger and Picazzo as leadman and assistant leadman, respectively. Picazzo testified that he had never seen a copy of the job description in evidence although he and Moore had discussed a "rough draft" of his duties soon after he became the assistant leadman, and he and Moore "went over roughly just more or less what [Moore] wanted me to do as assistant leadman under George Kreuger, which was mainly to assist with George," maintain the operation of the machinery, and act as leadman in the maintenance department.[80]

In the instant case, while the evidence shows that Picazzo had authority to assign and direct production employees and to evaluate them, including newly hired employees whom he also trained in the performance of their jobs, had a role in the disciplinary process, and performed certain other duties which might be construed as supervisory in nature, on the record as a whole I am convinced that Picazzo possessed no authority to act other than in a routine manner and only as a conduit between employees and management, and that he was therefore not a supervisor within the meaning of the Act. Further, a preponderance of the evidence fails to show that Picazzo exercised any independent judgment in performing his duties as assistant leadman.

The record is clear that Picazzo had no authority to hire, transfer, suspend, lay off, recall, promote, discharge, or reward any employee, or to adjust employee grievances. While Picazzo's rate of pay as assistant leadman was higher than the other production employees, except for those employees with substantially greater seniority than himself, still he was paid on an hourly basis like the other employees, received the same fringe benefits as they did, "punched a time clock" as other employees did, ate lunch with the employees in the lunch area, and had no office, desk, or telephone assigned for his own exclusive use as did acknowledged Supervisors Moore and Williams.[81] Moreover, George Kreuger, the leadman, distributed employee paychecks and prepared the weekly production work assignment schedules, and Ron Williams, the plant superintendent, kept and maintained employee timecards and absentee records.

The Respondent in its brief also asserts,

> According to the job description . . . the assistant lead's primary function is "To *supervise* the production operations of the assigned department in the most effective and efficient manner." [Emphasis added.] In accordance with this goal, the assistant lead has the responsibility of recommending "changes in work methods or procedure and cost reduction possibilities" and can "plan and control department operations."

However, there is no evidence in the record that Picazzo ever recommended changes in work methods or procedures and/or cost reduction possibilities, or that he in any way had any input into the planning and controlling of the production department's operations. Additionally, there is no evidence in the record that the Respondent looked to or sought such input from Picazzo about these matters.

In this vein, Picazzo testified that while he regularly attended management meetings during which plant production and expansion problems were discussed, he was

[78] From the failure of a party to produce material witnesses or relevant evidence obviously within its control without satisfactory explanation, the trier of the facts may draw an inference that such testimony or evidence would be unfavorable to that party. See *7-Eleven Food Store*, 257 NLRB 108 (1981); *Publishers Printing Co.*, 233 NLRB 1070 (1977).

[79] The Respondent's description of Picazzo's actual duties is as follows:

> Picazzo worked the day-shift with responsibilities in the production and maintenance areas. He testified that his immediate supervisor was plant superintendent Ron Williams, and that his duties were to assist the production lead, George Kreuger, and "to *head* the maintenance department." On any given day, Picazzo had 18 machine operators and helpers under him in the production department as well as three maintenance employees (an electrician, a hydraulic pump repairman, and a welder) and the janitors. He did not work side-by-side on a daily basis with any of the production or maintenance employees. Rather he gave them assistance, when necessary, which was on the average of once or twice a week. In the production department, Picazzo supervised the maintenance of equipment, checked the metal inventory and made weekly evaluations of employee performance. He also assigned work to production employees based on a schedule kept at the quality control desk. Significantly, the employees would go to Picazzo whenever they had questions regarding their work assignments, and he would organize overtime crews to meet production needs.

[80] The fact that additional meetings were required to clarify the duties of assistant leadman would tend to support Picazzo's testimony.

[81] *Judd Valve Co.*, 248 NLRB 112 (1980).

never asked for his opinion or recommendations concerning such problems nor asked to provide input into these discussions. He stated that he "sat and listened . . . all they do is say what to do, and I do it."[82] The Respondent alleges in its brief:

> Picazzo would have the Administrative Law Judge believe that a leadman—who worked directly in the quality control area, checked specifications daily, insured the quality of the product and issued warnings to those who failed to meet the standards—had absolutely nothing to report on the success or failure of production methods and that he was never asked for his opinion. Why would the Company even bother to include Picazzo if nothing was expected of him in the first place?

However, Picazzo's testimony concerning this is not at all unbelievable as the Respondent would imply. The evidence suggests, and it is reasonable to assume, that Moore and Williams, in conjunction with the Respondent's main office, set production policy and planned and controlled overall departmental operations. Since Picazzo's duties were to assist Kreuger in implementing these policies on the production level under the overall supervision of Moore and the immediate direction of Williams, Picazzo would have to be aware of management decisions, thus his attendance at these meetings, where problems arising therefrom were discussed, would be necessary and helpful. Also, Picazzo's role as an informational conduit between the employees and management, implicit in his duties as assistant leadman, would require his presence at these meetings.[83] Moreover, Picazzo reported to Williams daily, and it is again reasonable to assume that he would inform Williams of any problems arising in the production area, so that Williams thus had the information at hand during these meetings negating the need to question Picazzo thereon. On the other hand, while Picazzo may not have been asked for his opinions during these meetings, there is no evidence that he was specifically precluded from participation in the decisions, it appearing that he just did not do so. Significantly, while Moore testified herein, he did not specifically dispute Picazzo's above testimony, and as pointed out above, neither Williams nor Kreuger was called as a witness by the Respondent to contradict Picazzo's testimony. From the record evidence, it strongly appears that the responsibility and authority in this area was actually vested in Ron Williams, the plant superintendent, in Donald Moore, the plant manager, and perhaps somewhat in George Kreuger, the production leadman, and not with Picazzo.

The Respondent's brief continues,

> The assistant lead also has responsibilities in the area of work schedules. He can assign work and adjust schedules, arrange changes in job assignments, assist in the preparation of the vacation schedule, and plan temporary personnel requirements when required by the production schedule . . . . [Picazzo] also assigned work to production employees based on a schedule kept at the quality control desk. Significantly, the employees would go to Picazzo whenever they had questions regarding their work assignments, and he would tell them what was required. In addition, he would organize overtime crews to meet production needs.

However, the evidence herein shows that Kreuger, the production leadman, prepared the weekly work schedule which indicates "the type of bars and which machine is going to run it, and also who was going to operate the machine." Picazzo played no part in the preparation of these work assignments. While Picazzo distributed the actual work assignments to the employees each day, the assignments were based on the work schedules prepared by Kreuger and there is no evidence in the record that Picazzo had any choice as to which employees were assigned to which machine. It would also appear from the evidence that Picazzo had no authority to vary the information on the work schedule in any way, and although he had transferred employees from one work assignment to another, this was done only on the instructions of Williams to do so.[84]

All things considered, Picazzo's role in assigning employees to the roll forming machines is a routine one, "more clerical than supervisory"[85] and does not require the use of independent judgment and accordingly does not confer supervisory status. In fact, the assigning of employees to operate the machines requires little or no skill or judgment since Picazzo simply followed the production leadman's listing. Put in proper perspective, Picazzo exercised very limited or no judgment at all in al-

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[82] I assume that the Respondent submits that Picazzo's attendance at management meetings also indicates his supervisory status. As the administrative law judge in *Ahrens Aircraft*, 259 NLRB 839, 843 (1981), states,

> Although under certain circumstances such attendance has identified an employee as a company representative, I am aware of no case in which such attendance, in the absence of other criteria, is sufficient to cloak an individual with supervisory status. It should also be noted that attendance at management meetings is not among the supervisory functions identified in Section 2(11).

[83] Picazzo's role in transmitting instructions from management and any information from employees back to management, standing alone, does not make him a supervisor for purposes of the Act. See *Injected Rubber Products Corp.*, 258 NLRB 687 (1981); *American Feather Products Corp.*, 248 NLRB 1102 (1980).

[84] I am not unmindful that Picazzo stated in his Board affidavit that each morning he, Williams, and Kreuger would "get together and decide what work had to be done and who was going to operate which machine." However, this is not necessarily inconsistent with his testimony at the hearing that he assigned employees to the roll forming machines on the basis of the work schedules prepared by Kreuger, only reassigning them when instructed to do so by Williams. There is no evidence in the record that any input by Picazzo at these morning meetings regarding the assignments was other than routine or perfunctory, or required the exercise of independent judgment. The more likely circumstances occurring at these meetings were that Williams decided what work had to be done and he and Kreuger considered any changes in work assignments. Picazzo was then informed as to what work assignments he was to distribute to the employees, with Picazzo's role being that of a conduit of managerial decision based on the work schedule and production needs, rather than with Picazzo exercising any independent judgment on decision-making as to the scheduling of the production employees. See *Rich's Precision Foundry*, 262 NLRB 678 (1982); *Hydro Conduit Corp.*, 254 NLRB 433 (1981). Since Williams and Kreuger were not called as witnesses by the Respondent, this omission lends support to the above.

[85] *Hydro Conduit Corp.*, supra; *NLRB v. St. Francis Hospital*, 601 F.2d 404 (9th Cir. 1979). Contrast: *Liquid Transporters*, 250 NLRB 1421 (1980).

locating the assigned jobs to employees and, as assistant leadman, merely served as a conduit for management instructions. Thus, "The assignment of work was routine in nature and did not depend on the exercise of independent discretion, which is the hallmark of the supervisor."[86]

Moreover, there is no showing that employees require close supervision in performing the duties to which Picazzo assigned them. Since the products to be produced are generally standardized and the employees assigned to work classifications, the record fails to establish that any directions given the employees by Picazzo required the exercise of independent judgment.[87] Additionally, the fact that the employees went to Picazzo "whenever they had questions regarding their work assignments" does nothing to change this. Picazzo was the person who distributed their work assignments, thus having full knowledge of the work schedules, and was charged with maintenance responsibilities as to the proper functioning of the machines. Being also admittedly an experienced employee, with "above-average technical and mechanical ability," the employees would naturally bring their questions to him and their doing so does not confer supervisory status on Picazzo. This appears to be merely a case of employees seeking advice or instruction from a more experienced and knowledgeable employee who is assigned additional duties, than that of employees seeking managerial or supervisory direction that would elevate such action to that commensurate with supervisory authority. There is no evidence that he exercises in this activity any of the powers listed in Section 2(11) of the Act.

Implicit in the Respondent's assertion that Picazzo is a supervisor is Picazzo's responsibility for seeing that the work is completed properly and on schedule. However, this responsibility is not, in and of itself, sufficient to confer supervisory status.[88] There is no indication in the record that Picazzo's resolution of any problem concerning this responsibility requires the exercise of independent judgment characteristic of statutory supervisory status.[89] That is, there is no indication that his actions in resolving such routine problems represent more than an exercise of work judgment rather than that of delegated authority.[90] It would appear that if Picazzo encounters any problems which he cannot resolve in a routine manner, he is obliged to report this to Williams who would resolve it. Even if Picazzo had the authority to correct the work of employees, there is no evidence that he could reprimand or othewise discipline them "to an extent which might significantly affect the employees' job status or work to his detriment." Thus, Picazzo exercised little meaningful control over his coworkers' performance.[91]

While it is Picazzo who requests employees to work overtime whenever there is a need to do so, it is Williams who makes the determination as to whether overtime is to be performed and which employees are *not* to receive such overtime work. Furthermore, Picazzo does not direct employees to accept overtime work. He merely asks those employees who desire the additional work to speak up and accepts their decisions as to the assignments. There is no basis in the record for concluding that Picazzo exercises independent judgment in selecting or in effectively recommending the selection of employees who are to be assigned to perform such overtime work. Additionally, Picazzo lacks the authority to grant employees time off. He has no discretion to grant or reject employee requests to leave work early and there is no evidence that he has ever done so. Accordingly, his authority in this regard, if any, is not supervisory.

Picazzo spends a good deal of his time inspecting the work being performed by the other employees to ensure that it is being done properly and to specification. Yet, the work of an inspector, ensuring the quality of the product being produced, is not one of the powers listed in Section 2(11) of the Act. In fact, Congress made a conscious decision to exclude such work from the definition of a statutory supervisor.[92] Of course, if, in the performance of his inspections, Picazzo had exercised any of the supervisory powers of Section 2(11) of the Act—such as being able to discharge, direct, reward, or discipline employees, or effectively recommend such action—then there would be a basis for concluding that he is a supervisor. However, Picazzo does not exercise any of these statutory powers. So far as the record discloses, any direction that he may give in connection with inspection of work being performed by the employees "is dictated solely and routinely by the specific demand of each production job."[93] It has not been shown to be other than ministerial.[94] Moreover, there is no evidence in the record that Picazzo "arranges changes in job assignments" independently, using any discretionary authority, nor "assists in the preparation of the vacation schedule."

The Respondent also maintains in its brief,

> Regarding personnel, the assistant lead is required to write employee evaluations . . . . More significantly, the assistant lead "recommends wage increases or promotions," as well as the "hiring of additional employees." [Emphasis added.]

While it is true that Picazzo does write evaluations of employees, he testified uncontradictedly that he makes no recommendations therein as to promotion, transfer, or salary raises. The evidence shows that Williams makes

[86] *Ahrens Aircraft*, 259 NLRB 839 (1981); *B-P Custom Building Products*, 251 NLRB 1337 (1980). Also see *Rich's Precision Foundry*, supra, 262 NLRB 678 (1982).

[87] *John Cuneo of Oklahoma*, 238 NLRB 1438, 1439 (1978); *Medicine Bow Coal Co.*, 217 NLRB 931 (1975).

[88] *Hydro Conduit Corp.*, supra, 254 NLRB 433 (1981); *Loffland Bros. Co.*, 243 NLRB 74 (1979).

[89] *Print-O-Stat, Inc.*, 247 NLRB 272 (1980).

[90] *Hydro Conduit Corp.*, supra; *Dubin-Haskell Lining Corp. v. NLRB*, 375 F.2d 568 (4th Cir. 1967).

[91] *Ahrens Aircraft*, supra, 259 NLRB 839 (1981); *Tucson Gas & Electric Co.*, supra, 241 NLRB 181 (1979).

[92] *Hydro Conduit Corp.*, supra; *Clayton Mark & Co.*, 76 NLRB 230 (1948).

[93] *Print-O-Stat, Inc.*, supra.

[94] *Loffland Bros. Co.*, supra.

all the recommendations as to these actions, with Moore having the final say thereon. The evidence strongly infers that Picazzo's evaluations of employees are but the first step in an evaluation process for salary raises with Williams and/or Moore making an independent determination as to whether employees should receive raises and, perhaps where necessary, as to determinations of promotion or transfer. There is no evidence herein that Picazzo's evaluations are followed and used as the basis for such determinations. Nor does the evidence show that Picazzo can effectively recommend any of the above actions. At best, the evidence shows that Picazzo had some input about these matters, but his evaluations are only one aspect of the information considered, with the final decisions in these areas being made independently by Williams and/or Moore.[95] What weight, if any, would be given Picazzo's evaluations was obviously completely within Williams' discretion, and since the evaluation could be rejected by the Respondent without explanation, these evaluations cannot be regarded as having any decisive effect upon the employees involved. So far as the record discloses, any information which Picazzo may provide in connection with these matters is based on his working skill and experience, and is insufficient to confer supervisory status. Moreover, there is no evidence in the record showing that Picazzo recommends the hiring of additional employees.

The Respondent additionally asserts,

> As to discipline, the assistant lead not only assures that Company work rules are enforced, but he also "initiates and recommends appropriate disciplinary action when necessary."

However, while the evidence tends to show that Picazzo can verbally admonish employees for lateness, absenteeism, violating safety rules, and perhaps for performing incorrect or unsafe work, his responsibility for ensuring that work is performed safely "does not reflect the kind of discretion indicative of supervisory status."[96] More importantly, absent some showing of impact on employees' job status, verbal reprimands do not constitute "discipline" within the meaning of Section 2(11) of the Act.[97] Here, there is no evidence that Picazzo's admonishments regarding unsafe or improper performance of work have ever had any effect on employees' job status. Therefore, such verbal warnings do not serve to establish the existence of authority to discipline employees.

The evidence also shows that Picazzo issued written warning notices and placed employees on suspension. He testified that he took such action only upon instructions to do so, generally by Williams but also by Moore or Kreuger. According to Picazzo, after being told to discipline an employee for a particular incident and with the specific discipline to be imposed, Picazzo prepared an "Employee Warning" form, signed it, submitted the form to Williams for approval and Williams' signature, then delivered the form to the employee involved. After explaining its contents to the employee Picazzo would request the employee to sign the form. If the employee disputed the warning notice Picazzo told the employee that he could do nothing to change it and that the employee would have to discuss the warning with either Williams or Moore for any further consideration. Picazzo testified that, on occasion, Williams would tell him that he would sign the warning notice at a later date and that, in these situations, Picazzo would issue the warning notice to the employee without Williams' signature thereon. It should be noted that the testimony of Steve Kosiek tended to support Picazzo's assertions concerning the scope of his authority to discipline employees in this connection but, more importantly, Freeland, a witness for the Respondent, totally supported Picazzo's testimony as to this. Freeland testified that if he questioned or disputed a written warning issued to him by Picazzo, he went to Williams or Kreuger, or someone else "above" Picazzo for any further action thereon. Freeland also testified that he knew that Picazzo "more than likely" cleared the language on the warning with Williams before showing the warning to the employees, and that Picazzo did not have the authority to change any wording on the warning notices without Williams' approval. I therefore believe Picazzo's rendition of the scope of his authority in this regard. Again, significantly, neither Williams nor Kreuger testified at the hearing to dispute any of this, enforcing my above findings.

On the basis of the foregoing, with respect to the discipline of employees, Picazzo merely acted as a conduit for managerial decision, to convey the previously determined discipline to the employees. Picazzo's preparation of the warning form, obtaining signatures on the form, showing the form to the employee and distributing copies of the form for filing, are merely ministerial tasks which do not require nor thereby constitute the exercise of independent judgment.[98] The fact that the employees may perceive Picazzo as a supervisor when they receive the warnings from him, and see his signature on the line labeled "Signature of Supervisor," is not determinative because the facts herein show that Picazzo is not exercising supervisory authority.[99]

The Respondent also argues that Picazzo is a supervisor under the Act because he effectively recommends the discharge of employees, citing an incident in which a former production employee, Tom O'Shaughnessey, was discharged allegedly because of Picazzo. However, the evidence does not support this allegation. Briefly, since the facts thereon have been set forth in full detail above, Picazzo testified that Kreuger had informed him that Moore wanted O'Shaughnessey "out" that day. When Picazzo reported that O'Shaughnessey had just left his machine unattended, Kreuger directed Picazzo "to get" O'Shaughnessey for this and to terminate him. Picazzo issued a warning notice to O'Shaughnessey who tore it

[95] *Ahrens Aircraft*, supra; *Hydro Conduit Corp.*, supra; *Medicine Bow Coal Co.*, 217 NLRB 931 (1975), and cases cited therein.

[96] *Hydro Conduit Corp.*, supra; *Commercial Movers*, 240 NLRB 288 (1979).

[97] *Hydro Conduit Corp.*, supra; *John Cuneo of Oklahoma*, 238 NLRB 1438 (1978).

[98] *Injected Rubber Products Corp.*, 258 NLRB 687 (1981); *Hydro Conduit Corp.*, 254 NLRB 433 (1981); *Eastern Boiler & Electronics*, 228 NLRB 568 (1977).

[99] *Commercial Movers*, supra.

up in Picazzo's presence and demanded to speak to Moore about this. Picazzo denied making any recommendation with respect to O'Shaughnessey's termination.

Moore, on the other hand, testified that Picazzo and Kreuger had come to his office and reported, "It's Mr. O'Shaughnessey again." Moore asked them what the problem was and Picazzo responded that O'Shaughnessey had left his machine unattended. Moore stated that since O'Shaughnessey was close to being fired anyway because of his unsatisfactory employment record, he told Kreuger and Picazzo that he saw no reason not to fire O'Shaughnessey if they felt O'Shaughnessey should be terminated, and that this was the time to do so. However, Moore could not recall who first used the word "termination" in this conversation.

While I credited Picazzo's testimony concerning this incident, especially in view of Kreuger's failure to be called as a witness to testify herein and for the other reasons set forth above, even assuming arguendo that Moore's version is credited, the record still fails to establish that Picazzo possessed and exercised the authority to effectively recommend the discharge of employees. The evidence tends to show that Moore made the final decision to discharge O'Shaughnessey, as he admittedly does with all terminations of employees, and not on the basis of a recommendation of termination by Picazzo, but more likely from Kreuger. Apparently Picazzo had spoken to Kreuger about O'Shaughnessey after which they both went to see Moore. Picazzo perceived that he could not go directly to Moore or take any action himself under the circumstances. Thus it would be Kreuger if anyone who recommended the discharge, and not Picazzo.

Finally, the Respondent asserts in its brief,

> . . . the assistant lead is also relied upon for supervision of safety in the plant. He is given the responsibility of assuring that the work area is properly maintained and that mechanical safety guards and equipment are functioning properly . . . . Further, he "*initiates* corrective action when necessary." [Emphasis added.]

Picazzo testified that he was assigned by Moore to the safety committee, but was never told specifically what his duties were, only to "sit in." At the safety meetings employees made suggestions about safety to Bob Gangel, who "headed" the committee, and who determined which safety repairs should be made. The Respondent offered no evidence to refute this.[100] Further, the record is devoid of any evidence that Picazzo ever initiated any safety corrective measures or actions as assistant leadman or safety committee member.

From all of the above, it is evident that Picazzo, as assistant leadman, acted only in a routine manner and as a conduit between employees and management. He does not hire, transfer, suspend, lay off, recall, promote, discharge, reward, or adjust grievances, and does not effectively recommend such action. And while he may "assign," "discipline," or "direct" employees, this requires no use of independent judgment on Picazzo's part, being merely of a routine or clerical nature. Based on the record as a whole, I find that a preponderance of the credible evidence does not establish that Ralph Picazzo was a supervisor within the meaning of Section 2(11) of the Act, when he was discharged by the Respondent.[101] In view of the finding above, Picazzo is entitled to the protection of the Act and the rights guaranteed employees thereunder.[102]

[100] Gangel did not testify at the hearing.

[101] Although the parties' election stipulation provided for the inclusion of "leadpersons" and inferentially "assistant leadperson," and although Picazzo's name was contained in the *Excelsior* list given by the Respondent to a Board agent prior to the election, the Board and the courts have both held that such actions are not dispositive on the issue of supervisory status, that an employee's supervisory status must be determined upon a review of his duties and authority. See *Teamsters Local 692 (Absco Distributing)*, 209 NLRB 1144 (1974); *Great Western Broadcasting Corp.*, 139 NLRB 93 (1962); *Montgomery Ward & Co.*, 115 NLRB 645 (1956), enfd. 242 F.2d 497 (2d Cir. 1957); *Valentine Sugars*, 102 NLRB 313 (1953). Finally, in *A & B Cartage, Inc.*, 256 NLRB 14 (1981), the Board ruled that the parties' election stipulation was not dispositive on the issue of supervisory status, even where the employees in question were named in a *Norris-Thermador* list agreed to by the parties.

However, the question of the Respondent's good-faith approach to the Board's elective process must suffer some skepticism when the record discloses that, despite the above, the Respondent now asserts that all leadmen and Picazzo as an assistant leadman were supervisors within the meaning of the Act. These employees, George Kreuger, production leadman; Picazzo, production assistant leadman and maintenance leadman; Pat Patterson, production leadman, night shift; Jerry Colvard, shipping leadman; and Robert Gangel, toolroom leadman, included as a class of employees in the stipulated unit and in the *Excelsior* list, voted unchallenged by the Respondent at the election except for Picazzo, with the Union accepting the Respondent's implied assertion by its actions at the representation stage of these proceedings that they were not supervisors under the Act. Moreover, the silence of the Respondent's representatives when asked by the Board's agent as to the supervisory status of Picazzo and Jerry Colvard when they were selected by the Union as its election observers reinforces this skepticism and doubt.

[102] *Ahrens Aircraft, Inc.*, 259 NLRB 839 (1981); *Injected Rubber Products Corp.*, supra; *Hydro Conduit Corp.*, supra; *Savoy Brass Mfg. Co.*, 241 NLRB 51 (1979); *Maremont Corp.*, 239 NLRB 240 (1978); *Eastern Boiler & Electronics*, 228 NLRB 568 (1977). Also see *RAHCO, Inc.*, 265 NLRB 235 (1982). I have reviewed the cases cited by the Respondent in its brief to support its allegation that Picazzo was a supervisor within the meaning of the Act, and find each to be distinguishable from the instant case. For example, in *Earle M. Jorgensen Co.*, 240 NLRB 1296 (1979), "working foremen," found to be supervisors, not only oversee the work of other employees and daily assign them to their jobs, but have also transferred employees from "one bay to another," investigate job accidents, and make appropriate recommendations to management, *handle grievances*, and apparently have some discretion with regard to disciplining employees and assigning overtime work. Clearly Picazzo's duties as "assistant leadman," while in part similar to that of the "working foremen," differs substantially and pertinently.

In *Earle Industries*, 146 NLRB 536 (1964), the employees held to be supervisors and "whose duties were virtually identical to Picazzo's" as asserted by the Respondent, also changed employee work assignments "with employer acquiescence" held himself out as having authority "to discipline and responsibly direct employees work, recommended retention of an emloyee successfully, and in other ways recommended and affected employee working conditions such as salary increases, time off, and discharge."

In *Simpson Electric Co.*, 250 NLRB 309 (1980), the compared employee effectively recommended actions to be taken based on her evaluations of employees' work, in contrast to Picazzo's duties as to evaluating the employees and the use made by the Responent of these evaluations. The other cases cited by the Respondent are in the same vein and are also clearly distinguishable when carefully read and considered.

3. Acts of interference, restraint, and coercion

Section 8(a)(1) of the Act prohibits an employer from interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act.

The complaint alleges that the Respondent threatened Picazzo with discharge if he continued to campaign on behalf of the Union in violation of Section 8(a)(1) of the Act. The Respondent denies this allegation.

The evidence reveals that Picazzo first learned about the Union's organizing campaign at the Respondent's facility from other employees after the representation petition had been filed. Prior to the election, Picazzo attended union meetings and signed an authorization card for the Union. Picazzo also engaged in discussions with other employees in which he campaigned for the Union. Although the Respondent campaigned against the Union,[103] it was unaware that Picazzo was campaigning for the Union among its employees until about 10 days before the scheduled election when, according to Moore, he was informed by Jerry Colvard and Steven Kosiek that Picazzo was the one "pushing" for the Union, was "the source of the problem," and was "campaigning for the union on company time."[104]

Thereafter, on October 29, 1981, Moore approached Picazzo in the plant and engaged him in a conversation with no one else being present at the time. Picazzo testified that Moore told him that "if I continued to campaign for the union, that he would have me fired, and if I did not believe that, just to continue and he would see me in court." He stated that, later that same day, Moore again approached him and said that "he really didn't mean it quite that way. But that if, in fact, I was campaigning for the union, that he could have me fired." Picazzo maintained that these constituted the only occasions when Moore had discussed with him his campaigning for the Union. Picazzo continued that Moore had never said anything to him about his "campaigning on company time." He added that Moore did not explain why he could not campaign for the Union, nor why he could be fired if he did so.

Moore, on the other hand, testified that approximately a week before the election,[105] he warned Picazzo that, "apparently from the indications I had heard he was campaigning for the union on company time, and told him that I would appreciate it if he would desist or refuse to do that, and he could be subject to dismissal if he continued."[106] According to Moore, his second conversation with Picazzo occurred 3 or 4 days before the election and not later that same day, October 29, 1981, as alleged by Picazzo. Moore related that he told Picazzo that he understood that Picazzo was "still campaigning for the union on company time," and requested that Picazzo "discontinue that activity." Moore stated that he "indicated that [Picazzo] would be subject to termination, and that I didn't feel it was right what he was doing." Moore added that he used a more heated tone in this later conversation than he had in the first because he felt "betrayed" and "was annoyed because he was continuing to campaign for the union on company time." Moore also admitted that he had not explained to Picazzo why he thought Picazzo's actions were not "right."

While it is extremely difficult to decide whose testimony is to be credited since there were no other parties present during these conversations and, in connection therewith, only superficial circumstances and factors on which to base a finding, yet, as will become clear hereinafter, it really makes no difference either way concerning the resolution of this particular issue.

Generally, an employer engages in conduct violative of Section 8(a)(1) of the Act by requiring that employees refrain from engaging in union activities or by threatening employees with discharge if they did not cease their union activities. Correlative to this is the governing principle that a rule is presumptively invalid if it prohibits solicitation on the employee's own time.[107] "Working time is for work" is a long-accepted maxim of labor relations.[108] The Board, in its recent decision in *Our Way, Inc.*, 268 NLRB 394 (1983), signaled a return to the rules enunciated in *Essex International*, 211 NLRB 749 (1974), concerning employee solicitation on company premises. In *Essex International*, "the Board made clear that rules using 'working hours' are presumptively invalid because that term connotes periods from the beginning to the end of workshifts, periods that include the employees' own time. The Board also held, in contrast, that rules using 'working time' are presumptively valid because that term connotes periods when employees are performing actual job duties, periods which do not include the employees' own time such as lunch and break periods."[109] In *Florida Steel Corp.*, 215 NLRB 97 (1974), the Board found that a rule using the term "company time" was unduly ambiguous and restrictive and presumptively invalid, comparing it to the rule prohibiting solicitation "during working hours," appearing in *Essex International*.[110]

These presumptions, which concern the facial validity or invalidity of no-solicitation rules, can be rebutted by appropriate evidence. For example, an employer could be shown to have unlawfully modified and applied a fa-

[103] The Respondent admits having campaigned against the Union prior to the election. Moreover, Picazzo testified uncontradictedly that Moore passed around "anti-union propaganda" in the plant. However, the distribution of antiunion material by an employer is not unlawful in itself absent some form of coercion or pressure upon an employee to receive the material. *McDonald's*, 214 NLRB 879 (1974); *Farah Mfg. Co.*, 204 NLRB 173 (1973).

[104] While Kosiek denied that he had ever gone with Jerry Colvard to complain to Moore about Picazzo's union activities, he did testify that he had been in Moore's office when a janitor, Karl Bernsten, had mentioned to Moore that Picazzo was campaigning on behalf of the Union among the employees.

[105] Since the election was held on November 5, 1981, Moore's recollection that the first conversation occurred about a week before the election substantially agrees with that of Picazzo.

[106] Moore could not recall the specific words he used in this conversation, but that what he testified to herein constituted the gist of what he had said to Picazzo.

[107] *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945).

[108] *Peyton Packing Co.*, 49 NLRB 828 (1943).

[109] *Our Way, Inc.*, 268 NLRB at 394–395.

[110] Also see *Intersystems Design Corp.*, 267 NLRB 1310 (1983); *Ohio Masonic Home*, 205 NLRB 357 (1973); *KDI Precision Products*, 185 NLRB 335 (1970).

cially valid rule, or an employer could show that he communicated or applied an invalid "working hours" rule in such a way as to convey an intent clearly to permit solicitation during breaktime or other periods when employees are not actively at work.[111] Additionally, the presumptions can be rebutted by an employer's showing that a no-solicitation rule "was justified by a need to maintain discipline or production in its plant." Additionally, the presumptions can be rebutted by an employer's showing that a no-solicitation rule "was justified by a need to maintain discipline or production in its plant."[112]

Applying the above standards to the facts present in the instant case, I conclude that the Respondent violated Section 8(a)(1) of the Act whether Moore threatened to discharge Picazzo if he failed to discontinue campaigning for the Union or, alternately, whether he warned Picazzo that he would be terminated if he continued to campaign for the Union on "company time." In either case, Moore's statements constitute overly broad prohibitions on Picazzo's union activity. The Respondent offered no evidence to show that Moore or anyone else explained to Picazzo that he was permitted to campaign during nonworking periods without being subject to disciplinary action. Nor did the Respondent offer evidence to show that its no-solicitation prohibition was justified by a need to maintain discipline or production at the plant. Accordingly, I find that the Respondent interfered with, restrained, and coerced Picazzo in the exercise of the rights guaranteed in Section 7 of the Act and has thereby violated Section 8(a)(1).[113]

4. The discharge of Ralph Picazzo

Section 8(a)(3) of the Act prohibits an employer from discriminating against his employees in regard to hire, tenure, and other terms and conditions of employment for the purpose of encouraging or discouraging membership in a labor organization.

The complaint herein alleges that the Respondent discharged Ralph Picazzo and failed and refused to reinstate him to his former position of employment because he joined or assisted the Union or engaged in other protected concerted activities for the purposes of collective bargaining or other mutual aid or protection, in violation of Section 8(a)(3) and (1) of the Act. The Respondent denies these allegations and contends that Picazzo was discharged for cause.

Direct evidence of a purpose to discriminate is rarely obtained, especially as employers acquire some sophistication about the rights of their employees under the Act, but such purposes may be established by circumstantial evidence.[114] Under the law, if discrimination against an employee is motivated by union considerations, it constitutes a violation of the Act. Direct evidence of discriminatory motivation is not necessary to support a finding of unlawful discrimination and such intent may be inferred from the record as a whole.[115]

Ralph Picazzo was discharged by the Respondent on November 10, 1981. Picazzo's version of his conversation with Moore occurring at the time of his termination differed from that given by Moore. While Williams was also present during this conversation, he was not called as a witness to testify herein.

According to Picazzo, Moore advised him that he was being terminated because the Respondent "could not condone intimidating or threatening employees." Picazzo stated that Moore refused to disclose the names of the employees whom he had allegedly intimidated or threatened, the nature of the threats made or the intimidation, nor when these incidents had allegedly occurred, although Picazzo requested such information. Picazzo related that Moore neither asked him anything about any purported conversation with other employees nor gave Picazzo an opportunity to explain any of the circumstances of the allegations made during this conversation. Picazzo added that he had no idea at the time what Moore was referring to when he said that Picazzo had threatened and intimidated employees.

Moore testified that he told Picazzo that he was being discharged, "Inasmuch as you have continued to push for the Union on Company time and threatened and coerced employees." Moore stated that Picazzo said, "I have been expecting it." Moore added that if Picazzo had engaged in union activity only, without having also threatened and coerced employees, the Respondent would not have discharged him.

The General Counsel asserts in his brief that, "regardless of which version of Picazzo's discharge is credited, the termination was unlawful." I do not agree.[116] With

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[111] *Our Way, Inc.*, supra at fn. 6.

[112] *Photo Drive-Up*, 267 NLRB 329 (1983); *Ace Machine Co.*, 249 NLRB 623 (1980); *Plastic Film Products Corp.*, 238 NLRB 135 (1978).

[113] The record also discloses that the Respondent maintains a no-solicitation rule in its employee handbook which forbids "solicitations of any kind . . . on company property . . . during working hours." Under the holding in *Our Way, Inc.*, such a rule is presumptively invalid. However, inasmuch as the General Counsel does not allege a violation of Sec. 8(a)(1) of the Act in connection therewith, nor does the record show that, despite the failure to allege such a violation in the complaint, this issue was fully considered and explored at the hearing, with evidence offered thereon, I will make no finding concerning this. See *Conair Corp.*, 721 F.2d 1355 (D.C. Cir. 1983).

[114] *Jefferson National Bank*, 240 NLRB 1057 (1979); *Corrie Corp. v. NLRB*, 375 F.2d 149 (4th Cir. 1967); *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466 (9th Cir. 1966).

[115] *Photo Drive Up*, 267 NLRB 329 (1983); *Heath International, Inc.*, 196 NLRB 318 (1972); *Texas Aluminum Co. v. NLRB*, 435 F.2d 917 (5th Cir. 1970).

[116] However, I do agree, assuming arguendo, that if Picazzo was discharged by the Respondent because he campaigned for the Union on company time, his termination would be unlawful. As found above, the Respondent's no-solicitation rule was invalid as being overly broad. I also found that Moore's threats that Picazzo would be discharged if he did not discontinue campaigning for the Union on company time were unlawful and violative of the Act. Therefore, it must be presumed that the Respondent's employees were free to behave as though no rule existed. And it is well settled that, absent any rule, talking about a union during working time is protected activity unless shown to be otherwise. See *Gulf Envelope Co.*, 256 NLRB 320 (1981); *Punchito's*, 228 NLRB 136 (1977), enfd. 581 F.2d 204, 207 fn. 3 (9th Cir. 1978); *Catalyst*, 230 NLRB 355 (1977), enfd. 581 F.2d 215 (9th Cir. 1978). The Board has long held that a discharge for a violation of an unlawful rule is itself unlawful. See *Switchcraft, Inc.*, 241 NLRB 985 (1979), enfd. 631 F.2d 734 (7th Cir. 1980); *Kern's Bakeries*, 227 NLRB 1329 (1977); *J. L. Hudson Co.*, 198 NLRB 172 (1972); *Stoddard-Quirk Mfg. Co.*, 138 NLRB 615 (1962).

regard to this conversation, I credit Picazzo's account of what was said therein. The failure of the Respondent to call Williams as a witness, although he was present during this conversation and presumably could either corroborate Moore's testimony or contradict Picazzo's, must be construed to weigh heavily against the Respondent.[117] Additionally, Moore admitted having made various statements during the conversation, as alleged by Picazzo in his testimony, which tends to support Picazzo's version thereof.[118] Moreover, Moore's testimony that Picazzo would not have been terminated but for his having threatened and coerced employees implies that Picazzo's campaigning for the Union on company time allegedly played little part in the Respondent's determination to discharge him. Why then would Moore have any reason to assert to Picazzo that this was part of the cause of his discharge?[119]

The Respondent's actual alleged reason for discharging Picazzo is that he threatened and intimidated or coerced employees. It is evident that the Respondent contends that Picazzo engaged in such conduct while soliciting other employees to support the Union. In *NLRB v. Burnup & Sims, Inc.*, 379 U.S. 21, 23 (1964), the Supreme Court of the United States held,

> Over and again the Board has ruled that Section 8(a)(2) is violated if an employee is discharged for misconduct arising out of a protected activity, despite the employer's good faith, when it is shown that the misconduct never occurred. . . . In sum, Section 8(a)(1) is violated if it is shown that the discharged employee was at the time engaged in a protected activity, that the employer knew it was such, that the basis of the discharge was an alleged act of misconduct in the course of that activity, and that the employee was not, in fact, guilty of that misconduct.

Moreover, if it is shown that the Respondent discharged Picazzo in such circumstances with an antiunion motivation, then the Respondent has also violated Section 8(a)(3) of the Act.[120] The fact that the Respondent may have had a good-faith belief that Picazzo had engaged in misconduct in connection with his union activities does not constitute a defense to the violation, if, in truth, Picazzo had not engaged in such misconduct.[121] However, the burden of going forward with evidence to prove that Picazzo did not, in fact, engage in the misconduct alleged is on the General Counsel.[122]

The record evidence shows that the Respondent, through Moore, had knowledge that Picazzo was engaged in protected activity, that of soliciting other employees to support the Union. Moore acknowledged that he had been advised by other employees that Picazzo was engaging in union activity at the plant. Additionally, Moore accused Picazzo of campaigning for the Union on company time and of engaging in misconduct by threatening and coercing employees in the course of such activity. Moreover, there is sufficient evidence in the record to support a finding that the Respondent has a "good-faith belief" that Picazzo had engaged in this misconduct during his union activity. After Moore learned that Picazzo had allegedly threatened employees Larry Colvard, Mark Freeland, and Brent Yankee, he investigated the incidents by questioning the employees who had registered the complaints against Picazzo, and by interviewing the threatened employees themselves, to confirm what had been reported. Moore also discussed the incidents with the Respondent's attorney and in one instance, with the Respondent's "general manager in Chicago," before concluding that the complaints against Picazzo were valid and that Picazzo should be terminated. I therefore find that the Respondent "honestly believed" that Picazzo had threatened employees while soliciting their support for the Union, an activity which, without the alleged threats, would otherwise have been protected.[123]

I am aware that Moore did not afford Picazzo an opportunity to present his version of the incidents alleged.[124] Nor would Moore disclose to Picazzo the names of either the employees who had reported the incidents or the names of the employees who had allegedly been threatened, or the nature of the alleged threats, or when they occurred.[125] However, Moore explained that he had refused to divulge this information to Picazzo because he feared for the safety of the employees involved. I believe Moore as to this, despite my having credited Picazzo's testimony over Moore's as to what was said during their conversation.[126] The very nature of the threats allegedly made against employees, at least in part, involved the threat of physical harm;[127] and there is evidence in the record that soon after Yankee disclosed Picazzo's threat against him, the windows of his automobile were shattered. Additionally, the Respondent posted a security guard at the plant during Yankee's work shift.

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[117] See fn. 78 herein.

[118] Moore admitted that he had told Picazzo that the Respondent would not contest his unemployment insurance claim and that he would provide Picazzo with a letter of recommendation if requested, although, in fact, the Respondent did subsequently oppose Picazzo's claim for unemployment insurance benefits.

[119] However, as will be more fully discussed hereinafter, I believe that, in fact, Picazzo's union activity was a motivating factor in his being discharged by the Respondent, along with the Respondent's belief that he was guilty of misconduct while so engaged in these activities. As for now, note Moore's testimony that he "failed to see the difference" between Picazzo's campaigning for the Union on company time and his having allegedly threatened and coerced employees, "since the basis of the threats related to a [union] campaign."

[120] *Elk Brand Mfg. Co.*, 253 NLRB 1038 (1981).

[121] *Giant Food, Inc.*, 252 NLRB 1308 (1980).

[122] *Burnup & Sims*, supra at 23 fn. 3.

[123] *Classe Ribbon Co.*, 227 NLRB 406 (1976).

[124] Contrast the facts in *Elk Brand Mfg. Co.*, supra, and the instant case.

[125] Contrast the facts in *PPG Industries*, 251 NLRB 1146 (1980), and the instant case.

[126] As Judge Learned Hand stated in *NLRB v. Universal Camera Corp.*, 179 F.2d 749, 754 (2d Cir. 1950), "It is no reason for refusing to accept everything that a witness says, because you do not believe all of it; nothing is more common in all kinds of judicial decisions than to believe some and not all."

[127] Picazzo had threatened to "kill" Yankee, and had told Larry Colvard that the antiunion employees would have their "heads busted."

The above supports the reasonability of Moore's explanation.[128]

In view of the above, the remaining factor to be examined under the *Burnup & Sims* guidelines is whether, in fact, Picazzo was guilty of the alleged misconduct. The misconduct, asserted by the Respondent as the cause of Picazzo's discharge, involved threats allegedly made by Picazzo against employees Brent Yankee, Mark Freeland, and Larry Colvard. Picazzo denied, "as far as he knew," having threatened any employee.

Briefly, since the conversation between Picazzo and Yankee has been set forth fully above, Yankee testified that about 3 or 4 days before the Board's election, Picazzo told him that if the Union won the election, the employees would receive "some benefits . . . medical and all that," and that it would therefore "be better to vote for the union." According to Yankee, at the end of the conversation Picazzo warned him that "if you tell anyone what I've told you, I'll get you, I'll kill you." Yankee related that while he did not think that Picazzo's threat was made seriously, Picazzo had "acted like he was serious somewhat." Yankee added that he reported the conversation to his supervisor, Pat Patterson, requesting that Patterson not tell anyone else about it because he did not want anyone to get "hurt" or "in trouble."[129] Moore testified that, after he was apprised of Picazzo's threat to Yankee, he spoke to Yankee about this the following day, and Yankee told him that he was "afraid to come to work" that day. As a result of this incident the Respondent posted a security guard on Yankee's work shift.

Larry Colvard and Mark Freeland both testified that Yankee had told them, sometime during the week before the election, that Picazzo had threatened him saying, "I'm going to kill you." Colvard related that he told this to his brother, Jerry Colvard, because he had also been threatened by Picazzo and "Because already up to that time, if I'm not mistaken, Brent's car window had been smashed out, stuff like this. There was little things written on the bathroom walls about us. All over. It was just the atmosphere of the company." Freeland testified that Yankee said that Picazzo had threatened him "about saying things to his supervisors, because word had gotten out about the things that were being said, and Brent was rather shaken up at the time . . . he said something about threatening violence." Freeland added that Yankee had also told him that Picazzo had made the threat because someone had reported to a supervisor that Picazzo was campaigning for the Union at the plant.

Picazzo recalled having a conversation with Brent Yankee "two days" before the election. While his account of what was said both differs and is similar in part to Yankee's version thereof, most relevant is Picazzo's denial that he threatened to kill Yankee if Yankee told anyone about what was said during their conversation. Picazzo testified, "And then in my closing statement, I told him, be careful who you talk to." Picazzo stated that he made this latter remark to Yankee because there were rumors circulating through the plant that "heads will roll," that certain employees would be losing their jobs, a "general belief that apparently Don Moore was going to get even."[130]

The General Counsel in his brief submits that it is more reasonable to believe Picazzo's testimony with regard to this conversation than Yankee's. I do not agree and therefore credit Yankee's account of what Picazzo said concerning the "threat." The evidence herein fails to disclose any reason or rational basis for supposing that Yankee would report to his supervisor that Picazzo had threatened to kill him, then tell fellow employees Larry Colvard and Mark Freeland the same thing, if such a threat had not, in fact, been actually made. Additionally, between the testimony of Yankee and Picazzo concerning the language used by Picazzo to caution Yankee against telling others about the contents of their conversation, their versions thereof are so different as to preclude the chance of Yankee misconstruing or mishearing the words so that, what Picazzo might have said was phrased differently and in a nonthreatening manner. Moreover, I was impressed with the demeanor and forthrightness of Mark Freeland as a witness, and this, in addition to the other reasons given for crediting his testimony on another issue discussed herein, leads me to credit his testimony in full, which supports Yankee's version of the threatening language used by Picazzo rather than Picazzo's.[131] It should also be noted that employee Dale Scott, called as a witness for the Charging Party, testified that the employees at the plant had heard that Brent Yankee and other employees had been threatened. On consideration of the record as a whole, and the testimony of Yankee, Freeland, Colvard, Moore, and Scott as opposed to that of Picazzo, I find that Picazzo did threaten Brent Yankee as alleged herein.

Regarding the alleged threats made by Picazzo against Mark Freeland, Freeland testified that prior to the election Picazzo told him that it would be "wiser" for Freeland to support the Union since the Union was sure to win the election and "if Freeland was a no vote, that [he] would be making waves and everything, and it would be rough for [him]." Freeland continued that Picazzo had also told him that if the Union came in, the

[128] See *NLRB v. Charles Batchelder Co.*, 646 F.2d 33, 40 (2d Cir. 1981). It should also be noted that the General Counsel, in his brief, does not dispute the Respondent's "good-faith belief" that Picazzo had engaged in misconduct while campaigning for the Union.

[129] In this vein, Yankee testified, "I know Ralph [Picazzo]. He used to be my leadman. I don't know if he would do anything, but people can get greedy sometimes. . . . I didn't want to get in a hassle over it; you know, a fight or anything, you know, with the other guys and get my car broken, my windows broken, like I did have happen after I did—after Pat mentioned it I ended up getting my windows broken and stuff."

[130] This is unbelievable. Why would Moore have reason to "get even" with Yankee, who was against the Union anyway, since there is no evidence in the record even suggesting that Moore believed that Yankee would change his mind in opposing the Union.

[131] See fn. 126 herein. The General Counsel points up the following to support his submission that Picazzo's testimony should be believed: that Picazzo did not also threaten Colvard and Freeland with physical harm when he told them not to repeat the contents of their conversations to Moore, Williams, or Jerry Colvard; that neither Moore and the Colvards, nor Freeland ever accused Picazzo to his face of threatening to kill Yankee although they knew about the threat; and that Picazzo took no action against any individual whom he knew to be opposed to the Union even though he had the opportunity to do so. For obvious reasons, none of the above is persuasive in supporting the General Counsel's submission as to credibility.

Respondent would discharge Freeland's half-brother, Jerry Colvard, "rather than making Jerry a management position . . . because they wouldn't want to pay him the wages that he would deserve." Freeland added that, soon after the election and the Union's victory therein, he approached Picazzo and asked if there were anything he could do to get in the Union's good graces and Picazzo told him that he was a "fuck-up," and had better watch himself because he was "on the wrong side of the fence, and things could get rough, you know, as far as my job went, because I was a no vote, and I just was not for the union at all."[132]

Picazzo testified that before the election, during a conversation with Freeland, Freeland asked him if the rumors concerning Jerry Colvard were valid as to Colvard's "standing" and "working position" with the Respondent. Picazzo stated that he responded, "[A]s far as I know, it is just a rumor, that I did not know if it was true or not." Picazzo could not recall anything else that was said during this conversation. However, Picazzo denied that he had threatened Freeland or that he had told Freeland that after the election Colvard would be gone. Picazzo continued that one day after the election Freeland asked him what he could "expect" in view of the Union's victory in the election and Picazzo answered, "[T]hat now we just have to wait and see, you know, what happens afterward. It is totally up . . . to the negotiations." Picazzo denied having called Freeland a "fuck-up," or having threatened Freeland with the loss of his job if he did not support the Union.

For the reasons previously advanced herein with regard to the credibility of Mark Freeland, and further because Freeland testified in a clear and unequivocal manner throughout his testimony, I credit his account of what was said over that given by Picazzo.[133]

The General Counsel asserts in his brief that "it is more reasonable to regard Picazzo's statements to Freeland about watching himself as warnings made in an effort to protect Freeland rather than as threats to coerce him to support the Union." I do not agree. While it is true, as pointed to by the General Counsel, that prior to the election Picazzo had, on several occasions, warned Freeland to watch himself because additional warnings concerning his absenteeism and his failure to comply with company safety rules would result in his termination, yet, according to Picazzo's own testimony, most of these warnings were generated by the Respondent's management and/or supervisors, with Picazzo functioning merely as the conduit between management and Freeland. Moreover, it is apparent that these warnings were not given to Freeland in order to protect him in his job, but to serve as warning notice that if he did not maintain proper performance in his employment habits, he would be discharged. In considering Picazzo's admonition to Freeland, to the effect that he would be "wise" to support the Union because it was sure to win the election, and if he voted against the Union things could get "rough" for him, it is obvious that this warning clearly constituted a threat to vote for the Union or else, and Freeland perceived it to be so. In no way can Picazzo's statements be interpreted, under the circumstances present in this case, as having been made to protect Freeland rather than to coerce him into supporting the Union.[134]

In further support of the above is the evidence showing that, soon after the Union had won the election, Freeland approached Picazzo and asked what he could do to get on the Union's good side. If Freeland had not taken Picazzo's warning seriously, why would he do this? The only reasonable explanation is that in view of Picazzo's threat that a "no-vote" would lead to Freeland experiencing problems as to his job, even including retention thereof, Freeland sought to circumvent this by perhaps ingratiating himself with the Union through Picazzo's suggestions or advice, to mend his fences so to speak. Moreover, Picazzo's response to Freeland illuminates the intent of his previous warning to Freeland. Picazzo told Freeland in no uncertain terms that he was vulnerable as to discharge, and would thereafter have to be careful, "because I was on the wrong side of the fence and things could get rough . . . as far as my job went, because I was a no vote, and I just was not for the Union at all."[135]

Additionally, the General Counsel in his brief asserts that Picazzo's statements to Freeland regarding Jerry Colvard "were couched in speculative terms and did not constitute threats." However, these statements must be considered in the light of what was occurring at the time. Picazzo's statement that Colvard would "be gone" when the Union came in because the Respondent would not want to place him in a "management position" makes sense only in the context of Colvard's notorious antiunion position. Since rumor had it that the Respondent

[132] The evidence indicates that it was common knowledge at the plant that Mark Freeland, as well as Jerry Colvard and Larry Colvard, was opposed to the Union. However, Larry Colvard did testify that Freeland at times wavered as to his opposition to union representation.

[133] It should also be noted that Freeland's testimony was consistent with Moore's account of what Freeland had told him when Moore "investigated" the threats alleged to have been made by Picazzo against Freeland. Moreover, employee Dale Scott, called as a witness for the Charging Party, testified that prior to the election he had heard around the plant that someone had threatened Brent Yankee, Mark Freeland, and Larry Colvard, although Picazzo's name had not been "tied in with the threats."

[134] Picazzo was perhaps the Union's strongest adherent among the Respondent's employees at the plant while Freeland, along with his half brothers in the warehouse, Jerry and Larry Colvard, was known to oppose the Union. Additionally, there is no evidence in the record that Picazzo and Freeland were fast friends giving Picazzo some reason to protect Freeland.

[135] The fact that Picazzo refrained from issuing written warning notices to Freeland or other employees during the period immediately prior to the election or thereafter does not detract from the intimidating or coercive nature of Picazzo's threats nor support the General Counsel's contention that Picazzo did not engage in such conduct. Various reasons for Picazzo's failure to do so come to mind, i.e., Picazzo might have felt that his threats to Freeland were sufficient to change his mind about voting against the Union and if Freeland's discharge were effectuated by the Respondent before the election, what good were the threats. Moreover, according to Picazzo, written warnings were usually initiated by Williams or perhaps Kreuger so that Picazzo's opportunity to issue a "write-up" to Freeland after the election and before his discharge did not present itself. Be that as it may, I am not persuaded that Picazzo's failure to take such action either supports Picazzo's version of what he said or his alleged lack of intent to intimidate and coerce Freeland. The courts and the Board have often realized the effectiveness of threats as coercive and intimidating without the actual accomplishment of the threatened action.

would not promote Colvard to a managerial position, and therefore he would be let go, Picazzo's statements strongly suggest that the Respondent would be compelled to discharge Colvard under union pressure since the Union would oppose his membership in its ranks because of his antiunion stance and he therefore could not presumably remain as an employee under the collective-bargaining agreement's union-security clause to be negotiated thereafter. Moreover, it is highly unlikely that the Respondent would discharge an employee who was known to be opposed to union representation and in support of its own position regarding the Union unless somehow compelled to do so.[136] The reasonable inference to be drawn from all of Picazzo's statements to Freeland was that after the Union won the election, those employees, including Freeland, who had failed to support the Union would be punished, including "rough" working conditions and possible loss of jobs, and that Jerry Colvard, known as antiunion, would be terminated no matter what. The threat and the menace inherent in Picazzo's statements become patently clear under the circumstances present in this case.

With regard to Picazzo's alleged threats to Larry Colvard, Colvard testified that, prior to the election, he and Picazzo had discussed the Union occasionally but, "as the election drew near," these discussions became more frequent. According to Colvard, Picazzo told him that when the Union won the election, his brother Jerry Colvard "would be gone."[137] While Colvard maintained that Picazzo had not actually threatened him with any reprisals if he failed to support the Union, nor had he heard Picazzo threaten any other employees, he still felt threatened by Picazzo, "[E]ven if he never said a word . . . he did enough that I thought about it . . . I was worried about my job . . . My job security was threatened." Colvard related, "I figured that if he has got enough power to get my brother out of there, he's got enough power to get me of out there. I'd only been there two months." Colvard continued that a few days after the Union won the election, Picazzo told him that, "I'm going to enjoy this a lot. Heads are going to roll. The guys who talk for the company are going to get their heads busted."[138] Colvard added that he then related to his brother Jerry what Picazzo had said to him. Moore testified that after he had been informed about Picazzo's threats to Larry Colvard, he spoke to Colvard who said that "[Picazzo] has got me all shook up," and that he appeared to be "afraid of losing [his] job."

Picazzo denied having told Colvard that, after the Union won the election, his brother Jerry would be fired. However, Picazzo did admit telling Colvard and/or other employees about a "rumor" to the effect that the Respondent for its own reasons, not arising out of the Union's organizational campaign and ultimate success therein, would discharge Jerry Colvard after the election. Picazzo testified that, after the election, he had a conversation with Larry Colvard and, although he could not recall exactly what was said, he recollected that Colvard and another employee, Young, asked him about rumors circulating at the plant that some employees were scheduled by the Respondent for discharge, including Jerry Colvard.[139] Additionally, while Picazzo admitted that he passed along to the other employees the rumors that "heads will roll" and that "people will lose their jobs," which he also maintained was common knowledge among the plant employees, he denied ever having threatened any employee with physical harm or loss of employment if he failed to support the Union.

The General Counsel asserts that Colvard's testimony is unworthy of belief because it evidenced an inconsistency with his "pre-trial affidavit," and because Colvard was evasive while testifying on cross-examination as to whether or not Picazzo had threatened him personally. While it is true Colvard did testify that he never told Picazzo, during their conversations, whether he was for or against the Union, and in his affidavit he states that he did so, Colvard seemed genuinely confused about this since he testified soon thereafter, "I probably told everybody I was opposed to it at one time." This appears to be the only inconsistency therein and the evidence herein shows that it was common knowledge at the plant that Jerry and Larry Colvard and Mark Freeland were opposed to the Union.

As to Colvard's alleged evasiveness on cross-examination, it should be remembered that he testified that, while Picazzo had not personally threatened him directly, he still felt threatened because of Picazzo's statements concerning his brother Jerry's future employment with the Respondent, and about Picazzo's general statement concerning the discharge of those employees who had failed to support the Union. It appeared to me that what is alleged as "evasiveness" was actually Colvard's attempt to make his position known while attempting to answer the

[136] Whatever the legality of this under court and Board law, it should be remembered that the Respondent's employees are laymen and cannot be presumed to have knowledge and familiarity with the nuances of labor law. Moreover, Picazzo's position with the Union, as perceived by the employees, was one of strength and influence thereby enforcing any inferences Picazzo might raise in his statements which could conceivably be construed by them to be of an intimidating and coercive nature, especially threats intimating that their jobs were in jeopardy if they failed to support the Union.

[137] In his affidavit given to a Board agent, Colvard stated that Picazzo "made it sound like" the Respondent would be compelled to discharge his brother Jerry because he was a "wage-earner" like the other employees and would be subject to the provision of any collective-bargaining agreement executed between the Respondent and the Union; and since the Union would not allow Jerry Colvard into its membership because of his opposition to the Union, and the Respondent would not promote Colvard to a managerial position for its own reasons, Colvard would be discharged pursuant to the provisions of such an agreement.

[138] Colvard testified that another employee, Charles Young, was present when this conversation took place. Neither the Respondent nor the General Counsel called Young as a witness.

[139] Larry Colvard denied that there was any rumor at the plant prior to the election that a number of employees were going to be discharged. He also denied asking Picazzo if his brother Jerry's name was on any list of employees to be fired. While the Charging Party called two witnesses who were employed at the time relevant thereto, Ruben Vasquez and Scott, neither confirmed the rumor about an alleged employee discharge list, although Scott did testify that, prior to the election, employees were betting on how long Jerry Colvard would retain his employment with the Respondent after the election was held. It should be noted that this latter testimony by Scott could readily be perceived to imply that Jerry Colvard would be discharged when the Union won the election for the reason that he was antiunion as asserted by Larry Colvard in his affidavit and implied in Mark Freeland's testimony as stated above.

questions posed in a truthful and complete manner. It is not uncommon, and I have observed this in other cases, wherein a witness who is unsophisticated in thought and expression, and with little or no experience in testifying under oath at a trial, will have difficulty in the context of answering questions properly because of a feeling that he is not being afforded the opportunity to fully tell his story. I believe that this is what created a problem in Colvard's mind as to how to answer the questions asked, and translated into what the General Counsel perceived to be evasiveness on his part.

Be that as it may, I credit Colvard's testimony over that of Picazzo's for the reason that it was supported by other credible evidence in the record, including the testimony of other witnesses,[140] and because it appears that Picazzo has a greater stake in the outcome of these proceedings than does Colvard, and because although the testimony of Yankee, Freeland, Colvard and Moore could have been contrived as to Picazzo's alleged threats to employees, and that of Picazzo truthful, yet "if there was fabrication, it would seem more probable that it was the one, rather than the four, who was lying."[141]

From all of the above, I find and conclude that Ralph Picazzo did threaten employees as set forth above thereby engaging in misconduct in the course of his union activities.

As indicated above, under *Burnup & Sims*, supra, an employer who discharges an employee engaged in a protected activity known to the employer as such, the basis of the discharge being an alleged act of misconduct in the course of the activity, violates Section 8(a)(1) of the Act, where the employee, in fact, was not guilty of such misconduct. This is true even where the employer has acted in good faith.[142] The Supreme Court in *NLRB v. Burnup & Sims*, 379 U.S. 21, 22 (1964), stated further,

> We find it unnecessary to reach the questions raised under Section 8(a)(3) for we are of the view that in the context of this record Section 8(a)(1) was plainly violated, whatever the employer's motive.[2]

[2] . . . The Court of Appeals, however, rejected without discussion this suggestion of the existence of anti-union bias. . . . In its petition for writ of certiorari the Board expressly stated that "The propriety of this action [by the Court of Appeals] is not questioned here." In light of this concession it is unnecessary for us to determine whether the Board's alternative finding of a discriminatory motivation is supported by substantial evidence.

Therefore, where the discharged employee had not, in fact, engaged in the alleged misconduct during his protected activities the discharge is violative of the Act.[143] But where the employee has engaged in the misconduct alleged, the discharge is not unlawful where the basis of the discharge is, in fact, an "alleged act of misconduct."[144] Moreover, where the discharged employee has not engaged in the alleged misconduct and it is found that the real reason for the discharge was his/her union activity, the alleged misconduct being seized upon by the employer as a pretext for discharge, such discharge constitutes a violation of Section 8(a)(3) of the Act.[145]

The Respondent herein asserts that it discharged Ralph Picazzo because he engaged in acts of misconduct during his union activities. Although the General Counsel has failed to meet the burden of demonstrating that the misconduct alleged did not in fact occur, the evidence herein establishing that it did, the record evidence also clearly shows that the Respondent had another reason for discharging Picazzo, that of his union activity. In connection therewith and immediately coming to mind is Moore's admission that Picazzo was discharged not only for his misconduct while engaged in union activity, but also for such activity which he believed was also unlawful, and Moore's unlawful threats to Picazzo to discontinue his "campaigning [pushing] for the Union on company time."

The Board, in *Wright Line*, 251 NLRB 1083 (1980), enunciated,

> [W]e shall henceforth employ the following causation test in all cases alleging violation of Section 8(a)(3) or violation of Section 8(a)(1) turning on employer motivation. First, we shall require that the General Counsel make a *prima facie* showing sufficient to support the inference that protected conduct was a "motivating factor" in the employer's decision. Once this is established, the burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct.

The Supreme Court of the United States in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983), approved the Board's *Wright Line* allocation of proof.

An appraisal of the entire record convinces me that the General Counsel made a prima facie showing that Ralph Picazzo's union activity was a motivating factor in the Respondent's decision to discharge him. The record evidence establishes that Picazzo actively supported the Union by campaigning on its behalf, that the Respondent was aware of his union activities and was unhappy about it,[146] and that the Respondent actively opposed the Union, its union animus evidenced by both lawful[147] and unlawful actions.[148] Moreover, the Respondent, through Moore, in effect admitted that Picazzo was discharged in part because of his union activities "on company

[140] For example, Scott's testimony that he had heard at the plant that Larry Colvard was one of those employees who had been threatened during the Union's organizational campaign.

[141] *Classe Ribbon Co.*, 227 NLRB 406 (1976); *Fred Stark*, 213 NLRB 209 (1974).

[142] *Burnup & Sims*, supra; *Rubin Bros. Footwear, Inc.*, 99 NLRB 610 (1952).

[143] *Burnup & Sims*, supra.

[144] *Classe Ribbon Co.*, supra; *Rubin Bros. Footwear, Inc.*, supra.

[145] *Elk Brand Mfg. Co.*, 253 NLRB 1038 (1981).

[146] Moore testified that he was surprised when he learned of Picazzo's activities on behalf of the Union, "since the company had been kind of nice to him." Additionally, Moore unlawfully threatened to discharge Picazzo if he continued to campaign for the Union on company time.

[147] The evidence shows that the Respondent openly campaigned against the Union.

[148] As found above, the Respondent engaged in unlawful conduct in violation of Sec. 8(a)(1) of the Act in connection with the Union's organizing campaign.

time."[149] From all of the foregoing, I find and conclude that the General Counsel made a prima facie showing that Ralph Picazzo's union activity was a motivating factor in the Respondent's decision to discharge him. This having been established and in accordance with the causation test enunciated by the Board in *Wright Line*, the burden of proof shifts to the Respondent to demonstrate that the same action would have taken place against Picazzo even in the absence of his union activity.

The Respondent asserts that Picazzo was discharged because he threatened and intimidated employees. That Picazzo did threaten employees and, as will be more fully discussed hereinafter, did intimidate them is obvious from the record in this case, and I so found hereinbefore. I have also concluded from the record evidence that the Respondent was motivated in discharging Picazzo by considerations of his union activity. Thus it must be determined whether the Respondent would have discharged Picazzo because he threatened and intimidated employees had he not been engaged in campaigning for the Union as well.

As stated in *Twilight Haven, Inc.*, 235 NLRB 1337, 1342 (1978),

> . . . both the Board and the courts have granted considerable latitude to employees for argument and counterargument in preelection situations, recognizing the "strong emotions" generated by union activity. Thus, failure to exercise "finesse and gentility" in campaigning for or against representation will not serve to divest employees of their statutory protection. *Cement Transport, Inc.*, 200 NLRB 841, 845–846 (1972), enfd. 490 F.2d 1024 (C.A. 6, 1974); see also *N.L.R.B.* v. *Efco Manufacturing, Inc.*, 227 NLRB F.2d 675 (C.A. 1, 1955). "Meaningful protection in this situation must require that relatively minor incidents or misconduct, such as name-calling or somewhat ambiguous or veiled threats, do not remove the Act's protection from the perpetrator, or suffice to legitimize his discharge." *Corriveau & Routhier Cement Block, Inc.*, 171 NLRB 787, 788 (1968), enforcement denied . . . 410 F.2d 347 (C.A. 1, 1969).

However, unambiguous threats of violence[150] and statements that job loss would result from an employee's failure to support a union[151] fall outside the sphere of protected conduct.

In the instant case the evidence shows that Picazzo threatened Brent Yankee, Mark Freeland, and Larry Colvard and that these threats, under the circumstances existing when made, reasonably tended to coerce and intimidate these employees in the exercise of the rights protected under the Act.[152] These were no minor incidents of misconduct, such as name-calling or somewhat ambiguous or veiled threats. The threats by Picazzo against Freeland were unequivocal and Freeland perceived them to be so as above stated. And while Picazzo's threats against Larry Colvard were not framed in language directly threatening him, the threats carried the clear implication that he would suffer the same fate as his brother Jerry Colvard, the loss of his job, if he failed to support the Union. It should be noted that Picazzo was an intelligent, able employee, more so than other employees involved, and as evidenced additionally by his being advanced to assistant leadman by the Respondent. It should also be noted that all the threats, except for the one against Brent Yankee and the general threat that "heads will roll" directed against the antiunion employees, were made to or concerned the warehouse employees, it being common knowledge at the plant that they all opposed the Union. Both Freeland and Larry Colvard testified that they were worried about retaining their job because of Picazzo's threats. Moore testified that they had expressed their fears to him on this subject when he questioned them about Picazzo's threats.

Moreover, Picazzo's threat to "kill" Yankee if he told anyone about Picazzo campaigning for the Union was not one to be taken lightly either, and so Yankee perceived it. While it is apparent that even Yankee did not believe that Picazzo would kill him for disclosing their conversation, it is equally clear that Yankee did feel that Picazzo was not above causing him some kind of physical harm or damage to his personal property. Also, while it is true that, in the context of a union organizing campaign, it is not unusual for a tense atmosphere to be present, with questioned loyalties and even some animosity between management and the employees, and between employees against fellow employees, the evidence herein shows that this is an instance where such atmosphere was highly charged and volatile. Threats were made by Picazzo against at least three or four employees of a serious nature. Yankee suffered damage to his car after it was learned that he had disclosed Picazzo's threats against him. And written on the bathroom walls at the Respondent's plant were threats against the "dog brothers," a name commonly attributed to Jerry and Larry Colvard, so that the threats were only thinly veiled as against whom they were directed. Moreover, the Respondent after being apprised of the threat to Yankee felt that its seriousness merited the provision of a security guard on Yankee's work shift.

From all of the above I find that Picazzo's misconduct in threatening employees was of a sufficient nature to justify his discharge as a reasonable exercise of management's prerogatives in conducting its business and I conclude that the Respondent would have discharged Picazzo for this misconduct even if he had not engaged in

[149] While I discredited Moore's testimony that he told Picazzo that he was being discharged in part because he had continued to campaign for the Union on company time, I believe his admission that in fact this was a consideration in the decision to terminate Picazzo.

[150] *Florida Steel Corp.* v. *NLRB*, 529 F.2d 1225 (5th Cir. 1976); also see *Kern's Bakeries*, 227 NLRB 1329 (1977).

[151] *Classe Ribbon Co.*, supra, 227 NLRB 406 (1976); *Continental Woven Label Co.*, 160 NLRB 1430 (1966).

[152] See *Clear Pine Mouldings*, 268 NLRB 1044 (1984). While that case involves the question of misconduct by strikers in the context of whether reinstatement can be denied therefor, the test enunciated therein may well be applicable to threats made in the context of representation election campaigns. Also see *Newport News Shipbuilding Co.* v. *NLRB*, 738 F.2d 1404 (4th Cir. 1984).

union activity.[153] Of some significance in supporting this conclusion is the fact that Picazzo was not summarily discharged when the Respondent first learned of his misconduct in threatening and intimidating employees. At least three instances of threats involving Picazzo and Yankee, and Freeland and Colvard occurred prior to the election but the Respondent did not take any action against Picazzo, despite the fact that it already knew about his union activities and in fact resented his actions on behalf of the Union. It was only after Picazzo continued on his course of threatening employees, occurring after the Union had won the election, that the Respondent finally discharged him.

Accordingly, I find that the Respondent has sustained its burden of demonstrating that the same action it took against Picazzo, that of discharging him, would have taken place even in the absence of any protected conduct on his part, the threats being outside the scope of the protection of the Act in any context. Moreover, from all of the above, I conclude that the Respondent did not violate Section 8(a)(3) and (1) of the Act by discharging Ralph Picazzo. I shall therefore recommend that the 8(a)(3) and (1) allegations of the complaint relative to Picazzo's discharge be dismissed.[154]

IV. THE OBJECTIONS TO THE ELECTION

As set forth above, a secret-ballot election was conducted by the Board on November 15, 1981, among the Respondent's employees in an appropriate unit. The official tally of ballots showed that 19 votes were cast in favor of the Union, 10 votes against the Union, and 1 ballot was challenged.[155] On November 12, 1981, the Respondent filed timely objections to the election. By Order dated February 8, 1982, the Board overruled the Respondent's Objections 1, 2, 4, 6, and 10 as recommended by the Regional Director for Region 21 in his Report on Objections. Regarding Objections 3, 5, 7, 8, and 9, the Regional Director found that these objections relate to threats and other coercive conduct allegedly engaged in by Ralph Picazzo, "whom the Employer asserts to be a supervisor within the meaning of Section 2(11) of the Act." The Regional Director also found that "these objections revealed substantial and material issues of fact," closely related to the issues involved in the instant unfair labor practice case, and concluded that "these objections can best be resolved in a hearing with the related issues of the complaint."[156]

In substance, Objections 3 and 5 alleged that "Supervisor Picazzo" threatened employees with physical and economic harm, and the loss of their jobs if they did not support the Union, and if the employees told other employees or management officials about Picazzo's statements regarding the Union. Objection 7 alleges that "Supervisor Picazzo informed a bargaining unit employee that his brother, a lead man, would be fired if the Union won the election." Objection 8 alleges that "Supervisor Picazzo," after "openly supporting and campaigning" for the Union, and making the threats alleged above, "acted as an observer for the Union during the election, thereby creating an atmosphere of fear, coercion and domination during the election process." Objection 9 asserts that "Such an atmosphere of domination, fear and coercion prevailed due to the participation of the supervisor in the period proceeding the voting. As a result of this participation, the election was held in an atmosphere of fear and reprisal which was not conducive to a rational uncoerced choice of the bargaining representative."

In *Zeiglers Refuse Collectors v. NLRB*, 639 F.2d 1000, 1004–1005 (3d Cir. 1981), the court of appeals stated:

> The purpose of holding representation elections is to provide a means whereby workers may fairly and freely choose their bargaining representative if indeed they want one. See *NLRB v. A. J. Tower Co.* [329 U.S. 324 (1946)]. A representation election should be "a laboratory in which an experiment may be conducted, under conditions as nearly ideal as possible, to determine the uninhibited desires of the employees." *General Shoe Corp.*, 77 NLRB 124, 127 (1948) . . . . The Board has an obligation to insure that an election is held "under such conditions as well be conducive to the sort of free and untrammeled choice of representatives contemplated by the Act." *Methodist Home v. NLRB*, 596 F.2d 1173, 1183 (4th Cir. 1979) . . . .
>
> Hence, extreme care must be taken that the laboratory conditions have not become so tainted that employees may have based their vote not upon conviction, but upon fear or upon any other improperly induced consideration. The Board and the courts have emphasized that the existence of a coercive atmosphere, regardless of how such an atmosphere came about, is the critical fact upon which the Board should focus in determining whether a fair and free election was impossible. *Diamond State Poultry Co.*, 107 NLRB 3, 6 (1953); *Cross Baking*

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[153] See *NLRB v. Charles Batchelder Co.*, 646 F.2d 33, 40 (2d Cir. 1981). The court of appeals stated therein,

> Before an undisputed threat of violence to an employee can be written off as pretextual with the consequent impact of depriving the employer of his right of management, more evidence than is before us now must be presented.

Additionally, the General Counsel argues that "a significant factor in determining that alleged threats are a pretext to justify an otherwise discriminatory discharge, is the failure of management to confront the accused with the facts and to afford him an opportunity to explain or deny the accusations," citing *Elk Brand Mfg. Co.*, 253 NLRB 1038 (1981), and other cases. The General Counsel continues, "Moreover the inference to be drawn is also supported in the present case by the fact that, although Respondent raised the argument that Picazzo had intimidated other employees as a defense in Picazzo's unemployment compensation hearing, Respondent also did not identify in that proceeding whom Picazzo supposedly threatened," citing *PPG Industries*, 251 NLRB 1146 (1980). While I have already discussed this previously, I further find that the circumstances present in the above cited cases differ significantly from the instant case, i.e., in the *PPG Industries* case, the employer offered conflicting reasons for the discharge. Also see *NLRB v. Charles Batchelder Co.*, supra at 40.

[154] See *Classe Ribbon Co.*, supra; *Standard Motor Products*, 265 NLRB 482 (1982). Contrast: *St. Mary's Infant Home*, 258 NLRB 1024 (1981).

[155] The Respondent challenged the ballot of Ralph Picazzo on the alleged ground that he was a supervisor within the meaning of the Act and thereby ineligible to vote in the election.

[156] The Regional Director for Region 21 therefore consolidated Cases 21–CA–20824 and 21–RC–16865 for purposes of hearing.

> *Co. v. NLRB*, 453 F.2d 1346, 1348 (1st Cir. 1971).[157]

Moreover, in those cases in which election conduct is found to have inhibited the employees' free choice in selecting their bargaining representatives, it is the duty of the Board to withhold certification and order a new election.[158]

The Respondent contends in its brief that Picazzo's "threats and intimidating conduct" resulted in the election being held in an atmosphere of fear and reprisal which was not conducive to a rational, uncoerced choice of a bargaining representative and, therefore, the election results should be "invalidated" and the election set aside. The Respondent continues therein that because Picazzo was a supervisor who participated in the Union's organizational campaign, and made threats to employees of adverse treatment unless they supported the Union, the election was "tainted by such supervisory pressure [and] cannot be upheld."[159] In the alternative, the Respondent in its brief asserts that, "Even if it is somehow found that Picazzo was not a supervisor, it is clear that his conduct was of a sufficient magnitude to warrant overturning the election."

As previously found herein, Picazzo was not a supervisor within the meaning of Section 2(11) of the Act and I therefore reject the Respondent's contention that the election should be set aside because of his participation in the Union's organizational campaign. In view thereof, I conclude that the Respondent's Objection 9, founded primarily upon Picazzo's alleged supervisory status, should be overruled. Moreover, although the Respondent uses the term "Supervisor Picazzo" in its Objections 3, 5, 7, and 8 and notwithstanding my having found Picazzo not to be a supervisor, the issue of whether the election should be invalidated and set aside because of Picazzo's conduct remains to be determined.

In *Zeiglers Refuse Collectors v. NLRB*, supra at 1005, the court of appeals continues,

> In determining whether a fair and free choice by the employees was impossible the Board must consider many factors. These include: the number of the threats, the severity of the threats and whether those threatened were put in fear, the number of workers threatened, whether the threats were made close to the election and whether they persisted in the minds of the employees at the time of the election, whether the reports of the threats were widely circulated, whether the effect of pro-union threats were cancelled out by pro-management threats, the closeness of the vote, *Monmouth Medical Center v. NLRB*, 604 F.2d 820, 823 n. 4 (3d Cir. 1979), and whether the threats can be attributed to the union or the management, see e.g., *Price Bros. Co.*, 211 NLRB 822, 823 (1974). See also *Campbell Prods. Dept.*, 623 F.2d 876 (3d Cir. 1980). The Board must examine the record, determine the weight to be accorded each factor, and applying its experience, arrive at a final, articulated decision supported by substantial evidence.

Moreover, in *NLRB v. Aaron Bros. Corp.*, 563 F.2d 409, 412 (9th Cir. 1977), the court of appeals held,

> The Board will not set an election aside unless misconduct "constitute[d] an interference with free choice, for or against a bargaining representative . . . ." *N.L.R.B. v. Bata Shoe Co.*, 377 F.2d 821 (4th Cir.), cert. denied 389 U.S. 917 (1967), quoting *Anchor Mfg. Co. v. N.L.R.B.* [300 F.2d 303 (5th Cir. 1962)] . . . . We adhere to the Board's policy that "activities of a union's employee adherents which are not attributable to the union itself are entitled to less weight in the variable equation which leads to a conclusion that an election must be set aside." *N.L.R.B. v. Monroe Auto Equipment Co.*, 470 F.2d 1329 (5th Cir. 1972). Furthermore this Court has recognized that the Board's policy "credits employees with the ability to give true weight to the possibly impulsive allegations of fellow employees induced by the heat of a campaign." *NL.R.B. v. Sauk Valley Mfg. Co., Inc.*, 486 F.2d 1127, 1131, n. 5 (9th Cir. 1973). So to warrant overturning an election, employee conduct must be "coercive and disruptive conduct or other action [which] is so aggravated that *a free expression of choice of representation is impossible*." [Emphasis added.][160]

It is well settled that an election will be set aside where there is an atmosphere of violence or threats of violence which precludes employees from exercising a free choice.[161] For conduct to warrant setting aside an election, not only must that conduct be coercive, but it must be so related to the election as to have had a probable effect upon the employees' actions at the polls.[162] The burden of proving that an election should be invalidated because of objectionable conduct rests with the party filing the objections, in this case, the Respondent.[163] The Respondent, as the party challenging pre-

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[157] Also see *NLRB v. Sauk Valley Mfg. Co.*, 486 F.2d 1127 (9th Cir. 1973).

[158] *Valley Rock Products v. NLRB*, 590 F.2d 300 (9th Cir. 1979); *NLRB v. G. K. Turner Associates*, 457 F.2d 484 (9th Cir. 1972). Also see *Zeiglers Refuse Collectors v. NLRB*, supra, the court stating therein, "Thus, if it is determined that a substantial possibility existed that the threats affected the outcome of the election, a new election must be held."

[159] The Respondent cites several cases in support thereof, *El Caballo*, 251 NLRB 46 (1980); *Delchamps, Inc.*, 210 NLRB 179 (1974); *Lamar Electric Membership Corp.*, 164 NLRB 979 (1967); *Turner's Express, Inc. v. NLRB*, 456 F.2d 289 (4th Cir. 1972); *NLRB v. Heck's, Inc.*, 386 F.2d 317 (4th Cir. 1967); *Parkchester Machine Corp.*, 72 NLRB 1410 (1947).

[160] Also see *Valley Rock Products v. NLRB*, 590 F.2d 300 (9th Cir. 1979).

[161] *Price Bros. Co.*, 211 NLRB 822 (1974); *Valley Rock Products v. NLRB*, supra; *Zeiglers Refuse Collectors v. NLRB*, supra.

[162] *Valley Rock Products v. NLRB*, supra; *NLRB v. Golden Age Beverage Co.*, 415 F.2d 26 (5th Cir. 1969).

[163] *NLRB v. Mattison Machine Works*, 365 U.S. 123 (1961); *Campbell Products Department*, 260 NLRB 1247 (1982). As the Ninth Circuit Court of Appeals stated in *Valley Rock Products v. NLRB*, supra, 590 F.2d 300, 302:

> It is well established that Congress has entrusted the Board with wide discretion in conducting and supervising elections. *NLRB v. Sauk Valley Manufacturing Co., Inc.*, 486 F.2d 1127, 1130 (9th Cir. 1973). Accordingly, the party challenging the election carries a

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lection conduct, must establish that such conduct impaired employees' freedom of choice.[164] Thus, when preelection conduct is challenged on the basis that it interfered with the election, the critical inquiry is whether employees were able to exercise free choice.[165]

Initially, it should be noted that, without some evidence that the Union "instigated, directed, authorized, adopted, ratified or condoned" Picazzo's statements threatening employees, those statements may not be attributed to the Union.[166] I can find no such evidence in this proceeding. Picazzo held no position in or conferred by the Union.[167] Nor does the record reveal any impropriety committed by a union official. Further, there is no showing that the Union knew of Picazzo's improper acts or that it failed to repudiate them.[168] Therefore, Picazzo's threats to other employees cannot be attributed to the Union and must be considered as being those of a third party.

It has long been held that the acts of third parties, including those of rank-and-file employees, even if the employees are "outspoken union partisans" are given less weight in determining whether or not conduct actually or potentially would affect the freedom of choice of employees.[169] However, both the Board and the courts have held that where the conduct creates a general atmosphere of fear and reprisal which renders a free expression of choice of representative impossible, thereby destroying the laboratory conditions of the election, the election will be set aside, despite the fact that such conduct is not attributable to either party to the election.[170]

In applying the above Board and court decisions to the circumstances present in this case, and while not condoning misconduct of the type found herein,[171] I conclude that such conduct was insufficient to warrant the setting aside of the election. Although Picazzo's various statements to employees, made both before and after the election, were found to constitute threats of an egregious and intemperate nature and sufficient to justify his discharge lawfully, regarding this particular issue we are concerned with his preelection conduct, and I find the character thereof is not so aggravated as to create an atmosphere of fear and reprisal which so rendered a free expression of choice of representative impossible and thus destroyed the laboratory conditions of the election.

It should be noted that Picazzo's misconduct occurred between 2 weeks and "two or three" days before the election. As stated by the Court of Appeals, Fourth Circuit, in *Methodist Home v. NLRB*, supra at 1184:

> If coercive conduct takes place on the very day of the election, particularly if within an hour or two before the election is to take place, it can be assumed to have had a far more substantial effect on the election than conduct occurring days or weeks before the election, since in the latter case the effect of the conduct may have largely been dissipated before election day.

The evidence shows that Picazzo warned Mark Freeland and Larry Colvard that their "brother" Jerry Colvard would be discharged by the Respondent and "be gone" after the Union won the election. As discussed above, these employees interpreted this as, in effect, meaning that the Union would insist on Jerry Colvard's dismissal because of his known strong antiunion feelings and that the Respondent would be compelled to comply therewith. Picazzo also warned Freeland that "it would be rough for you" if he failed to support the Union. Freeland and Colvard both testified that Picazzo's statements caused them to fear for their job security. However, neither employee testified that this had altered their decision as to which way they intended to vote in the election.[172] Moreover, it should be remembered that when they apprised Moore of their fears he assured them that the discharge of employees was still subject to management decision whatever the Union's input and that they had nothing to worry about, that their jobs were secure. The impact of this assurance, coming soon after Picazzo's threats and a few days before the election, could well have dissipated any coercive effects of Picazzo's threats concerning these employees.[173]

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heavy burden in charging that coercion prevented a fair election, for evidence must be furnished overcoming the presumption that ballots cast under the the safeguards provided by Board procedure reflect the true desires of the participating employees.

[164] *NLRB v. Eurodrive, Inc.*, 724 F.2d 556 (6th Cir. 1984); *NLRB v. Basic Wire Products*, 516 F.2d 261 (6th Cir. 1975).

[165] Ibid.

[166] *Six Flags Over Mid-America, Inc.*, 253 NLRB 111 (1980); *Beaird-Poulan Division*, 247 NLRB 1365 (1980), enf. denied 649 F.2d 589 (8th Cir. 1981); *Firestone Steel Products Co.*, 241 NLRB 382 (1979).

[167] The fact that Picazzo was designated by the Union as an election observer does not alter this finding. In accordance with well-settled Board law, Picazzo's service as an election observer did not confer upon him the status of a union agent. Moreover, there is no evidence in the record that Picazzo received any payment for this service. (That Picazzo acknowledged being "paid off" by the Union for his union activities, whether made seriously or jokingly, is too ambiguous in the record to be considered evidence thereof.) *Anchor Inn Hotel of St. Croix*, 262 NLRB 1137 (1982); *Connecticut Foundry Co.*, 247 NLRB 1514 (1980); *Methodist Home v. NLRB*, 596 F.2d 1173 (4th Cir. 1979); *NLRB v. Bristol Spring Mfg. Co.*, 579 F.2d 704 (2d Cir. 1978). Additionally, the Union also designated Jerry Colvard, a known antiunion employee, as its other election observer. Further, while Picazzo did actually campaign on the Union's behalf, by speaking to employees in its favor, he never obtained employee signatures on union authorization cards other than his own, and had not been instrumental in bringing the Union into the Respondent's plant to organize the employees. Moreover, the Union in no other way, actually or impliedly, held Picazzo out as its representative with the employees. Contrast, *NLRB v. Georgetown Dress Corp.*, 537 F.2d 1239 (4th Cir. 1976), wherein it was held that members of a union's "in-plant organizing committee" were agents of the union regarding their union activities.

[168] *Certain-Teed Products Corp. v. NLRB*, 562 F.2d 500 (7th Cir. 1977).

[169] *ATR Wire & Cable Co.*, 267 NLRB 204 (1983); *Six Flags Over Mid-America, Inc.*, supra; *Fabricut, Inc.*, 233 NLRB 1196 (1977).

[170] *Sonoco of Puerto Rico*, 210 NLRB 493 (1974); *Steak House Meat Co.*, 206 NLRB 28 (1973); *Diamond State Poultry Co.*, 107 NLRB 3 (1953); *Zeiglers Refuse Collectors v. NLRB*, supra; *Methodist Home v. NLRB*, supra.

[171] As stated by the administrative law judge in *ATR Wire & Cable Co.*, supra at 210:

> That is not to say that the acts and language used by these individuals is to be condoned. Rather, it is to accept the realities of the industrial setting and to note that antiseptic perfection is not a realistic possibility.

[172] Contrast, *Steak House Meat Co.*, 206 NLRB 28 (1973).

[173] It should be noted that Jerry and Larry Colvard and Mark Freeland were known to be against union representation, and the tenor of the evidence herein including the testimony given strongly infers, and it can be reasonably presumed, that they voted against the Union in the election

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Additionally, in connection with Picazzo's threats involving Jerry Colvard, the Board, in a somewhat analogous situation, confirmed the ruling of the administrative law judge in *Anchor Inn Hotel of St. Croix*, 262 NLRB 1137 (1982), that statements made by an employee, similar in nature to Picazzo's regarding Jerry Colvard and which lent themselves to the same reasonable interpretation of meaning as in the instant case, did not interfere with a free election, and upheld his recommendation to overrule the election objection premised thereon.[174]

Picazzo also threatened to "kill" employee Brent Yankee if he disclosed to anyone what Picazzo had told him during their conversation about the Union. Picazzo had previously been admonished by Moore to cease his union activities or face discharge. That Picazzo did not want the Respondent to know that he was continuing this activity is strongly suggested by the evidence herein.[175] Thus it is apparent that his threat to Yankee was directed toward this end rather than towards coercing Yankee into voting for the Union. While obviously Picazzo would have liked Yankee to support the Union by voting for it in the upcoming election, he did not threaten Yankee to do so. Moreover, as Yankee testified, this encounter with Picazzo actually strengthened his resolve to vote against the Union. It is therefore evident that Yankee did not act in fear of reprisal when he cast his ballot.[176]

Additionally, while there is testimony in the record that rumors were circulating at the Respondent's plant that Larry Colvard, Freeland, and Yankee had been threatened, Picazzo's name was not associated with the threats nor was the subject matter thereof identified in the record. The Respondent has the burden of proof on this issue and evidence concerning the circulation of rumors of ambiguous threats is not sufficient to establish that an election was conducted in a general atmosphere of fear of reprisal. Moreover, the Union won the election by a vote of 19 to 10. Picazzo was found not to be a supervisor so that his challenged ballot should be counted and a good bet would be that he voted for the Union. Thus the Union won by a 2-to-1 margin, not insubstantial or that close, even though the total vote was not large, 30 eligible voters. As the United States Court of Appeals, Fourth Circuit stated in *Methodist Home v. NLRB*, 596 F.2d 1173, 1184:

> [T]he result of the election itself, whether won by a clear majority or by a close vote, is entitled to considerable weight in evaluating the influence of the challenged conduct on the fairness of the election. It has been repeatedly declared that in a case where "a change of only a few votes would affect the outcome of the election, less egregious actions may require a rerun of the election than [in] a case in which a clear-cut choice has emerged from the balloting." *N.L.R.B. v. Gulf State Canners, Inc.*, (5th Cir. 1978) 585 F.2d 757, 759; *Henderson Trumbull Supply Corp. v. N.L.R.B.* (2d Cir. 1974) 501 F.2d 1224, 1230.

The Board in *ATR Wire & Cable Co.*, 267 NLRB 204, 210 (1983), affirmed the conclusions of the administrative law judge that:

> The policy of the Act is to further collective bargaining if a majority of employees in an appropriate unit so choose. The question here is whether the wishes of a majority of the Respondent's employees to bargain collectively should be set aside because of the actions of a few individuals. Should the validity of an election depend upon the subjective feelings of a few antiunion employees, even if those subjective feelings were real as to them? I conclude that the overwhelming case authority is to the contrary. Absent actual acts which would reasonably intimidate or coerce employees in the exercise of their votes, the wishes of a majority of employees should not be lightly set aside.

Accordingly, I find and conclude that Picazzo's preelection threats directed to Mark Freeland, Larry Colvard, and Brent Yankee, while not to be condoned, were insufficient to warrant the setting aside of the election. I additionally recommend, in light of the foregoing, that the Respondent's Objections 3, 5, 7, 8, and 9 be overruled.

V. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of the Respondent set forth in section III, above, found to constitute unfair labor practices occurring in connection with the operations of the Respondent described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow thereof.

VI. THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall recommend that it cease and desist therefrom and take certain affirmative action to effectuate the policies of the Act.

In light of the standards set forth in *Hickmott Foods*, 242 NLRB 1357 (1979), I conclude that a broad remedial order is inappropriate since it has not been shown that the Respondent has a proclivity to violate the Act or has

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despite Picazzo's threats. After the Union had won the election, Freeland asked Picazzo what Freeland could do to get on the Union's "good side." Also he did not tell Picazzo that he had voted for the Union to support his request to ingratiate himself with Picazzo and the Union, which he most likely would have done if in fact he had voted for the Union.

[174] As set forth above, Picazzo's statements concerning Jerry Colvard's discharge attain reasonable meaning only in the light of future pressure by the Union which won the election, to get rid of an ardent antiunion employee and in the context of a collective-bargaining agreement containing a union-security clause.

[175] While not coupled with a threat as in the Yankee incident, Picazzo also asked Freeland and Larry Colvard not to tell management about Picazzo's conversation with them concerning the Union.

[176] I am aware that Yankee suffered damage to his automobile (a broken window) soon after his conversation with Picazzo. While property damage is of course a serious matter, this was the only instance of such damage done to employee property appearing in the record and neither Picazzo nor the Union was connected to its accomplishment. I do not find this sufficient to change my finding concerning the threat to Yankee. See *ATR Wire & Cable Co.*, supra.

engaged in such egregious or widespread misconduct as to demonstrate a general disregard for employees' fundamental rights. Accordingly, I recommend the use of the narrow injunctive language "in any like or related manner" in the recommended Order.

CONCLUSIONS OF LAW

1. The Respondent, Chicago Metallic Corporation, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Sheet Metal Workers' International Association, Local Union 170, AFL-CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. By threatening an employee with discharge if he failed to discontinue campaigning for the Union and/or campaigning for the Union on company time, the Respondent has interfered with, restrained, and coerced its employee in the exercise of the rights guaranteed in Section 7 of the Act, and has thereby engaged in unfair labor practices in violation of Section 8(a)(1) of the Act.

4. The Respondent did not engage in unfair labor practices within the meaning of Section 8(a)(3) and (1) of the Act when it discharged Ralph Picazzo.

5. The unfair labor practices engaged in by the Respondent as set forth in Conclusion of Law 3, above, affect commerce within the meaning of Section 2(6) and (7) of the Act.

The Objections in Case 21-RC-16865

It having been established herein that the acts relied on by the Respondent did not in fact have such a coercive effect as to warrant the setting aside of the election held on November 5, 1981, nor interfere with the employees' free choice therein, I recommend that the Respondent's Objections 3, 5, 7, 8, and 9 be overruled. Since the Union received a clear majority of the valid ballots cast in the election, I recommend that the Board certify the Union as the exclusive bargaining representative of the employees in the unit found appropriate therein.[177]

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[178]

ORDER

The Respondent, Chicago Metallic Corporation, Vernon, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening its employees with discharge if they engage in activities on behalf of the Sheet Metal Workers' International Association, Local Union 170, AFL-CIO, or any other labor organization.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Post at its facility located at 5501 Downey Road, Vernon, California, copies of the attached notice marked "Appendix."[179] Copies of the notice, on forms provided by the Regional Director for Region 21, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that the allegations of unlawful conduct not specifically found herein to be violative of the Act be dismissed.

IT IS ALSO ORDERED that, in Case 21-RC-16865, Objections 3, 5, 7, 8, and 9 be overruled, the election held on November 5, 1981, be validated, and the Sheet Metal Workers' International Association, Local Union 170, AFL-CIO be certified as the exclusive representative of all the employees in the appropriate unit for purposes of collective bargaining in respect to rates of pay, wages, hours of employment, and other conditions of employment.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union

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[177] The appropriate unit consists of "all production and maintenance employees and shipping and receiving employees, including leadpersons, employed by [the Respondent] at its facility located at 5501 Downey Road, Vernon, California, excluding all other employees, office clerical employees, managerial employees, confidential employees, professional employees, and guards and supervisors as defined in the Act."

I am not unmindful that some time has elapsed since that date of the election on November 5, 1981, until today and that the courts have asserted that the Board should consider employee turnover over the passage of time in connection with representation and bargaining issues. However, there is no evidence in the record that the Respondent experienced any employee turnover problem. Moreover, had the Union been certified by the Board as the collective-bargaining representative of the Respondent's employees in an appropriate unit after the election, the employees would not be in any different circumstances, and should employee desires change as to representation, the Board offers procedures for accomplishing this.

[178] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[179] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT threaten our employees with discharge if they join, support, or otherwise engage in activities on behalf of the Sheet Metal Workers' International Association, Local Union 170, AFL–CIO or any other labor organization.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

CHICAGO METALLIC CORPORATION

Blue Island Newspaper Printing, Inc. *and* **Chicago Typographical Union No. 16, Petitioner.** Case 13-RC-16459

30 January 1985

DECISION AND CERTIFICATION OF REPRESENTATIVE

BY CHAIRMAN DOTSON AND MEMBERS HUNTER AND DENNIS

The National Labor Relations Board has considered objections to an election held 28 June 1984 and the hearing officer's report recommending disposition of them. The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 20 for and 10 against the Petitioner, with no challenged ballots. The Employer, Blue Island Newspaper Printing, Inc. (Blue Island), filed objections to the election, and the Regional Director directed that a hearing be held before a hearing officer.

The Board has reviewed the record[1] in light of the exceptions and briefs and adopts the hearing officer's findings and recommendations[2] as modified and finds that a certification of representative should be issued.

The hearing officer recommended that all six of Blue Island's objections to the election be overruled. Blue Island excepts as to the hearing officer's disposition of Objections 3, 4, 5, and 6. We find no merit in Blue Island's exceptions but modify and supplement the hearing officer's report as follows.

I.

Objection 3 concerned, in part, two statements made by third-shift press employee John Hill that allegedly created an atmosphere of fear which interfered with a free and fair election. About 1-1/2 weeks before the election, after Blue Island's president made an antiunion speech at an employee meeting, third-shift pressman John Kwiatkowski heard Hill say, "I am going to have my own meeting and take care of those who are going to vote no." On the morning of the election prior to the polls opening, third-shift Press Foreman David Bujnowski[3] heard Hill, while in the press area, say, "I will have to take care of all your no votes." Hill denied that he made these statements, but the hearing officer found to the contrary.

To judge whether threats by third parties[4] create a general atmosphere of fear and reprisal that renders a free election impossible, we apply the following criteria recently articulated in *Westwood Horizons Hotel*, 270 NLRB 802 (1984):

> In determining the seriousness of a threat, the Board evaluates not only the nature of the threat itself, but also whether the threat encompassed the entire bargaining unit; whether reports of the threat were disseminated widely within the unit; whether the person making the threat was capable of carrying it out, and whether it is likely that the employees acted in fear of his capability of carrying out the threat; and whether the threat was "rejuvenated" at or near the time of the election.

Id. at 803 (footnotes omitted). In this case, in addition to Foreman Bujnowski, six employees worked in the press area during the third shift: Hill, Kwiatkowski, Alonzo Dixon, Joseph Davis, Michael Bocot, and David Lancaster. As Hill's threatening statements were made in the press area, they appear to have been directed to, at most, the other third-shift press employees. As Kwiatkowski was an outspoken opponent of the Union, it may have been that Hill's statements were directed solely or principally at Kwiatkowski. Dixon, Davis, and Bocot testified that they did not hear the statement Hill made 1-1/2 weeks before the election that he would hold his own meeting and take care of those who were going to vote no, nor did they hear Hill's statement on the morning of the election that he would take care of the no votes. Moreover, they testified that they had not heard about such statements being made. Lancaster did not testify. Kwiatkowski, who heard Hill's earlier statement, testified that another employee was standing in the vicinity when this statement was made, but he could not recall which employee it was. Kwiatkowski told only his foreman, Bujnowski, about Hill's statement. Kwiatkowski also testified about a conversation he had with Hill on the morning of the election but did not testify that he had heard Hill's statement that morning that he was going to take care of the no votes. Therefore, we conclude that Hill's threatening statements were heard by only one foreman and, at most, two employees—Kwiatkowski and the unidentified employee who was in the vicinity when Hill made his first statement.[5] We further conclude that the testimony of

[1] We grant Blue Island's request that the word "paystubs" be corrected to read "paste-ups" everywhere that it appears in the hearing transcripts.

[2] In the absence of exceptions, we adopt, pro forma, the hearing officer's recommendations that Objections 1 and 2 be overruled.

[3] Notwithstanding Bujnowski's job title, his name, as well as that of another press foreman, appeared on the *Excelsior* list.

[4] We adopt the hearing officer's conclusion, for the reasons he states, that Hill was not an agent of the Union.

[5] It may be that Lancaster was the unidentified employee, as he was the only third-shift press employee who did not testify. All the others, except Kwiatkowski, denied hearing Hill's statement. Alternatively, it may be that the unidentified employee did not hear Hill's statement.

the other employees that they did not hear Hill's statements and had no knowledge of them affirmatively demonstrates that knowledge of Hill's statements was not disseminated to the other employees.

As to whether Hill was capable of harming opponents of the Union and whether it is likely that the employees acted in fear of his carrying out the threats, there was evidence that Hill at one time had a fight with his brother, who also was an employee of Blue Island, outside of work concerning a nonwork-related matter, but Hill had not been in fights at work. Additionally, a long time ago Hill had been a high school wrestler in the 105 pound weight class. The hearing officer found that Hill had a serious, almost brooding, demeanor. Davis and Bocot both testified that Hill was a quiet person. Kwiatkowski testified that Hill was mild mannered but tried to cultivate a reputation of being tough, although Kwiatkowski did not specify what Hill did to try to develop this reputation. Kwiatkowski also testified that, after he heard Hill say that Hill was going to have his own meeting and take care of those who were going to vote no, Kwiatkowski did not take seriously that Hill might do something to opponents of the Union. We also note that the language of Hill's two statements was vague and susceptible to a variety of interpretations. On the basis of these facts, we conclude that the hearing officer was correct in finding that Hill was not especially capable of carrying out a threat of physical harm. Moreover, we conclude that it is not likely that the employees acted in fear of Hill's threatening statements.

Finally, as to rejuvenation of the threat, Hill repeated his statement on the morning of the election but, as discussed above, Foreman Bujnowski was the only person to hear or learn of this statement.

Based on our analysis of Hill's threatening statements and the circumstances in which they were made, under the criteria set forth in *Westwood Horizons Hotel*, above, we conclude that, at most, only three individuals had knowledge of Hill's statements and the statements were unlikely to intimidate prospective voters. Therefore, we agree with the hearing officer that Hill's statements did not create a general atmosphere of fear and reprisal rendering a free election impossible.

II.

We adopt the hearing officer's finding, in overruling Objection 6, that Marilyn Setzke,[6] the most prominent union supporter among the employees, was not a supervisor. Moreover, even if she performed the functions of a supervisor on the occasions that both Josie Kwiatkowski, who was in charge of stuffers, and Scott McManimen, who was the senior stuffer, were absent, these occasions were sporadic and insignificant. Setzke substituted for Kwiatkowski and McManimen only six times between 1 January and 30 July 1984, including three times from 1 January 1984 to the date the election petition was filed, 7 May 1984, and three times from 7 May to 30 July 1984.[7] The substitutions occurred irregularly rather than on any scheduled basis. Therefore, even if Setzke performed as a supervisor on the few occasions that she substituted for Kwiatkowski and McManimen, she did not spend a regular and substantial portion of her working time performing supervisory tasks. Accordingly, under *Aladdin Hotel*, 270 NLRB 838 (1984), she was not a supervisor within the meaning of Section 2(11)[8] of the National Labor Relations Act.

In adopting the hearing officer's disposition of Objection 6, we find it unnecessary to pass on the alternative rationales set forth by the hearing officer supporting his disposition beyond his finding that Setzke was not a supervisor.

CERTIFICATION OF REPRESENTATIVE

IT IS CERTIFIED that a majority of the valid ballots have been cast for Chicago Typographical Union No. 16 and that it is the exclusive collective-bargaining representative of the employees in the following appropriate unit:

> All full-time and part-time production and maintenance employees but excluding all office clerical employees, salesmen, guards and supervisors as defined in the Act.

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[6] The spelling of the name "Setzke" is corrected from that which appears in the hearing officer's report.

[7] Although whether Setzke was a supervisor after 28 June 1984, the date of the election, has no relevance to Objection 6, the evidence was presented in terms of the number of times that Setzke acted as a substitute prior to 30 July 1984, the final day of the hearing. Of the three times that Setzke served as a substitute between 7 May and 30 July 1984, the record shows that one of these occasions was on 27 May. It is not clear whether the two other times were before or after 28 June. Even if we assume that all three were prior to the election, our conclusion that Setzke did not fill in for Kwiatkowski often enough or regularly enough to be deemed a supervisor is not altered.

[8] 29 U.S.C. § 152(11).

Dane County Dairy, Inc. *and* Drivers, Salesmen, Warehousemen, Milk Processors, Cannery, Dairy Employees and Helpers Union Local 695, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America. Case 30–CA–7966

30 January 1985

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS HUNTER AND DENNIS

On 10 February 1984 Administrative Law Judge Stanley N. Ohlbaum issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed a reply brief.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.[2]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Dane County Dairy, Inc., Madison, Wisconsin, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

DECISION

STATEMENT OF THE CASE

STANLEY N. OHLBAUM, Administrative Law Judge. This proceeding[1] under the National Labor Relations Act (Act) was litigated before me in Madison, Wisconsin, on January 5, 1984, with all parties participating throughout by counsel or other representative. Respondent elected to proceed through its secretary and registered agent Duane F. Bowman. Although the Charging Party was present and testified through its recording secretary and business agent Louis Firari, it was unrepresented by its own counsel at the trial. All parties were afforded full opportunity to be heard and to present evidence and contentions. Although at the conclusion of the trial Respondent requested and was allowed 1 month's time to file briefs and propose findings and conclusions, none have been received. The entire record has been carefully considered.

Issues

The issues presented are whether Respondent violated Section 8(a)(1) and (5) of the Act through failing and refusing to furnish the Charging Party with required bargaining information and, through instituting unilaterally during the course of collective negotiations with the Union, unnegotiated changes in wages, terms, and conditions of employment of Respondent's bargaining unit employees.

On the entire record and may observations of the testimonial demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, Respondent, a Wisconsin corporation, has been engaged in the wholesale dairying and/or carrier delivery service of dairy and other products, based in Madison, Wisconsin. During the representative calendar year immediately preceding issuance of the complaint, Respondent purchased and received at or

[1] In its exceptions the Respondent contends that the complaint should be dismissed because it does not meet the Board's jurisdictional standards. We find no merit in this contention. Thus, in *Dane County Dairy*, 269 NLRB 218 (1984), the Board asserted jurisdiction over the Respondent based on the finding of the judge there, to which the Respondent did not except, that it met the Board's $50,000 indirect inflow standard for nonretail commercial enterprises and the Respondent's admission that it was an employer within the meaning of the Act. In the present case, the complaint alleges that the Respondent met the Board's indirect inflow standard by purchasing and receiving within the previous year products, goods, and materials valued in excess of $50,000 from enterprises within the State which had received them directly from points located outside the State. The Respondent neither denied this allegation of the complaint in its answer nor presented any evidence at the hearing to refute it. At the hearing, the Respondent admitted facts sufficient to show that it meets the statutory standard for assertion of the Board's jurisdiction and admitted that it was an employer within the meaning of the Act. Although evidence was presented at the hearing to show that around July 1983 (within a year prior to the issuance of the complaint) the Respondent converted its operations as a licensed wholesale dairy to a wholesale line hauler, there is no evidence that after this change the Respondent no longer continued to meet the Board's indirect inflow standard for the assertion of jurisdiction. In these circumstances, we find it proper to assert jurisdiction over the Respondent. See *Roma Baking Co.*, 263 NLRB 24 fn. 1 (1982). In asserting jurisdiction over the Respondent, however, we do not adopt the judge's finding that at the hearing the Respondent admitted purchasing goods in the State valued at $50,000 which its suppliers had acquired from places outside the State, since the record reflects no such specific admission by the Respondent at the hearing.

[2] In the remedy portion of his decision, the judge concluded that the Respondent should be required to pay interest in accordance with *Florida Steel Corp.*, 231 NLRB 651 (1977), inter alia, on sums it failed to contribute to the employees' pension and health and welfare plans as a result of its unilateral discontinuance of payments to those plans. Because the provisions of employee benefit fund agreements are variable and complex, the Board does not provide at the adjudicatory stage of a proceeding for the addition of interest at a fixed rate on unlawfully withheld fund payments. Accordingly, we do not adopt the portion of the judge's proposed remedy providing for *Florida Steel* interest rates on delinquent fund contributions. Rather, we leave to the compliance stage the question whether the Respondent must pay any additional amounts into the fringe benefit funds in order to satisfy our "make-whole" remedy. These additional amounts may be determined, depending on the circumstances of the case, by reference to the provisions in the documents governing the funds at issue and, where there are no governing provisions, to evidence of any loss directly attributable to the unlawful withholding action, which might include the loss of return on investment of the portion of funds withheld, additional administrative costs, etc., but not collateral losses. See *Merryweather Optical Co.*, 240 NLRB 1213 (1979). Further, with respect to all backpay due here, the judge cited *F. W. Woolworth Co.*, 90 NLRB 289 (1950). We note that the quarterly computation method used in *F. W. Woolworth* is inappropriate in the circumstances here. See *Ogle Protection Service*, 183 NLRB 682 (1970).

[1] Based on a complaint issued by the Regional Director for Region 30 of the National Labor Relations Board, dated October 25, growing out of a charge filed September 9, 1983.

near its Madison, Wisconsin facility products, goods, and materials valued at over $50,000 in connection with and as a necessary part and in the course and conduct of the operation of its aforesaid business enterprise from other enterprises in Wisconsin in turn acquired from places outside of Wisconsin. At trial, Respondent conceded such purchases and stipulated it is an employer within the meaning of the Act.[2]

I find that at all material times Respondent has been and is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act; and that, at all of those times, the Charging Party has been and is a labor organization as defined in Section 2(5) of the Act.

II. UNFAIR LABOR PRACTICES

At trial, Respondent conceded in testimony of its secretary, registered agent and labor negotiator Duane F. Bowman, that during the course of negotiations with the Charging Party as acknowledged bargaining representative of Respondent's bargaining unit employees and, without having arrived at impasse, Respondent unilaterally (1) reduced unit employees' wages from $8.84 to $8 per hour, and (2) ceased making contributions to those employees' health and welfare and pension funds. It was further established, through credited testimony of the General Counsel's witnesses,[3] not overcome by credible counterproof, that Respondent also unilaterally (3) discontinued its long-established system of vacation pay,[4] and also (4) failed and refused to provide the Union with bargaining information, needed and expressly requested by the Union, as well as explicitly promised to the Union by Respondent, concerning (a) costs of Respondent's sick leave, jury-duty leave, and funeral leave policies and practices for its employees, and (b) data, with confirmatory audit access to Respondent's books and records, concerning Respondent's plea of poverty, acknowledged by Respondent at trial to have been made. Although Respondent denies it has also failed and refused to agree to a date for further negotiations, I credit Bowman's testimony that he is ready and willing to continue to negotiate, since no negotiating impasse has been reached, but that he has, as a matter of strongly felt individual principle, been unwilling to negotiate under the compulsion, "threat," or "club" of the instant pending unfair labor practices proceeding against Respondent. It is clear, however, that, as matter of law, this is no defense, since the filing of a charge under the Act neither mitigates prior unlawful failure to bargain or other violation of the Act nor tolls further obligation to bargain and otherwise comply with the Act's requirements. Cf. *Pine Manor Nursing Home*, 230 NLRB 320, 326 (1977), enfd. 578 F.2d 575 (5th Cir. 1978); *Zenith Radio Corp.*, 187 NLRB 785 (1971), enfd. 80 LRRM 2768 (7th Cir. 1972). Under our system, where individual "principle" clashes with law, it must yield to law, recourse being to the legislative branch.

Respondent also contends that because of the necessity to "defend" this proceeding it has not had the time to furnish the required bargaining information, which it does not contend is improper and which, indeed, it has agreed to supply to the Union. Since this "explanation," which is difficult to accept and has not been factually established, would in any event not be a defense to those allegations of the complaint[5] and has no bearing whatsoever on the allegations concerning the unilateral changes in wages, terms and conditions of employment during the course of impasse-free bargaining, the "explanation" is noted but must be rejected as inadequate in law.

That unilateral changes in wages and terms and conditions of employment during impasse-free collective bargaining are violative of the bargaining obligation of the Act has long been well settled. See *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203 (1964); *NLRB v. Katz*, 369 U.S. 203 (1964); *Taft Broadcasting Co.*, 163 NLRB 475 (1967), enfd. 395 F.2d 622 (D.C. Cir. 1968). It has likewise been long settled that failure to provide necessary bargaining information or data, reasonably required by the employees' bargaining representative in fulfilment of its bargaining tasks—including access to the employer's books and records to confirm an employer's claim of poverty or economic inability to deal further[6]—is also violative of the bargaining obligations of the Act. See *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1956); *Curtiss-Wright Corp. v. NLRB*, 347 F.2d 61 (3d Cir. 1965); *NLRB v. Whitin Machine Works*, 217 F.2d 593, 594 (4th Cir. 1954), cert. denied 349 U.S. 905 (1955). That this includes fringe benefit cost data, see *NLRB v. Borden*, 600 F.2d 313 (1st Cir. 1979); *Sylvania Electric Products v. NLRB*, 358 F.2d 591 (1st Cir. 1966), cert. denied 385 U.S. 852 (1966); *Curtiss-Wright*, supra; *NLRB v. John S. Swift Co.*, 277 F.2d 641 (7th Cir. 1960); *Semco Printing Center*, 265 NLRB No. 73 (1982) (not reported in Board volumes); *Weber Veneer & Plywood Co.*, 161 NLRB 1054 (1966). It is, finally, further well settled that, since such actions also interfere with, restrain, and coerce employees in the exercise of rights guaranteed to them by the Act, they also infringe employees' Section 7 rights and thereby violate Section 8(a)(1) of the Act.

It is accordingly so found and determined.

On the foregoing findings and the entire record, I state the following

CONCLUSIONS OF LAW

1. Jurisdiction is properly asserted in this proceeding.

2. By its actions described and found in section II, above by each of them, Respondent has, as alleged in the complaint, failed and refused, in violation of Section 8(a)(5) of the National Labor Relations Act to bargain in good faith with the Charging Party as the exclusive bargaining representative of Respondent's employees in the following appropriate bargaining unit:

> All production and maintenance employees, including driver salesmen, milk and ice cream, relief driv-

[2] Also as admitted and so found in earlier Board Case 30-CA-7218 (JD-237-83; June 27, 1983, *Beddow, J.*).

[3] Andersen, Locke, Firari, and Knoebel.

[4] As alleged unopposed amendment, at trial, to complaint par. "D4b."

[5] Cf., e.g., *Aeolian Corp.*, 247 NLRB 1231 (1980).

[6] *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1956).

ers, truckdrivers, working foremen and garage employees at Respondent's facility in Madison, Wisconsin.

3. By its said actions and each of them, Respondent has further interfered with, restrained, and coerced employees, and continues so to do, in the exercise of their rights under Section 7, in violation of Section 8(a)(1) of said Act.

4. The aforesaid unfair labor practices and each of them have affected, are affecting and, unless permanently restrained and enjoined, will continue to affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Respondent should be required to cease and desist from the unfair labor practices found, and affirmatively to carry out its bargaining obligations under the Act. Respondent should further, under the circumstances, be required to reinstate all unilaterally changed wages and to make and reinstitute all unilaterally discontinued benefits and other payments, pending the outcome of good-faith bargaining thereon with its unit employees' bargaining representative; also forthwith to furnish said representative with necessary and required bargaining information and data consisting of costs of its sick leave, jury-duty leave, and funeral leave policies and practices; and also to furnish said representative with economic data, with access to Respondent's books and records for corroboration and audit purposes, to support Respondent's claim of poverty and economic inability to deal further. Sums due to employees and the Union shall be computed, together with interest, as explicated in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), *Isis Plumbing Co.*, 138 NLRB 716 (1962), and *Florida Steel Corp.*, 231 NLRB 651 (1977). Respondent should also be required to preserve and make available to the Board's agents its books and records for backpay, other computation, and compliance purposes and, finally, to post the usual informative notice to employees.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[7]

ORDER

The Respondent, Dane County Dairy, Inc., Madison, Wisconsin, its officers, agents, successors, and assigns, shall

1. Cease and desist form

(a) Unilaterally and without bargaining in good faith with Drivers, Salesmen, Warehousemen, Milk Processors, Cannery, Dairy Employees and Helpers Union Local 695, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America as the exclusive bargaining representative of Respondent's employees in the following appropriate bargaining unit, reducing or otherwise changing said employees' wages or terms or conditions of employment, including their vacation pay and Respondent's payments or contributions into the employees' health and welfare fund and their pension fund. The aforesaid bargaining unit is:

> All of Respondent's production and maintenance employees, including driver salesmen, milk and ice cream, relief drivers, truckdrivers, working foremen and garage employees at Respondent's facility in Madison, Wisconsin.

(b) Failing and refusing to supply the Union with necessary and required bargaining information and data, including the costs of Respondent's sick leave, jury-duty leave, and funeral leave policies and practices, and also including the facts concerning Respondent's plea of poverty and alleged economic distress and inability to deal further with regard to economic issues with said employees, and providing accompanying access to Respondent's books and records for corroboration and audit purposes.

(c) Failing to specify a further date or dates for continuing negotiations with the Union.

(d) In any like or related manner not bargaining in good faith with the Union or failing to place into writing and execute any agreement reached with the Union incorporating the outcome of such bargaining or interfering with, restraining, or coercing employees in the exercise of rights under Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Forthwith rescind, retroactively as of the date placed into effect, Respondent's unilateral wage decrease and its unilateral cessation of payments into the health and welfare fund and pension fund of its employees in the collective-bargaining unit, made on or about August 8, 1983, and also rescind, retroactively as of the date placed into effect, Respondent's unilateral discontinuance of or change in the employees' vacation pay and benefits; and forthwith reinstitute and reinstate all of the foregoing until the outcome of good-faith collective bargaining with its employees' Union.

(b) Make whole Respondent's employees, as well as their health and welfare fund and their pension fund, for all unilateral reductions in their wages, elimination or reduction in vacation pay and benefits, and cessation of payments into the aforesaid funds, together with interest, as set forth in the remedy portion of the decision of which this Order forms a part.

(c) Promptly supply to the Union data, heretofore requested and undertaken to be furnished, concerning the costs of Respondent's sick leave, jury-duty leave, and funeral leave policies and practices.

(d) Promptly supply to the Union data, heretofore requested and undertaken to be furnished, concerning the facts and basis underlying and justifying Respondent's claim of poverty or alleged economic inability to deal further on economic matters involving the wages and terms and conditions of employment of its unit employees, and in conjunction therewith provide access to Re-

[7] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

spondent's books and records, at reasonable places, dates, and times, to the Union and its representatives for corroboration and audit purposes.

(e) At the aforementioned Union's request, bargain collectively in good faith with the Union, as of the date of Respondent's discontinuation thereof about September 9, 1983, including specifying reasonable dates, times, and places for such resumed bargaining, without making unilateral changes in wages, terms, or conditions of employment of unit employees during the course of such bargaining and place in writing, and sign any agreement reached.

(f) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, wage rate and income records, work schedules, overtime records, and all other records necessary to determine the amounts of backpay, vacations and vacation pay, health and welfare fund and pension fund contributions or payments, and other sums due under and the extent of compliance with the terms of this Order.

(g) Post at its Madison, Wisconsin premises copies of the attached notice marked "Appendix."[8] Copies of the notice, on forms provided by the Regional Director for Region 30, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(h) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[8] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT change your wages, vacation pay, or other terms or conditions of employment, or eliminate or reduce our contributions or payments into your health and welfare fund or your pension fund, without bargaining in good faith with your Union.

WE WILL NOT fail or refuse to supply your Union, at its request, with information and data required by your Union in carrying out its representational and bargaining functions on your behalf, including our costs of your sickness leave, jury-duty leave, and funeral leave benefits, and also access to our books and records for audit purposes to verify any claim of poverty or economic inability on our part in relation to your wages, benefits, and terms and conditions of your employment.

WE WILL NOT in any like or related manner fail or refuse to bargain in good faith with your Union nor interfere with, restrain, or coerce you in the exercise of your rights under the Act.

WE WILL at once reinstate your wage rates which we reduced about August 8, 1983, as well as our payments and contributions into your health and welfare and pension funds which we discontinued then, and make you and those funds whole for any sums which you lost thereby, as well as for any vacation pay you lost when we eliminated or reduced those benefits, all plus interest.

WE WILL bargain with Drivers, Salesmen, Warehousemen, Milk Processors, Cannery, Dairy Employees and Helpers Union Local 695, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, as the exclusive bargaining representative of our employees in the following collective-bargaining unit, including specifying a date or dates for resumed bargaining, and WE WILL place into writing and sign any agreement reached. The bargaining unit is:

> All production and maintenance employees, including driver salesmen, milk and ice cream, relief drivers, truckdrivers, working foremen and garage employees at our Madison, Wisconsin facility.

WE WILL promptly supply your Union with information and data requested by the Union and needed by it for negotiation purposes with us, including the cost to us of your sick leave, jury-duty leave, and funeral leave; and WE WILL also promptly supply to your Union information and data supporting our plea of poverty and our inability to improve or maintain your pay and benefits, and WE WILL permit the Union's representatives to corroborate that information through their audit of our books.

DANE COUNTY DAIRY, INC.

Indianapolis Power & Light Company *and* Local 1395, International Brotherhood of Electrical Workers, AFL–CIO. Case 25–CA–15784

31 January 1985

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS HUNTER AND DENNIS

On 6 June 1984 Administrative Law Judge Frank H. Itkin issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed her brief to the judge in support of the decision.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

The judge concluded that the Respondent violated the Act by suspending and threatening to discharge employee Herbert King because he refused to cross a stranger picket line to perform assigned work at the premises of the Respondent's customer. We reverse.

On 17 August 1983 the Respondent assigned King to read a meter and change a tape at Indiana Bell Telephone Company. Bell employees were picketing the premises when King arrived, and he refused to cross the picket line. The Respondent suspended him for 2-1/2 days and warned that refusal to cross a picket line to carry out a job assignment was cause for immediate termination.

The Respondent claimed, inter alia, that its actions did not violate the Act because the following contractual provision waived employees' right to engage in sympathy strikes:

> [T]he Union and each employee covered by the agreement agree not to cause, encourage, permit, or take part in any strike, picketing, sit-down, stay-in, slow-down, or other curtailment of work or interference with the operation of the Company's business, and the Company agrees not to engage in a lock-out.

Following Board precedent,[1] the judge reasoned that, because the contractual no-strike language did not expressly mention sympathy strikes, the contract would not bar them unless extrinsic evidence clearly showed the parties' intent to do so. He found the parties' bargaining history and past practice regarding sympathy strikes equivocal and uncertain, and thus insufficient to establish a sympathy-strike waiver.

We conclude that the broad no-strike clause bars employees from honoring stranger picket lines. We agree with former Member Penello, concurring in *Operating Engineers Local 18 (Davis-McKee)*, 238 NLRB 652, 661 (1978), that a broad no-strike prohibition encompasses direct and indirect work stoppages, including sympathy strikes: "Where the parties to a collective-bargaining contract embody in the agreement a clause stating essentially that there shall be no strikes during the term of the agreement, it means that there shall be no strikes during the terms of the agreement—unless extrinsic evidence indicates that the parties intended otherwise." Although previous Board decisions have held that sympathy strikes lie outside the scope of broad no-strike clauses, we can discern no logical or practical basis for the proposition that the prohibition of all "strikes" does not include sympathy strikes merely because the word "sympathy" is not used. As the District of Columbia Circuit stated, "[T]he practical relationship between work stoppages and the honoring of picket lines is so well understood in the industrial climate that we think that a clause of this kind using only the word 'strike' includes plant suspensions resulting from refusals to report for work across picket lines." *News Union of Baltimore v. NLRB*, 393 F.2d 673, 676–677 (1968). See also the Seventh Circuit's opinion in *United States Steel*, supra.

We consider former Member Penello's *Davis-McKee* concurrence a sound and straightforward guide to construing no-strike provisions. If a collective-bargaining agreement prohibits strikes, we shall read the prohibition plainly and literally as prohibiting all strikes, including sympathy strikes. If, however, the contract or extrinsic evidence demonstrates that the parties intended to exempt sympathy strikes, we shall give the parties' intent controlling weight. We therefore overrule such cases as *United States Steel* and *W-I Canteen Service* to the extent that the standard applied there is inconsistent with this holding.

The instant no-strike provision prohibits "strike[s], picketing . . . or other curtailment of work." Nothing in it suggests an intent to create an exception for sympathy strikes. Further, based on the judge's discussion of the bargaining history and the parties' conduct, we find there is insufficient extrinsic evidence establishing the parties' intent to exclude sympathy strikes from the no-strike provision's scope.

We therefore conclude that the no-strike provision "clearly and unmistakably" waived the employees' right to engage in sympathy strikes. See

[1] *United States Steel Corp.*, 264 NLRB 76 (1982) (former Chairman Van de Water and Member Hunter dissenting), enf. denied 711 F.2d 772 (7th Cir. 1983); *W-I Canteen Service*, 238 NLRB 609 (1978), enf. denied 606 F.2d 738 (7th Cir. 1979).

Metropolitan Edison Co. v. NLRB, 460 U.S. 693 (1983). Accordingly, employee King was not privileged to refuse to cross the picket line established at the premises of the Respondent's customer, and the Respondent was therefore free to suspend King and threaten him with discharge for refusing to cross the picket line.

ORDER

The complaint is dismissed.

DECISION

STATEMENT OF THE CASE

FRANK H. ITKIN, Administrative Law Judge. An unfair labor practice charge was filed in this case on August 18 and a complaint was issued on September 29, 1983. A hearing was held in Indianapolis, Indiana, on November 28 and 29, 1983. The General Counsel alleges that Respondent Company violated Section 8(a)(1) and (3) of the Act by disciplining and threatening employee Herbert King with discharge because of his refusal to cross a picket line and perform his assigned job duties at the premises of Respondent's customers. The principal question raised here is whether or not the Charging Party Union waived in its collective-bargaining agreement the statutory right of its employee members, including King, to engage in sympathy strikes. On the entire record, including my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent Company, a public utility engaged in the sale of electrical engergy, is an employer engaged in commerce as alleged. The Charging Party Union is a labor organization as alleged.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *Facts*

The Company and the Union have been parties to collective-bargaining contracts covering an appropriate unit of employees, including Herbert King, since 1972. The pertinent provisions of the initial 1972 contract, which have remained unchanged and are presently operative, are as follows (G.C. Exh. 2):

ARTICLE 1

RECOGNITION

. . . .

Section 1.02. Recognition of the Rights of the Company. The Company has and retains the right to manage and direct its business, property and employees according to the best judgment of its officers and duly authorized supervisors, subject only to the limitations expressed in the terms of this agreement and the rights of employees to the adjustment of their grievances as herein provided.

Section 1.03 Recognition of the Agreement. During the term of this agreement and any extension or renewal thereof, the Union and each employee covered by the agreement agree not to cause, encourage, permit, or take part in any strike, picketing, sitdown, stay-in, slow-down, or other curtailment of work or interference with the operation of the Company's business, and the Company agrees not to engage in a lock-out.

Section 1.04 Recognition of the Duties of Employees. (a) In recognition of the fact that the Company is a public utility which is obligated to provide continuous and adequate service to the public, each employee covered by this agreement has a special duty to assist the Company in maintaining that service by rendering competent, efficient and diligent service at all times in the performance of his job.

(b) In the event of any interruption or threatened interruption of the service supplied or to be supplied by the Company to the public, the Union and each employee covered by this agreement hereby promise to assist the Company in preventing the interruption and in restoring, maintaining and continuing normal service to the public.

Section 1.05 Purpose of Agreement. (a) The purpose of this agreement is to facilitate the peaceful adjustment of all disputes which may arise from time to time and to promote harmony and efficiency in the departments of the Company in which employees covered by this agreement are employed.

(b) It is the intent of the Company and the Union that they will cooperate with each other to promote harmonious relations, mutual good will and efficiency, and it is not the intent or desire of either party to engage in any subterfuge or to evade or circumvent the spirit and intent of this agreement.

Article 2, in turn, contains provisions for the "Settlement of Grievances" and "Arbitration."

The parties stipulated (G.C. Exh. 2) that on August 17, 1983, employee Herbert King was suspended from duty for refusing to cross a picket line and perform his assigned work at the property of Indiana Bell Telephone Company in Indianapolis. The work in question involved reading a meter and changing a cassette tape which records peak power usage by Respondent's customer, Indiana Bell. Two days later, on August 19, Respondent Company—after consultation with representatives from the Charging Party Union—decided to assess a 2-1/2-day disciplinary suspension against employee King for his refusal to perform his assigned work duties.

General Counsel's Exhibit 2, the stipulation of the parties, includes the written notice issued to employee King, dated August 23, 1983, which recites in part:

> On August 17, 1983, the employee refused to cross picket lines to perform job duties and was insubordinate when he failed to follow the direct orders of authorized supervision.
>
> . . . .
>
> Employee is hereby notified that refusal to cross picket lines to perform job duties and/or acts of in-

> subordination are intolerable and subject to immediate discharge. The termination penalty is being reduced to a 2-1/2 day suspension due to the Union's pledge to inform the membership of its responsibility under Section 1.03 of the agreement, and due to the employee's 32 years of long and loyal service. Future similar acts will justify immediate termination.

King protested the above notice, asserting, inter alia, that crossing the picket line to maintain continuous service to the customers in an emergency is different; this was routine work and not an emergency. The Union also protested, asserting, inter alia, "[T]he Union did not, nor do we now, agree with [the Employer's] assertion that the agreement precludes concerted action of the type that resulted in Mr. Herb King's suspension."

The parties, in support of their positions concerning the waiver issue, introduced the following evidence pertaining to the bargaining history and interpretation of the contract language now in dispute. Thus, on December 16, 1974, as stipulated (G.C. Exh. 2), seven company employees received disciplinary suspensions because they refused to enter a jobsite to do work, i.e., refused supervision's orders to enter the construction area of the Big Eagle apartment project where they had underground construction work duties to perform; there were three male carpenters at the main entrance to the project who were striking and there was no form of restraint to prevent entrance to this project. The Union then filed a grievance, and the "Dept. Head's answer—He didn't feel that there was a picket on job site . . . he felt he had to take disciplinary action in response to the men's refusal to work." The Company later denied the Union's allegations of violation of the labor agreement by imposing the above discipline, and asserted the no-strike clause prohibited such action by the employees.

In addition, as further stipulated (G.C. Exh. 2), on April 3, 1978, a company employee received a reprimand for an unexcused absence from work. The Union's chief steward did lead the members across the picket line approximately one-half hour after the stipulated starting time, and the disciplined employee's leaving the site was unauthorized either by his supervisor or his union steward.

It was further stipulated, with reference to the bargaining history, that in 1973, during negotiations for a renewed agreement, the Charging Party Union proposed to amend section 1.03 as follows (G.C. Exh. 2):

> [A]mend to include—after word lock-out—it is also the policy of this IBEW L.U. not to cross picket lines which are established by AFL-CIO or Independent Labor Organizations.

And, in 1975, the Union proposed to amend section 1.03 and section 1.04(b) as follows (G.C. Exh. 2):

> Section 1.03 . . . During the term of this agreement, and any extension or renewal thereof, the Union and each employee covered by the agreement agree not to cause, encourage, permit, or take part in any strike, picketing, sit-down, stay-in, slowdown, or other curtailment of work or interference with the operation on the Company's property and the Company agrees not to engage in a lock-out.

Section 1.04(b), as proposed, would eliminate reference to the interruption or threatened interruption of service to be supplied.

In addition to the above stipulations, Bruce Sumner, business manager for the Union, testified that he attended the initial 1972 contract sessions; that the Union did not then propose any language dealing with the right to strike; that there was discussion between the parties in those negotiations about the right to strike; and that he could not recall any of it. Sumner was unclear and uncertain as to specifically what the Company said this no-strike language would cover. Sumner, however, added, "The substance was that they [the Company] could not have a contract that did not have some [no-strike] protection" and "We [the Union] would not agree to language that was totally restrictive."

Sumner turned to the 1973 contract negotiations. He explained that the Union proposed General Counsel's Exhibit 2(c) during the negotiations because "this was some language that I had received earlier from the AFL-CIO or the IBEW in D.C. as the suggested language for our contract." Prior to 1973, according to Sumner, there had been no problems with regard to the no-strike language in the 1972 contract. Sumner then claimed, "I wanted to strengthen the language in the contract, Art. 1.03, as far as crossing picket lines anywhere," and, therefore, he proposed General Counsel's Exhibit 2(c) in 1973. The Company, as noted, rejected this proposal. Sumner, when asked if the Company gave any reasons for not agreeing to General Counsel's Exhibit 2(c), testified, inter alia, "I cannot remember every specific right now." Sumner added, "We withdrew the proposal." Sumner assertedly did not, by withdrawing this proposal, agree that employees would have to cross all picket lines.

Sumner then addressed the 1975 contract negotiations. Sumner noted that earlier, in 1974, "we had a problem . . . there was a construction going on . . . there was an information picket on the site [and] there were six or seven [employees] laid off for three days." The 1974 dispute, as noted supra, concerned crossing a picket line at the Eagle Apartment site. The Union filed a grievance over these suspensions; the grievance ws never arbitrated; the dispute was held in abeyance until the 1975 contract negotiations; the grievance was discussed during the 1975 negotiations; and the Union then proposed General Counsel's Exhibit 2(d)—"this proposal refers to only on the Company property." Sumner testified:

> Q. Did you intend this to be a change in the agreement?
>
> A. Just in how it is handled. It would have been a change in the language . . . it would make it more restrictive . . . but it would not be a change in how it had been handled in the past.

This union proposal pertaining to the no-strike language was withdrawn. Sumner claimed that the withdrawal

was predicated on an assumption that the Company did not want the people or equipment hurt from crossing picket lines. Sumner generally asserted that during the 1972, 1973, and 1975 negotiations the Union did not tell the Company that employees would not participate in sympathy strikes. Sumner testified that before the summer of 1983 the employees were not forced to cross picket lines; the employees would cross a picket line only in an emergency situation.

Further, Sumner recalled discussing employee King's refusal to cross a picket line with management during August 1983. Initially, Company Representative Lowell McGaughey had assured Sumner that the Employer would send out other people to read the meters and pull the tapes. Later, however, Company Representative Robert McGraw "told me [Sumner] that . . . he had talked to Mr. Snyder [counsel for the Employer], and due to the 7th District Case [sic], that these guys [including King] were going to read the meters." McGraw apparently was referring to the recent court of appeals decision in *United States Steel Corp. v. NLRB*, 711 F.2d 772 (7th Cir. 1983). Sumner denied agreeing with management that employee King had been insubordinate by refusing to cross the picket line at the customer's premises; however, he did agree with management that he would have "a meeting with the people to discuss crossing lines"—he did not agree to instruct them to cross such picket lines.[1]

The Union's International representative E. J. Bailey testified that he was involved in the 1972 negotiations for an initial contract, that the Company then proposed the language contained in sections 1.03 and 1.04 as quoted above, and that the Union made no proposal pertaining to these provisions. There was, however, a long discussion of the no-strike clause. Bailey recalled:

> The Company took the position that this [sec. 1.03] covered all types of . . . strikes or related activities. . . . And the Union took the position that this was not necessarily the case, and we discussed at great length the employees' right to refrain from crossing the picket line, to be in sympathy with the strikers that were manning that picket line.

Bailey testified on direct examination:

> Q. Did the parties ever reach agreement on whether or not employees would have a right to refrain from crossing picket lines during that negotiation?
>
> A. No, the Company never did accede to our argument, nor did we to theirs.
>
> Q. Was the language itself agreed on as part of the contract in these negotiations?
>
> A. Yes it was.
>
> Q. But you're saying that there was no agreement as to what the language meant?
>
> A. No.
>
> Q. Did the Union specifically agree during those negotiations that the employees would waive their rights to engage in sympathy strikes?
>
> A. No, we did not.[2]

Bailey, as he further testified, participated in the discussions with management pertaining to the disciplinary action taken against employee King. Bailey denied that the Union, at this discussion, agreed that King had violated the no-strike provision of the contract or had been insubordinate. The Union, according to Bailey, agreed, in effect, to "tell the employees that when the Company gives you an assignment you've got to carry out that assignment." Bailey testified on direct:

> Q. Did you discuss with the Company whether or not you would instruct them to cross a picket line to do that?
>
> A. No. I don't believe we did.

Elsewhere, Bailey explained:

> The gist of the conversation [with management] was that we would instruct our people that the Company made work assignments, and that we would carry out the work assignments, and I think I mentioned to the Company that we were down there to kiss and make up and get Mr. King back to work, and forget the whole thing.

As Bailey noted, King was put back to work; however, he was not paid for his suspension.[3]

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[1] On cross-examination, Sumner explained that in 1972 there was no talk about sympathy strikes and whether or not the no-strike clause would apply to such a strike. There were discussions about sympathy strikes in 1973 when the Union proposed a change in language for sec. 1.03. And, in 1975, when the Union again proposed a change in language for sec. 1.03, there was discussion about sympathy strikes. Sumner testified, in part:

> Q. Is it your testimony that during the negotiations in 1975 any spokesman gave you an assurance that employees would not be disciplined in the future for refusing to cross the picket line as these six or seven employees were disciplined in December 1974?
>
> A. I don't recall . . . any Company officer or spokesman saying that in that particular way. No.

[2] Bailey also attended some of the 1973 negotiations between the parties for a renewed agreement. He assertedly did not witness any discussion of the no-strike clause. Bailey identified G.C. Exh. 2(c) as the Union's proposal in 1973; however, again, he did not witness any discussion on this proposal. Bailey claimed that in 1973 there was no agreement to waive the employees' right to engage in sympathy strikes.

Bailey attended some of the 1975 negotiations between the parties. Bailey again claimed that there was no agreement by the Union that this contract language would preclude the employees from participating in a sympathy strike.

[3] Bailey, on cross-examination, claimed that the Union's position in the 1972 negotiations was that sec. 1.03 "was tied to Union Security, and also the discussion relative to crossing the picket lines." Bailey added: "The Union was taking the position that they would instruct their members to—in emergency work—cross all picket lines, and the Union was taking the position on non-emergency work . . . their members couldn't and shouldn't be required to cross picket lines."

Bailey was recalled for further cross-examination. His testimony concerned the 1972 negotiations. Bailey acknowledged, "I think what my notes was saying to me is that we could buy this language providing we get an understanding across the table on picket lines . . . we wanted an understanding that no one would be forced to cross the picket lines." Bailey claimed: "We were asking that if the people encountered picket lines . . . the Company make other arrangements to perform their work." Bailey discussed the linkage between the no-strike provision and the union-security provision. The Union knew the Company wanted some

Continued

Donald Presly, an employee and union member, testified that on several occasions since 1972 he has encountered picket lines at customers' premises when attempting to read meters; that he requested permission from the pickets to cross the picket line; that, if he was refused such permission by the pickets, he made a "notation . . . that there was a strike in progress and the pickets requested that I not cross the picket line"; and that "I never heard anymore from it." Presly claimed that "until this current [1983] incident . . . there was never any conflict." Presly explained that he never crossed a picket line until August 1983 when the pickets objected to it; that he was never directed by anyone in management or supervision to cross a picket line where the pickets objected before August 1983; and that on August 17, 1983, management:

> . . . informed us at that time that one of our fellow employees, Herb King, had already been disciplined and laid off for the refusal to cross the picket lines at the [specified] locations . . . and we were reminded that we had a contract . . . that had a no-strike clause.

Presly then crossed the picket line. Presly added: "[T]he only two places . . . that I've ever crossed a picket line where I was not permitted . . . was at the Western Electric and Greyhound location"—all following the King disciplinary action.

Randy Lucas, an employee and union member, testified that he, too, encountered picket lines on two occasions. On one such occasion in 1981, he was sent to read meters; he declined to cross the picket line; he reported to the Company that "I couldn't read the meters . . . they were on strike"; and "there was never anything said about it." On the second such occasion, "the day before Mr. King didn't get the stop," in August 1983, he again refused to cross a picket line and he was not ordered to do so or threatened with discipline.

James Thompson, an employee and a union member, testified that he has encountered picket lines at customers' facilities twice since 1972; that on one such occasion he did not cross the picket line; that the Company in that case made other arrangements; that on the second occasion he in fact made his delivery; and that his supervisor, Shirley Bennett, later "told us we shouldn't have crossed the [second] picket line." Thompson was not threatened with any discipline for his refusal to cross a picket line—he was not "instructed" to cross a picket line.[4]

Dennis Richards, an employee and union member, described the procedure which he normally followed when he arrived at a customer's site and found a picket line on the premises as follows:

> [Y]ou were there to do the job . . . you tried to get across without any altercation or problems and read the meters and change the tape and bring it back in.

Richards would ask the pickets for permission to "cross the picket line to do my job." If permission was refused, he went on to another job and turned the work slip in that evening. Richards was never ordered by management to cross picket lines or threatened with discipline.

Richards next recalled the incident in the summer of 1983 involving the Indiana Bell facility. He did not cross the picket line and so advised management. Later, Richards and King were informed by management not to honor the picket line and do your job. Coworker King, according to Richards, was laid off the next day. Richards, however, was granted permission to cross the picket line at his particular site. Richards recalled that management, during this incident, explained to him that the "Seventh [Circuit] Court of Appeals . . . in July . . . had affirmed some other decision or something that companies have the right to tell anybody to go across anybody's picket line, or something to that effect." Richards, at the time, explained to his superior, Lowell McGaughey, "I don't know what you're talking about"—"I'm not a lawyer."

Finally, employee Herbert King related the sequence resulting in his discipline during August 1983 for refusing to cross a picket line at the Indiana Bell facility. King refused to read the meter at the site because of the presence of pickets. Initially, management said nothing to King. Later, however, he was instructed, with coworker Richards, "to go out and get these stops." King recalled:

> Mr. McGaughey said, we have a job to do inside Western Electric here . . . if you think that you are legally covered from going in there . . . . you can forget it; the Seventh Circuit Court of Appeals has overturned [a] ruling.

King refused and, as stipulated, was disciplined. King, prior to 1983, had refused to cross picket lines and was never instructed to do so.

Albert Burnside, division superintendent for Respondent, testified with reference to the refusal of seven employees to cross a picket line at the Big Eagle Apartment site during December 1974. Burnside then went to the site and, as he explained, "I looked the situation over and really did not see any picket line . . . I don't recall any sign." The employees involved "just told me [Burnside] that there [were] pickets on the line, and they were asked not to cross it, and they did not." Burnside noted that there were no pickets there when he arrived. The seven employees, as stipulated, were later disciplined. Burnside claimed that they were disciplined for not crossing the picket line. However, Burnside acknowledged that his "boss, Mr. Meko," did not feel that there

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type of no-strike clause and the Company knew the Union wanted some type of union security. The Union ultimately only got maintenance of membership and checkoff. Finally, Bailey claimed:

> I believe your position [the Company's position] was that as these problems came up . . . the Company had made arrangements in the past, and you [the Company] expected them to make arrangements in the future, but you [the Company] never did accede completely to our argument.

[4] There was also similar and related testimony by employees Robert Bell, Danny Walker, William Vest, Oscar Mitchell, Phillip Brown, Robert Davis, Charles Anderson, Phillip Elza, Ralph Miller, and Raymond Lee.

was a picket on the jobsite and he had to take disciplinary action in response to the men's refusal to work.[5]

Robert Adams, now director of installation and metering for Respondent, testified that between 1978 and 1980:

> I cannot recall a specific incident where we were never able to enter the customer's premises. There may have been times may be that we did not cross the picket line on the first encounter, but usually the men would either try to work back later in the day or we'd try to pick it up the next day.

Adams, when apprised that an employee had not taken a reading or changed the tapes because of a picket line, would give it to another person. Adams noted that since 1980 metering is a higher technology; magnetic tapes were installed; and if a meter tape ran out the recorded data would be lost to the Company. Adams further testified:

> Q. All right. Now you've heard the testimony of a number of your employee subordinates that prior to August of 1983 none was ever ordered to cross a picket line. Is that correct?
>
> A. Yes. I've heard that.
>
> Q. And is that true?
>
> A. As far as I know being ordered, I'd say that's true.
>
> Q. Prior to August of 1983 did any employee, any employee subordinate of yours, refuse to cross a picket line?
>
> A. Not to my knowledge. Well, let me rephrase that. They did not cross primarily because they were not allowed to cross.
>
> Q. Allowed by whom?
>
> A. By the picket line.

Adams was then asked, "[W]hat occurred in August of 1983 . . . that brought about the change whereby Mr. King and Mr. Lucas . . . were ordered to cross the picket lines." Adams claimed:

> . . . it came to my attention . . . that there were several Bell accounts [tapes] that we weren't getting . . . I proceeded to call Employee Relations and asked for the next step that we were going to have to do to try to get in to get these tapes . . . because it wouldn't be long before the tape would be running out.

Jerry Fogleman, supervisor of Respondent's installation demand division, testified that in February 1980 he was informed that employee King did not read a meter because of a strike at a customer's site; that Fogleman was instructed by his superiors that under the no-strike clause in the bargaining agreement the employees were expected to cross picket lines to perform their jobs; that he explained this to King; and that he then drove King through the line and King performed his assignment. Fogleman acknowledged on cross-examination that, when he drove King "across the line" in February 1980, there was no objection whatsoever from the pickets.[6]

Bobby McGraw, director of labor relations for Respondent, testified that during the 1972 contract negotiations the Union took the position that a no-strike clause would depend on a union-security clause and, further, the Union did not particularly want to get anybody in any trouble or hurt in any way crossing the picket lines. The Company's response was that "it was not the Company's intention to get anybody hurt at anytime. We would afford them any safeguards . . . that would be required to cross the picket lines." The Union did not, during 1972, state any position or present any argument whereby a distinction was drawn between picket lines on company property and picket lines elsewhere.

McGraw turned to the 1973 negotiations. There was very little discussion about sympathy strikes. McGraw added:

> I can't recall whether they [the Union] had a distinction [between picket lines on Company property and elsewhere] . . . . I think there was a proposal at that time. I'm not real clear on it. [See G.C. Exh. 2(c).]

McGraw turned to the 1975 negotiations. McGraw testified:

> I think Mr. Sumner's position was that he . . . had no intention of striking the Company . . . I don't recall specific arguments the he put forth.

McGraw added: "The Company's spokesman stated very clearly and precisely that there would be no contract without a no-strike clause that included sympathy strikes." As for the pending grievance pertaining to the seven employees who had refused to cross a picket line in December 1974, the suspension penalty was partially reduced.[7]

McGraw then cited an incident in 1974 where employees initially refused to cross a picket line at the Market Street Arena. McGraw explained to the employees that "we had a no-strike clause"—"they were either to do the work or they would be sent home." The employees did

[5] Morris Hiser, a lines manager for Respondent, testified that he was superintendent of overhead lines in 1975; that employees were scheduled to make a new connection at a new building; that there were pickets at the site; that the mud at the site was dry or soggy and there was no need to be in a big hurry; and that the employees were apparently not instructed to cross the picket line. Cf. the testimony of William Vest (Tr. 192–196).

Patrick Collins, an employee, related an incident in 1978 with a picket line at the service center at Indianapolis Power and Light. An independent union, which represented the clericals, was picketing. The Charging Party's steward "said to us [Collins and his coworkers] that we didn't have to cross the picket line." Collins and his coworkers then left the area and went to Collins' home. Collins was later instructed by Union Representative Sumner "that we had to go back to work . . . we were going to be fired." Collins acknowledged that this picketing was at "Ipalco's premises . . . rather than on customer's premises."

[6] Employee King, on rebuttal, was asked if Fogleman had discussed the no-strike provision in the contract with him during February 1980. King testified, "Not that I remember." King insisted that he was not directed to cross the picket line in February 1980.

[7] McGraw had visited the Big Eagle Apartment site in 1974 and observed pickets present during his visit. McGraw assertedly apprised the pickets that his employees would be crossing the picket line, and they said there would be no problems. Respondent's crew later arrived and entered the premises.

the work. McGraw next cited an incident in 1978, "at our station down in Petersburg," involving the Company's clerical employees and an independent union. McGraw again apprised the Union that "we had a no-strike clause and I expected them to go to work." The employees crossed the picket line. One employee was later disciplined. McGraw then cited an incident in 1981 at the Villadrome site. There were pickets present. McGraw again apprised the employees that the Company had a no-strike clause and their failure to cross the picket line would result in disciplinary action. The union representatives instructed the employees to cross the picket line.

On cross-examination, McGraw acknowledged that the Market Square Arena and Villadrome disputes "were both situations . . . where IPALCO had assigned particular work to its employees and Local 481 was claiming that that work should be its work under its jurisdictional definition." McGraw agreed that basically the Local 481 pickets were there protesting the fact that work was assigned to the IPALCO employees. And, as noted, the Petersburg incident involved the Company's premises and its clericals.

McGraw acknowledged that during the 1975 contract negotiations:

> . . . a Company spokesman stated there would not be a contract without an agreement that there would not be sympathy strikes . . . . [The Union] in fact responded to that proposal by saying that the Union was just as adamant, that they were not going to waive their right to sympathy strikes.

In short, the Union did not specifically agree to give up its right to sympathy strikes.[8]

B. *Discussion*

It is not seriously disputed here that an employee, like Herbert King, has a statutory right to honor a lawful picket line at the premises of his employer's customers. Cf. *NLRB v. Browning-Ferris Industries*, 700 F.2d 385 (7th Cir. 1983). The question raised in this case is whether or not the Charging Party Union has waived that statutory right. In *United States Steel Corp.*, 264 NLRB 76 (1982), enf. denied 711 F.2d 772 (7th Cir. 1983), the Board majority stated (at 79):

> The Board and the courts repeatedly have held that a waiver of the right to engage in sympathy strikes will not be inferred simply from a broad, general no-strike clause in a contract, but that such a waiver must be clear and unmistakable. Where, as here, the contractual no-strike language does not expressly prohibit sympathy strikes, a waiver of the right to engage in such strikes may be established by bargaining history or other extrinsic evidence showing the parties' clear intent.

The Board majority concluded in *United States Steel*, "[W]e perceive no express contractual language or evidence of bargaining history to support a waiver." Id. at 80. See also *W-1 Canteen Service*, 238 NLRB 609 (1978), enf. denied 606 F.2d 738 (7th Cir. 1979). I am, of course, obligated to apply the foregoing principles as restated by the Board.

In the instant case, there is no express contractual language prohibiting sympathy strikes and, as counsel for Respondent acknowledges (Br. 13), "under current Board authority, broad no-strike clauses without more are insufficient to establish a waiver of the right . . . to engage in sympathy strikes." Further, the extrinsic evidence adduced here pertaining to bargaining history and past practices falls far short of establishing the parties' clear intent to waive this statutory right. Indeed, this extrinsic evidence, as summarized supra, serves only to demonstrate the equivocation and division of the parties with respect to this issue.

For example, Union Representative Bailey credibly testified that, from the outset of negotiations in 1972, the Company took the position that section 1.03 "covered all types of strikes and related activities, and the Union took the position that this was not necessarily the case, and the parties discussed at great length the employees' right to refrain from crossing a picket line." Bailey explained that the parties never reached agreement on whether or not employees would have the right to refrain from crossing picket lines—"the Company never did accede to our argument, nor did we [the Union] to theirs." Bailey restated the positions of the parties over the years, as follows:

> I believe your position [the Company's position] was that as these problems came up . . . the Company had made arrangements in the past, and you [the Company] expected them to make arrangements in the future, but you [the Company] never did accede completely to our argument.

And Company Representative McGraw acknowledged, during the 1975 contract negotiations, that:

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[8] Terrence Truax, supervisor of the Company's system operations division, testified with reference to electricians performing work in substations at premises where a picket line was in place. Truax claimed that he had no knowledge or did not recall any instances where an electrician had been unable to carry out assigned work because of the presence of pickets.

The evidence summarized above is in large part undisputed. There are, however, some conflicts in testimony. With respect to the testimony principally pertaining to the 1972, 1973, and 1975 bargaining history, I note that the testimony of Sumner for the Union and McGraw for the Employer was at times vague, incomplete, and unclear. I am persuaded here that Bailey for the Union gave a more complete and reliable account of this sequence. Insofar as the testimony and recollection of Sumner and McGraw differs from the testimony and recollection of Bailey, I credit the latter. Further, I also credit the testimony of employees Presly, Lucas, Thompson, Richards, and King as summarized above. Their testimony is in part mutually corroborative and is also substantiated in part by the related credible testimony of employees Bell, Walker, Vest, Mitchell, Brown, Davis, Anderson, Elza, Miller, and Lee. Insofar as the testimony of Burnside, Hiser, Collins, Adams, Fogleman, McGraw, and Truax differs from the testimony of the above employee witnesses, I find the testimony of the employee witnesses to be more candid, complete, trustworthy, and reliable on this record. In particular, I note the conflict between Fogleman's recollection of an incident in 1980 and King's recollection of the same incident. I find here that King has candidly and credibly related the pertinent sequence of events. Fogleman, on the other hand, did not impress me as a reliable witness.

> . . . a Company spokesman stated that there would not be a contract without an agreement that there would not be sympathy strikes . . . the Union was just as adamant that they were not going to waive their right to sympathy strikes.[9]

The evidence pertaining to the past practices and understandings of the parties from 1972 on manifests similar mutual equivocation and uncertainty. For example, a number of employees credibly testified, as detailed supra, that prior to 1983 they were not required by the Employer to cross picket lines at the premises of customers. They were not threatened with discipline. And Company Director Adams acknowledged that "there may have been times maybe that we did not cross the picket line on the first encounter, but usually the men would either try to work later in the day or we'd try to pick it up the next day." There is, of course, testimony that seven employees were disciplined in 1974 assertedly because of their failure to cross such a picket line. However, as noted, the record suggests that management, in the 1974 incident, "did not feel that there was a picket on the jobsite and, consequently, it had to take disciplinary action in response to the men's refusal to work. Other cited instances of threatened disciplinary action or actual disciplinary action taken since 1972, as discussed above, also do not provide the clear intent required. Thus, the cited Market Square Arena and Villadrome disputes involved work assigned by Respondent to its employees and Local 481 was claiming jurisdiction to this work; the Petersburg incident involved the Employer's premises and its clerical employees; and the stipulated 1978 incident apparently involved an unexcused absence from work.

In sum, the broad no-strike clause in this case is insufficient to establish a waiver. And the extrinsic evidence adduced does not show the parties' clear intent. Therefore, absent a clear and unmistakable waiver of employee King's statutory right to refrain from crossing the picket line in question, I find and conclude that Respondent, by its suspension and threatened discipline of King, violated Section 8(a)(1) and (3) of the Act as alleged.

[9] As stipulated, the Union in 1973 and 1975 unsuccessfuly proposed specific contractual language pertaining to sympathy strikes. However, these unsuccessful attempts to include in a collective-bargaining agreement a statement of the statutory rights of employees do not sufficiently demonstrate a waiver of these statutory rights. See *W-1 Canteen Service*, supra.

CONCLUSIONS OF LAW

1. The Respondent Company is an employer engaged in commerce as alleged.
2. The Charging Party Union is a labor organization as alleged.
3. Respondent Company violated Section 8(a)(1) and (3) of the Act by suspending and disciplining employee Herbert King and by threatening employee King with discharge because of his refusal to cross a picket line and perform his assigned job duties at the premises of Respondent's customers.
4. The unfair labor practices found above affect commerce as alleged.

REMEDY

Respondent Company will be directed to cease and desist from engaging in the conduct found unlawful herein, and like or related conduct, and to post the attached notice. Affirmatively, Respondent Company will be directed to make whole employee Herbert King for any loss of earnings or employment benefits he may have suffered as a result of his unlawful suspension. Backpay will be computed with interest in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and *Florida Steel Corp.*, 231 NLRB 651 (1977). See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962). In addition, Respondent Company will be directed to expunge from its files any reference to the above suspension and to notify employee King that this has been done and that evidence of his unlawful suspension will not be used as a basis for future discipline against him. If employee King has been counseled or assessed with any other form of disciplinary action as a result of having been unlawfully suspended, Respondent Company must restore him to the status he otherwise would have occupied.

[Recommended Order omitted from publication.]

International Longshoremen's Association Local 1588, AFL–CIO *and* Atlantic Cement Company, Inc. *and* International Union of Operating Engineers, Local 825, AFL–CIO. Case 22–CD–429

31 January 1985

DECISION AND DETERMINATION OF DISPUTE

BY CHAIRMAN DOTSON AND MEMBERS HUNTER AND DENNIS

The charge in this Section 10(k) proceeding was filed 6 April 1984 by the Employer, alleging that the Respondent, International Longshoremen's Association, Local 1588, AFL–CIO (ILA Local 1588), violated Section 8(b)(4)(D) of the National Labor Relations Act by engaging in proscribed activity with an object of forcing the Employer to assign certain work to employees it represents rather than to employees represented by International Union of Operating Engineers, Local 825, AFL–CIO (the Operating Engineers). The hearing was held 22 May and 14, 15, and 28 June 1984 before Hearing Officers Gregory Burke and Raymond Heineman.

The Board affirms the hearing officers' rulings, finding them free from prejudicial error. On the entire record, the Board makes the following findings.

I. JURISDICTION

The Employer, a Delaware corporation, is engaged in the wholesale distribution of cement at its terminals in Newark and Bayonne, New Jersey, where it annually receives goods and materials valued in excess of $50,000 from points located outside the State of New Jersey. The parties stipulated, and we find, that the Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that ILA Local 1588 and the Operating Engineers are labor organizations within the meaning of Section 2(5) of the Act.

II. THE DISPUTE

A. *Background and Facts of the Dispute*

The Employer receives and ships loads of bulk cement at its Newark and Bayonne terminals. It owns barges of two sizes, class A and class B barges, which it uses to transport cement to these two terminals. Class A barges carry 18,000 short tons, and class B barges carry 6500 short tons. The Employer unloads about 25 class A barges and about 50 class B barges at both terminals combined in 1 year. The Employer ships out the cement by barges and by truck. It ships about two loads out of its Bayonne terminal on its class B barges in a year, and it ships about 50 loads out of both terminals on customer barges in 1 year. The customer barges are owned by the Employer's clients and carry smaller loads ranging from 600 to 2500 short tons. The Employer's truck shipments are not involved in this proceeding.

On its class A and class B barges, the Employer uses barge crews referred by International Longshoremen's Association, Local 333, AFL–CIO (ILA Local 333) with which it has a collective-bargaining agreement. It also employs about five or six terminal employees, who work regular 40-hour weeks and are represented by the Operating Engineers. The most recent contract covering the terminal employees is effective from 11 November 1983 to 11 November 1984. The terminal employees maintain and operate the Employer's storage facilities and the loading equipment used to load and unload the barges and trucks; they work several shifts so that someone is on duty around the clock when loading or unloading operations are scheduled. Class A barges take from 12 to 30 hours to unload and class B barges take from 12 to 36 hours to unload, depending on how full they are.

For over 15 years before April 1984, the Employer also used two additional men, Joseph and Michael Benedetto, to perform line handling and hose hookup work at both of its terminals when barges arrived and departed. When the Benedetto brothers first began working at the Employer's terminals, they were members of ILA Local 1588 and were employed through John W. McGrath Co. (McGrath), a stevedore and terminal operator that was a member of the New York Shipping Association (NYSA) and signatory to successive collective-bargaining agreements between NYSA and the ILA covering longshore work in the port of New York. Later, Joseph Benedetto transferred his membership to International Longshoremen's Association, Local 901–1, AFL–CIO (ILA Local 901–1), which represents marine carpenters employed under the NYSA-ILA contract in the port of New York, and McGrath was succeeded by International Terminal Operating Co., Inc. (ITO), also a stevedore and terminal operator that is a member of NYSA and signatory to the NYSA-ILA contract. Although the Benedettos were paid by ITO, they had no other contact with ITO and the Employer's Terminal Manager Giorgio kept their timesheets, called them in to work as needed, supervised their work, resolved their grievances, and provided them with tools and equipment. The Benedettos were called in to work as a team whenever a class A or B barge was arriving or departing from either of the Employer's terminals, an average of about two times a week. Their line handling and hose

hookup work took about 1 hour upon the arrival and 1 hour upon the departure of each barge, but they were paid for the entire time the barge was being unloaded, between 12 and 36 hours, because they were required to remain "on call" for that period.

Before April 1984 the line handling and hose hookup work at the Employer's terminals was performed as follows. When a class A or B barge arrived at one of the terminals to be unloaded, the Employer's barge crew cast off the lines used to secure the barge to the dock; the Benedettos caught the lines and tied up the barge; the barge crew hooked up one end of the flexible discharge hose on the barge, placed the hose into a boom on the barge, and swung the boom out over the dock; the Benedettos then hooked up the other end of the hose on the dock by removing a cover plate and bolting the hose to the opening on the dock. When a class B barge arrived to be loaded, the barge crew again cast off the lines to be tied up by the Benedettos; the terminal employees operated a hydraulic boom that swung a loading spout out over the barge; and the Benedettos and the terminal employees worked together to connect the loading spout to the scuttle opening on the barge. Any time a class A or B barge departed from the terminal, the reverse procedures occurred. As to customer barges that arrived to be loaded, the Benedettos performed no work at all. Rather, the terminal employees caught the lines and secured the barge to the dock, operated the hydraulic boom to swing a loading spout out over the barge, and connected the loading spout to the hatch on the barge. When customer barges departed, the terminal employees also performed the reverse procedures.

Over the past 15 years, the Operating Engineers had periodically asked the Employer why it did not use the terminal employees to perform the line handling and hose hookup work on all the barges. During negotiations for a new collective-bargaining agreement in November 1983, the Employer stated it would not be able to grant any economic increases because it was losing more than $7 million already in 1983, and the Operating Engineers then demanded that the Employer stop paying the Benedettos not to work and give all the line handling and hose hookup work to its terminal employees if it was serious about reducing costs. The Employer signed an agreement with the Operating Engineers effective 11 November 1983 that it would assign this work to its terminal employees and made plans to implement the agreement in April 1984.

In late March 1984, ILA Local 1588 President Fullam received a grievance alleging that an employee working at the Employer's terminals was not a longshoreman. Fullam appointed a committee of three ILA Local 1588 officials to investigate this grievance. The committee met with the Employer's Terminal Manager Giorgio and Joseph Benedetto on 2 April 1984. During this meeting, ILA Local 1588 Vice President Lachnicht told Joseph Benedetto, "You don't work here. You are a carpenter." Joseph Benedetto responded that Fullam knew about it, and the other two ILA 1588 officials said if Fullam knew about it, "there is no problem." On 3 April 1984, Fullam met with Terminal Manager Giorgio and told Giorgio that Joseph Benedetto "don't work here no more" and that if Giorgio needed any more men he should call the hall. Fullam also handed Giorgio a business card with his name listed as president of ILA Local 1588 and the telephone number of the ILA Local 1588 office. On 5 April 1984 Fullam called Giorgio and asked him to come to ILA Local 1588's office, but Giorgio told Fullam he should talk to Vice President Johnson of the Employer's parent company, Newmont Mining Corporation. Fullam then called Johnson and asked when the Employer was "going to quit using the wrong ILA and start using the right ILA at those two terminals." Johnson said they were assigning the work to their own terminal employees under an agreement with the Operating Engineers and as a result of a review of their practice at all of their terminals they would not be using ILA members as supplemental labor any more. Fullam responded, "You do that and I'll strike you down there and up at Brooklyn too."[1] Fullam continued, "I'm not asking for anymore people down there . . . but they will be out of my local and not the wrong local and it won't be some damn carpenter who shouldn't even be unloading." Later that day, Fullam and Lachnicht met with Giorgio; they told him he was "running scared," and Lachnicht handed Giorgio a piece of paper with Lachnicht's home telephone number on it, saying, "If ever you need anybody, any time, any day or night, you call this number."

About 6 April 1984 when the next barge was scheduled to arrive at one of the Employer's terminals, the Benedettos reported for work and were prevented from entering the Employer's facility. Since that time, the Employer's terminal employees have performed all of the line handling and hose hookup work for barge arrivals and departures at the Employer's Newark and Bayonne terminals.

[1] Fullam denied that he made any threats to strike or picket during this conversation.

B. *Work in Dispute*

The parties were unable to agree on a description of the work in dispute. The notice of 10(k) hearing defines the work in dispute as:

> The tie up and hook up work associated with the unloading of cement barges at the Employer's Bayonne and Newark, New Jersey docks as performed by one of the two persons assigned to perform said work by or through International Terminal Operators and its predecessor, McGrath Stevedoring Company.

The Employer took the position that this definition was sufficient; however, ILA Local 1588 contended that it was claiming the work performed by both Benedettos. The Operating Engineers took no position on this issue.

We find that the work in dispute is the line handling and hose hookup work associated with the loading and unloading of class A and class B cement barges at the Employer's Newark and Bayonne, New Jersey terminals.

C. *Contentions of the Parties*

The Employer contends that the work should be assigned to its employees represented by the Operating Engineers, arguing that the collective-bargaining agreement, employer assignment and practice, area and industry practice, the relative skills of the employees, and economy and efficiency of operation all favor such a result.

ILA Local 1588 initially claims that there is no jurisdictional dispute in this case within the meaning of either Section 10(k) or Section 8(b)(4)(D) of the Act. Thus, ILA Local 1588 contends that it took no action against the Employer, made no threats against the Employer, and did not cause any employees to refuse to perform work. Further, ILA Local 1588 argues that in disputing the Employer's assignment of this work to its terminal employees, ILA Local 1588's objective was limited solely to the preservation of work that had traditionally been performed by the employees it represents. Alternatively, ILA Local 1588 contends that even if a 10(k) dispute does exist, the disputed work should be awarded to the employees it represents because of the following factors: a prior Board certification, the NYSA-ILA contract, the Employer's past practice, area and industry practice, and the relative skills of the employees.

D. *Applicability of the Statute*

Before the Board may proceed with a determination of the dispute pursuant to Section 10(k) of the Act, it must be satisfied that there is reasonable cause to believe that Section 8(b)(4)(D) has been violated and that the parties have not agreed on a method for the voluntary adjustment of the dispute.

As to the statutory requirement of reasonable cause to believe that Section 8(b)(4)(D) has been violated, Vice President Johnson testified that during the 5 April telephone conversation ILA Local 1588 President Fullam threatened to strike the Employer if it assigned the disputed work to its terminal employees. Although Fullam denied making this threat, a conflict in the testimony does not prevent the Board from proceeding under Section 10(k), because the Board is not charged with finding that a violation actually occurred but only with determining whether reasonable cause exists for finding a violation.[2] Thus, we do not rule on the credibility of the testimony at issue, but we find that Johnson's testimony provides reasonable cause to believe a threat to strike was made.

It is also clear that an object of Fullam's threat was to force or require the assignment of the disputed work to employees represented by ILA Local 1588 rather than to employees represented by the Operating Engineers. Fullam's statements all show that he intended to claim this work for employees represented by his local. Further, we are unpersuaded by ILA Local 1588's assertion that in claiming this work it was motivated solely by a valid work preservation objective. ILA Local 1588 never asked the Employer to keep using the two employees who had been doing the disputed work, i.e., the Benedettos. Instead, ILA Local 1588 directed all its efforts toward acquiring this work for its own members, even trying to get rid of one of the Benedettos because he was a member of a different ILA local. Thus, Fullam told Giorgio on 3 April that Joseph Benedetto could no longer work at the Employer's terminals because of the grievance which alleged he was not a longshoreman and that Giorgio should call the local if he needed any more men. Fullam also asked Johnson to get rid of Joseph Benedetto because he was a member of ILA Local 910–1 rather than ILA Local 1588, stating on 5 April that the Employer should "quit using the wrong ILA and start using the right ILA at those two terminals." After Johnson told Fullam the Employer was assigning the disputed work to its terminal employees, Fullam reiterated this demand, stating that the employees doing the work "will be out of my local and not the wrong local and it won't be some damn carpenter who shouldn't even be unloading." Finally, ILA Local 1588 Vice President Lachnicht told Giorgio on 5 April to call Lachnicht at home if he ever needed

[2] *Carpenters Local 1400 (Golden State Precast)*, 269 NLRB 1141 (1984).

any men. Such attempts to secure work for the Local at the expense of the dislocated employees show that ILA Local 1588 was merely seeking to protect its own interests rather than to preserve the employment of the Benedettos. Thus, ILA Local 1588 did not have a legitimate work preservation objective.[3] Accordingly, we find that reasonable cause exists to believe that Section 8(b)(4)(D) of the Act has been violated.

As to the second factor, the parties stipulated, and we find, that no agreed-upon method exists for the voluntary adjustment of the dispute within the meaning of Section 10(k) of the Act. Accordingly, we find that the dispute is properly before the Board for determination.

E. *Merits of the Dispute*

Section 10(k) requires the Board to make an affirmative award of disputed work after considering various factors. *NLRB v. Electrical Workers IBEW Local 1212 (Columbia Broadcasting)*, 364 U.S. 573 (1961). The Board has held that its determination in a jurisdictional dispute is an act of judgment based on common sense and experience, reached by balancing the factors involved in a particular case. *Machinists Lodge 1743 (J. A. Jones Construction)*, 135 NLRB 1402 (1962).

The following factors are relevant in making the determination of this dispute.

1. Certification and collective-bargaining agreements

ILA Local 1588 contends that the Board certification in *New York Shipping Association*, 116 NLRB 1183, 1188 (1956), covering a unit of longshore employees in the port of New York, favors an award of the disputed work to employees it represents. In that case, the ILA was certified to represent a multiemployer unit of "all longshore employees engaged in work pertaining to the . . . loading and unloading of cargoes, including . . . handling lines in connection with the docking and undocking of ships" for employer-members of NYSA. The ILA and NYSA are parties to a master contract covering this unit. The evidence is clear, however, that the Employer has never been a member of NYSA and is not otherwise bound by this NYSA master contract with regard to the line handling and hose hookup work. ILA Local 1588 argues that the certification and contract should apply to the Employer because it is a joint employer of the Benedettos with ITO, which is a member of NYSA and a party to the ILA contract. It is undisputed that the longshore unit involved in this certification and covered by the NYSA-ILA contract conforms in scope with the jurisdiction of the New York Waterfront Commission, which is limited to companies that are "carriers of freight by water" and excludes "carriage by barge of bulk cargoes consisting of only a single commodity." Therefore, regardless of whether the Employer is a joint employer of the Benedettos with ITO, the certification and the NYSA-ILA contract do not favor an award of the work in dispute to ILA Local 1588-represented employees.

The Employer and the Operating Engineers are parties to a collective-bargaining agreement covering hookup and line handling functions involved in loading and unloading barges and specifically assigning this work to the Employer's terminal employees. We find that this contract supports an award of the work to employees represented by the Operating Engineers.

2. Company preference and past practice

The Employer has assigned the work in dispute to its employees who are represented by the Operating Engineers, and the record indicates that the Employer maintains a preference for this assignment. Before April 1984, the Employer subcontracted the work in dispute to ITO, which assigned the work to employees represented by ILA Local 1588. Accordingly, we find that the factor of employer assignment and preference favors an award of the work to employees represented by the Operating Engineers, but the factor of employer past practice favors an award of the work to employees represented by ILA Local 1588.

3. Area and industry practice

The Employer's terminal manager Giorgio testified, without contradiction, that two employers with terminals adjacent to the Employer's terminals regularly assign line handling and hookup work associated with the loading and unloading of barges carrying oil and chemicals to their own terminal employees rather than to employees referred by a stevedore. Vice President Johnson testified, without contradiction, that carriers on the east coast and in Galveston, Texas, typically use terminal employees to perform line handling work in connection with the unloading of barges carrying cement or petroleum products in bulk. Therefore, we find that the factor of area and industry practice supports an award of the work to employees represented by the Operating Engineers.

[3] See *Boilermakers Local 6 (Pacific Far East Lines)*, 224 NLRB 222 (1976); *Plumbers Local 208 and Local 3 (Midwest Engineering Service)*, 199 NLRB 790 (1972).

4. Relative skills

The record establishes that both groups of employees have performed the disputed work. Inasmuch as there is no evidence that either group of employees possesses significantly superior skills related to the performance of this work, we find that this factor favors neither group of employees.

5. Economy and efficiency of operation

The record discloses that the Employer paid ITO substantial fees for the work performed by the two Benedettos in the year before April 1984. It is undisputed that the Employer's terminal employees have always been present while the Benedettos performed the work in dispute and that since April 1984, when the terminal employees began doing all of the line handling and hose hookup work, the Employer has not paid its terminal employees for any additional hours over what it would have had to pay them even if the Benedettos were still doing the disputed work. Thus, it is clear that the Employer's operations are more economical and efficient as a result of its assignment of this work to its employees represented by the Operating Engineers. Accordingly, we find that this factor strongly supports an award of the work to employees represented by the Operating Engineers.

Conclusions

After considering all the relevant factors, we conclude that employees represented by the Operating Engineers are entitled to perform the work in dispute. We reach this conclusion relying on the collective-bargaining agreement, employer assignment and preference, area and industry practice, and economy and efficiency of operation. In making this determination, we are awarding the work to employees represented by the Operating Engineers, not to that Union or its members. The determination is limited to the controversy that gave rise to this proceeding.

DETERMINATION OF DISPUTE

The National Labor Relations Board makes the following Determination of Dispute.

1. Employees of Atlantic Cement Company, Inc. represented by International Union of Operating Engineers, Local 825, AFL–CIO are entitled to perform the line handling and hose hookup work associated with the loading and unloading of class A and class B cement barges at Atlantic Cement Company, Inc.'s Newark and Bayonne, New Jersey terminals.

2. International Longshoremen's Association, Local 1588, AFL–CIO is not entitled by means proscribed by Section 8(b)(4)(D) of the Act to force Atlantic Cement Company, Inc. to assign the disputed work to employees represented by it.

3. Within 10 days from this date, International Longshoremen's Association, Local 1588, AFL–CIO shall notify the Regional Director for Region 22 in writing whether it will refrain from forcing Atlantic Cement Company, Inc., by means proscribed by Section 8(b)(4)(D), to assign the disputed work in a manner inconsistent with this determination.

Americana Healthcare Center *and* Laborers' International Union of North America, Local 438. Case 10–CA–19274

31 January 1985

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS HUNTER AND DENNIS

On 6 July 1984 Administrative Law Judge Howard I. Grossman issued the attached decision. The Respondent filed exceptions and a supporting brief, and the Charging Party filed a reply brief.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Americana Healthcare Center, Decatur, Georgia, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

We agree with the judge that the parties by mutual mistake omitted the agreed-upon sick leave provision and the Respondent violated the Act by unilaterally terminating the agreed-upon sick leave program. We find it unnecessary to pass on the judge's discussion of the zipper clause and his finding that the Respondent was motivated by antiunion considerations.

We correct the judge's following inadvertent errors: in the second sentence of par. 1 in sec. III,C,1, the first use of "Union" should be "Respondent"; in the last sentence of par. 5 and the first sentence of par. 11 in sec. III,G, the "September 29 proposal" was made between 29 September and 20 October 1981.

DECISION

STATEMENT OF THE CASE

HOWARD I. GROSSMAN, Administrative Law Judge. The original charge was filed on May 25, 1983, and an amended charge on June 3 by Laborers' International Union of North America, Local 438 (the Union or the Charging Party). A complaint issued on November 2, alleging that Americana Healthcare Center (Respondent) unilaterally discontinued the sick leave benefits of certain of its employees on March 9, 1983, without notice to the Union, in violation of Section 8(a)(5) and (1) of the National Labor Relations Act (the Act).

A hearing was held before me in Atlanta, Georgia, on February 13 and 14, 1984. On the entire record, including briefs filed by the General Counsel, Respondent, and the Charging Party, and on my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent is a Delaware corporation with an office and place of business at Decatur, Georgia, where it is engaged in operating a nursing home. During the calendar year preceding issuance of the complaint, a representative period, Respondent received gross revenues in excess of $100,000, and purchased and received at its Decatur, Georgia facility goods valued in excess of $50,000 directly from suppliers located outside the State of Georgia. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The pleadings establish and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

The pleadings, as amended at the hearing, establish that, following a Board election, the Union was certified in March 1979 as the exclusive collective-bargaining representative of certain of Respondent's employees in an appropriate unit.[1] Respondent filed objections to the election which were overruled, and thereafter refused to bargain. The Board's Order that it do so was enforced by a United States Circuit Court of Appeals in April 1981.

B. *The Bargaining Prior to December 9, 1982*

On May 8, 1981, Union Representative Donnie M. Dennison wrote a letter to an Americana lawyer requesting bargaining and information about employee benefits. The letter was answered on May 18, 1981, by James E. Dick, director of human resources.[2] He promised cooperation, and on June 1, 1981, wrote Dennison a letter describing various employee benefits including sick leave. Dick's letter describes the latter as follows: "Sick leave commences after 600 hours of employment. Each additional 200 [hours] worked accrues for paid hours up to

[1] The appropriate unit is:

All full time and regular part time service and maintenance employees employed by the employer at its Decatur, Georgia, facility, including all nurses' aides, physical therapy aides, unit clerks, housekeeping employees, maintenance employees, dietary employees, and laundry employees, but excluding all office clerical employees, professional employees, technical employees, licensed practical nurses, and guards and supervisors as defined in the Act.

[2] During the contract negotiations in 1981, Americana Healthcare Center was owned by a company named Cenco Incorporated, which employed Dick. During the same time period, other negotiations were underway whereby Cenco agreed to sell Americana to Manor Healthcare Corporation. The exact date of the sale is not clear from the record, but Dick lost his job as a result of it, according to James F. McCormick, an official with Manor Healthcare. Dick did not appear as a witness at the hearing.

120 hours total. The benefit commences on the second day of excused absence. In December upon application, we will pay out to employees up to one half of remaining sick leave due" (G.C. Exh. 6). Respondent's administrator Patricia Sheppard further explained the policy as an accrual of 4 hours of sick leave for every 200 hours worked (after 600). On July 24, Dick sent Dennison his "basic contract," which says nothing about sick leave (G.C. Exh. 7).

The first bargaining session was held on August 25 and, at that time, Dennison gave Dick a proposed contract which contained sick leave provisions more favorable to the employees than those outlined by Dick. The provisions are numbered "Article XXXIV" and entitled "Sick Leave" (R. Exh. 2, p. 22). The parties agreed on a few articles during this session, and Dennison evidenced his assent by writing "OK" and the date in the margin opposite the relevant article on his copy of Dick's "standard contract." There was no agreement on sick leave at this session.

On September 11, 1981, Dick wrote Dennison a letter with "enclosed updated copies of our pending labor agreement. Please note that I hopefully have corrected the errors discovered during our last meeting, as well as incorporated much of the language you proposed." (G.C. Exh. 8.)

A second meeting was held on September 29, but sick leave was not discussed. However, just before the third meeting, on October 20, the Company submitted to Dennison its position on various subjects, including sick leave. This position reads as follows:

> SICK LEAVE
>
> The Company rejects the proposed language contained in *Article XXXIV, Sick Leave* but will agree to a sick leave program providing that after 600 hours of active employment an employee shall accrue 4 hours of credit for use as sick leave for every 200 hours, and providing further that pay for one-half of an employee's accrued, unused hours may be requested at Christmas and will be paid in the last payroll check before December 25 [G.C. Exh. 10-v].[3]

On November 11, 1981, Dick sent Dennison a letter with "a lot of material" he had promised on October 20. In it was a repetition of the Company's position on sick leave, with a note that it was an "open item" (G.C. Exh. 11). It was an "economic" item, and was marked "pass" on a summary Dick sent to Dennison (G.C. Exh. 11-E).

The parties met again on November 17 and 18, and the Union submitted "economic proposals" on items which were still open. These included paid holidays, funeral leave, vacation, sick leave, and wages.[4] The sick leave proposal reads: "Accrue eight (8) hours credit for every 200 hours worked not to exceed 120 hours." (G.C. Exh. 12.) As noted above, the existing accrual rate was 4 hours of sick leave credit for every 200 hours. According to Dennison, Dick said that he would respond to the Union's economic proposals at the next meeting. On December 1, Dick sent Dennison an updated copy of the contract incorporating the changes agreed on during the last session, together with a covering letter (G.C. Exhs. 13(a), (b)).

C. *The December 9 Bargaining Session*

1. Summary of the evidence

The last bargaining session took place on December 9. The Union was represented by James E. Dick and Mary K. (Jennie) Watkins, while the Union was represented by Dennison, Joyce Brown, Lucille Humphries, and Deborah Allen.

Dennison testified that the Company submitted a written response to the Union's economic proposals. Copies of the response are in evidence, and present the Company's position on the topics with the same numbering as that given in the Union's economic proposals. With some exceptions, the Company agreed to the Union's proposals on holidays, funeral leave, vacations, and wages.

Dick also brought with him a document entitled "Contract Highlights." This document outlines topics on which the Company had given employees increased benefits, or topics on which Dick claimed that the Company was giving its employees more than other companies in the area. There is no reference to sick leave in this document (G.C. Exh. 15).

The Company's documented position on sick leave at the December 9 session reads as follows:

> SECTION FOUR
>
> Sick Leave
>
> The Company *will not* change its computation methods during the term of the agreement [G.C. Exh. 14].

Dennison testified that the Union accepted the Company's proposals, subject to ratification, although he could recall little that was said about sick leave. On cross-examination, he said that the intended contract language was that set forth in the Company's response.

Several copies of the Company's response were given to the union negotiators, according to Dennison. On one of them, the letters, and date "OK, 12/9/81" appear on the sections covering funeral leave and vacations, while the date "12-9-81" and letters "O.K." appear after the section on sick leave (G.C. Exh. 14). Dennison testified that the latter notations were in his handwriting and were made on December 9. Another copy of the Compa-

[3] The Company's October 20 statements of position include the following: "The Company rejects the Union's proposed language contained in Article VIII, Seniority, Section 40 Seniority Lists, but will agree in a side letter that such lists will be made available when requested." (G.C. Exh. 10-B.) The Union accepted this resolution of the matter and withdrew its proposal (G.C. Exh. 11). Other company positions either accept, reject, or request clarification of union proposals. According to Dennison, seniority was the only topic in which the parties agreed to a side letter.

[4] The Union's proposals were numbered as follows: section one, paid holidays; section two, funeral leave; section three, vacations; section four, sick leave; section five, wages.

ny's response has similar notations on all issues except the first (paid holidays), as well as the one on sick leave, which reads "O.K., 12-9-81" (R. Exh. 3). Dennison said that he thought the writing on this exhibit was that of Union Negotiator Joyce Brown, except for the approval and date indicated for sick leave, which were his. He testified that Brown and he worked on the proposals together, and that evidently he had picked up her copy.

Respondent introduced notes of the bargaining sessions which Dennison made on a yellow note pad. His notes of the December 9 meeting include the following: "(4) Sick Leave—same OK." "O.K.'s" also appear with reference to other of the Company's proposals (R. Exh. 1).

Another subject, not specifically contained in the "economic proposals," was the Union's request that the Company supply uniforms to its employees. Dennison testified that Dick agreed to do so, but did not want to "put it in writing." Dennison denied that Dick expressed any such restriction on the subject of sick leave.

Lucille Humphries also testified about the subject. Although she was a union representative at the time, the parties stipulated that she was made a supervisor some time in late June 1983, and that she gave an affidavit to a Board agent on June 22, 1983.

Humphries testified that the Union agreed to the Company's position on sick leave on the "next to the last 2 days . . . in December." On cross-examination, she referred to a continuing dispute over the Union's request for uniforms for employees, and the discussion of sick leave. According to Humphries, Dick said to Dennison: "Now, Donnie, we can go around and around with this thing for 6 more months. Now I'm telling you just the way it is. The Company is not going to back down on sick time. They will not change. Now, we have this matter about uniforms. We will agree to give the bargaining unit one uniform per year if you will accept the sick time the way it is." The union representatives then agreed, according to Humphries.

Humphries said that she kept records of the negotiations in a little book, which she considered to be her private property. After she had "talked with the man from the Labor Board," i.e., had given her affidavit, she "thought that it was all over and that we wouldn't have to be bothered with it any more." Accordingly, she destroyed her notes.

On behalf of Respondent, Mary K. (Jennie) Watkins testified that there was no discussion of sick leave during the December 9 session. She further affirmed that she took notes of the last meeting, and had destroyed them. Before doing so, Watkins claimed, she reduced them to typewritten form, and this document is in evidence. It is dated December 9, 1981, and relates that Dick discussed paid holidays, funeral leave, sick leave, wages and hours of work, and overtime. Humphries asked that the sick leave policy be explained, and Watkins responded. The union representatives protested the absence of uniforms, and Dick agreed that the Company would give every employee a uniform in December, but would not put it in writing (G.C. Exh. 20).

Watkins admitted that Respondent had a copy of Dick's book of notes of the negotiations. At first, she said that she could not remember whether she had ever looked in the book, but later admitted discussing its contents with Administrator Sheppard, including the provisions concerning sick pay.

2. Factual analysis

Respondent moved to strike Humphries' testimony because of her admission that she had burned her notes. The General Counsel opposed the motion on the ground that such destruction took place at a time when Humphries was a company supervisor. As noted above, Humphries testified that she destroyed her notes after giving a Board affidavit, on June 22. Also, she was made a supervisor in "late June." I denied Respondent's motion to strike, a ruling which I reaffirm. The record is inconclusive as to whether Humphries was a supervisor when she destroyed her notes, but it would appear likely that she was. In any event, I credit her testimony that the reason she did so was her belief that it was "all over."

Humphries was in error about the date sick leave was discussed, as there was only one negotiating day in December. However, it is clear from Watkins' typed notes that sick leave was discussed on December 9. Aside from this error as to date, Humphries was a believable witness, and I credit her testimony that Dick told the Union he would give uniforms to employees if the Union would accept the Company's position on sick leave. This is partially corroborated by Watkins' notes. Watkins' testimony that sick leave was not discussed is flatly contradicted by her typewritten notes. Further, unlike Humphries, she gave no reason for destroying her original notes.

In essence, Humphries' testimony supports Dennison's averment, corroborated by his notes of the negotiation, and his "O.K.'s" on Respondent's proposals, that the Union accepted them on December 9, including the one on sick leave, subject to ratification.[5] I so find. I also credit Dennison's testimony that Dick promised to give uniforms to employees but said that he did not want to put it in writing, and that he failed to make any such reservation with respect to sick leave.

D. *The Ratification and the Signing of the Contract*

There was a ratification meeting of union members on the same day as the last bargaining session, December 9, 1981. Dennison went over Dick's "Contract Highlights" with the members. He also told them that sick leave benefits would remain the same.

The contract was executed on January 5, 1982, during a luncheon at a restaurant. It contains sections on four out of the five "economic subjects" about which the parties had bargained on November 17 and 18, and December 9,[6] but there is no section dealing with sick leave. Article XVIII, dealing with on-the-job injuries," states in part that "No charge will be made against accrued sick leave for on-the-job injuries" in certain circumstances.

[5] I do not consider Dennison's admission that he approved of the sick leave provision on another union representative's copy as damaging to his credibility. With a number of copies of the Company's proposal on the bargaining table, this is not unlikely.

[6] The following articles deal with the indicated topics: art. XI, funeral leave; art. XIII, wage rates; Art. XIV, holidays; and art. XV, vacations (Jt. Exh. 1).

The contract is signed on page 26 by Dick for the Company, and by various union officials including Dennison. Page 27 is an appendix containing wage rates, while page 28 has additional provisions relating to supervisory compensation, and the following sentence: "A new uniform will be ordered for each employee in the month of December of each year." This latter statement is signed by Dick and a union official (Jt. Exh. 1).

Dennison skimmed through the contract at the luncheon, but did not read it word for word. His reason, he said, was that he had had prior negotiations with Dick, and that he had no reason to doubt that it represented the agreement of the parties. Also, Dick told him that if there were any errors, they could be worked out at a later time.

Mary K. (Jennie) Watkins testified that Dick told the union representatives to be sure and "look over" the contracts before signing them, and that Dennison replied that that would not be necessary. However, Lucille Humphries, a company supervisor at the time of her testimony, averred that Dick said it would not be necessary to proofread the contract, because they could "get together" on any errors. I credit Humphries.

Humphries asserted that, despite Dick's statement, she did look through the contract, and protested to Union Representative Joyce Brown that it was not printed the way it was negotiated. Brown replied that any problems could be taken care of at a later time.

Administrator Sheppard contended that she had a conversation with Humphries in late 1982 in which the latter said that she had called Dennison and had told him that there were "five points" left out of the contract, and that Dick had given them only 10 days to get back with correction of errors. Although Humphries testified about concern over the management rights clause, she denied ever discussing sick leave with Dennison. The reason, Humphries asserted, is that she continued to receive sick leave benefits, and was still getting them at the time of the hearing. Administrator Sheppard confirmed that, although sick leave was terminated for unit employees in 1983, it was not terminated for nonunit employees and Humphries was a supervisor by June 1982. I credit Humphries' denial that she ever discussed sick leave with Dennison.

E. *Respondent's Administration of the Contract and the Termination of Sick Leave Benefits*

Dick did not instruct the staff to discontinue payment of sick leave benefits, although he did conduct a training session on the contract for his supervisors a few months after its execution. According to Sheppard, Dick did not discuss sick leave during this session. Sheppard herself did not go through the contract carefully for some time, and the Company routinely approved requests for sick leave during 1982. No charges against accrued sick leave were made for on-the-job injuries, in accordance with the contract.

Some time in the fall of 1982, Sheppard had a conversation with Manor Healthcare Official McCormick, since Manor Care at that time owned Respondent. She said that she could not find anything about sick leave in the contract, and asked McCormick to look at the contract provision concerning "oral understandings."[7] According to Sheppard, McCormick called back and told her to pay the employees their "buy-back" sick leave benefits for Christmas 1982, but to terminate all sick leave benefits in 1983, "since it's not in the contract." Sheppard testified that she did not inform Dennison of this decision.

McCormick agreed that he made the decision to terminate sick leave benefits. There was no such provision in the contract, and he had the right to do so under the "zipper" clause (art. XXVIII) and other clauses. His object was to reduce operating costs, McCormick stated. He said that the Company would "prefer" to operate in a nonunion environment, although he had told Respondent's managers that he could work with the Union.

In December 1982, Respondent posted a notice that the Company would be paying for unused sick leave according to its policy, but that the Union had left sick leave out of the contract. Dennison received a call from a union steward that something was amiss about sick leave, and called Sheppard. About a week later, she called back and said that sick leave benefits would be paid that year as they always had been. It was about then that Dennison discovered that the sick leave provision was not in the contract. The payments for Christmas 1982 were not received until the first week of January 1983.

In late January 1983, Dennison asked Company Attorney Carl Becker why the Company was late in paying sick leave benefits. Becker replied that he was new with the Company, but would consult with McCormick first. Becker told Dennison that he would be back to discuss the matter with him prior to some pending arbitration cases. "We'll also take care of the uniforms and the sick benefits. There will be no problem," said Becker.

In the first week of February 1983, a union steward informed Dennison that an employee was denied sick leave benefits, and that Mary K. Watkins had said that such benefits were left out of the contract. Dennison called Sheppard, and she told him to talk to Becker. Although

[7] Art. XXVIII of the contract entitled "Waiver of Further Bargaining" reads as follows:

Section 1. The parties agree that this Agreement contains their full and complete understanding and that any prior practices, benefits or oral agreements are superseded by the terms of this Agreement. The parties further agree that no oral understandings, practices or benefits will be recognized or regarded as binding unless committed to writing and signed by the parties as a supplement to this Agreement and that the Company may, in its discretion, discontinue or modify the provision of any benefit or privileges not required under this Agreement.

Section 2. Since this agreement expresses the understanding of the parties in respect to all matters deemed by them to be applicable to the Bargaining Unit, for the term of this Agreement, the Company and the Union each voluntarily and unqualifiedly waives the right, and each agrees that the other shall not be obligated, to bargain collectively with respect to any subject or matter referred to or covered by this Agreement, or with respect to any subjects or matters not specifically referred to or covered by this Agreement, and even though such subjects or matters may not have been within the knowledge or contemplation of either or both of the parties at the time they negotiated or signed this Agreement.

Section 3. The Company does not by this Agreement waive any rights, legal or equitable, which it would otherwise have except as specifically defined and provided in this Agreement, which sets forth all understandings and agreements arrived at by the parties.

Sheppard denied a "demand for bargaining," she did not deny this call. Dennison called the following day, and Becker replied that he had not yet had sufficient time to go over everything, but would "come in here" in early February and discuss sick leave benefits. However, no such meeting ever took place. Dennison had an arbitration with Becker on February 23, but there was no discussion of sick leave. At another arbitration on March 2, Becker failed to give Dennison a "direct answer."

F. *The Termination of Sick Leave*

Mardell Storey, an occupational therapist, testified that Mary K. Watkins told her in February that sick leave could not be honored for an employee in the hospital because it was not in the contract.

There was a meeting on March 9 between Assistant Director of Nurses Donna Thompson[8] and nine nurses' assistants. Nurses assistant Lizzie Bryant testified that Thompson said that "when the Union negotiated the contract, they left out sick leave," and that the Union had been in arbitration two or three times. Shop Steward Regina Hutchison added that Thompson said to blame the Union, because it was not in the contract. Thompson admitted saying that sick leave was not in the contract, but denied the other statements attributed to her. I credit Hutchison and Bryant.

About 30 minutes later, the nurses held a meeting with Administrator Sheppard. Bryant testified that Sheppard said "that it was left out of the contract, and that the home office had told her that we no longer get it because of the contract." Shop Steward Hutchison averred that Sheppard said that the bargaining unit employees would no longer be getting sick leave, but that the licensed practical nurses and department heads would be receiving it. Sheppard partially admitted the truth of this testimony and I credit it. There is record evidence that the salaries of the nonunit employees were higher on the average than those of unit employees.

On March 29, Becker told Dennison that the Company would not arbitrate the sick leave issue, and that the Union could file an unfair labor practice charge.

G. *Legal Analysis and Conclusions*

"In determining whether an underlying oral agreement has been reached, the Board is not strictly bound by the technical rules of contract law but is free to use general contract principles adapted to the collective bargaining context. Thus, acceptance of a final offer of a complete bargaining agreement manifests mutual assent, creating a binding bargaining agreement, and therefore triggers the duty to execute a written contract on request embodying that agreement." *NLRB v. Electra-Food Machinery*, 621 F.2d 956, 958 (9th Cir. 1980)

It is clear that the parties bargained over sick leave as one of the economic subjects. The bargaining history shows that the Company rejected the Union's first sick leave proposal, but then stated that it would agree to a sick leave program which in essence was the existing program, including accrual of 4 hours of sick leave credit for every 200 hours worked up to a maximum limit. The Union submitted a proposal that 8 instead of 4 hours be accrued, and the Company on December 9 responded that it would not change its computation methods, i.e., that it would continue to accrue only 4 hours. Its existing computation methods began sick leave on the second day of excused absence. The Union accepted. The parties thus clearly reached agreement to continue the existing sick leave program.

Did the parties intend this to be an oral agreement or a side agreement? There is no evidence of either intent. Company Representative Dick sought to gain the Union's assent to the Company's position on sick leave by granting a concession on uniforms. The fact that Dick said that he did not want to put the uniform agreement in writing (although he did), but failed to make any such reservation with respect to sick leave shows that inclusion of the latter agreement in the written contract was intended.

Nor is there any evidence that the parties intended a side agreement on sick leave. When the parties intended such an agreement, as on seniority lists, the bargaining history shows it.

On the contrary, the parties met on December 9 to consider five economic subjects, including sick leave. The fact that the written contract contains provisions on four out of five of the topics agreed on by the parties is further persuasive evidence that similar treatment was intended for the fifth subject, sick leave. The fact that the Company's response was not in precise "contract language" does not invalidate this conclusion—other topics upon which the parties reached agreement on December 9 are, similarly, not expressed in precise contract language. Yet the final agreements of the parties on these topics do appear in the contract. Indeed, the Company's September 29 proposal on sick leave, with some modification (eliminating the Company's rejection of the Union's proposal and adding that such leave accrues on the second day of excused absences) indicates the contractual language to which the Company was willing to agree (G.C. Exh. 10-V).

The fact that the contract bars charges against "accrued sick leave" in the case of certain on-the-job injuries is further support for a conclusion that sick leave benefits were intended to be included in the contract. Respondent argues that the parties reached agreement on on-the-job injuries prior to the agreement on sick leave, and, therefore, that the former cannot serve as any indication of what the parties agreed to on the "still open subject of sick leave benefits." On the contrary, the fact that the parties reached such an agreement on on-the-job injuries, to be incorporated in the contract, shows that they intended similar treatment for the "still open" subject.

Such an agreement, barring charges for on-the-job injuries, would otherwise be meaningless, since it would modify a provision not in the contract. This ambiguity requires consideration of extrinsic circumstances in order to determine the intent of the parties. *Memphis Furniture Mfg.*, 252 NLRB 303, 306 (1980).

[8] The parties stipulated that, at the time of the hearing, Thompson was acting as a supervisor within the meaning of the Act.

The Company routinely granted sick leave benefits in 1982, and made no charges against such benefits in the case of on-the-job injuries, pursuant to the contract. Respondent's apparent argument, that it was either abiding by an oral agreement or continuing a past practice (on sick leave), but was modifying same with a specific contractual provision, is too strained to be plausible.

Although the Company criticizes Dennison for failure to read the contract, its own conduct was about the same. Dick conducted a training session on the contract a few months after its execution, but did not discuss sick leave. Administrator Sheppard did not read the contract for some time, and it was only in the fall of 1982 that she discovered that it did not contain a sick leave provision, and called McCormick. The fact that Sheppard told McCormick that she could not find anything about sick leave in the contract clearly indicates that she was looking for it, and suggests that she theretofore believed that there was such a provision. This inference is buttressed by the Company's actual administration of the program.

Respondent relies on *Mercedes-Benz of North America*, 258 NLRB 803 (1981). In that case the parties stipulated that they did not even discuss the topic which was in issue, and the Board declined to make a finding that they had reached agreement on it. There is no such stipulation in this case. Respondent also cites *E. I. duPont & Co.*, 238 NLRB 299 (1978). But in that case the company frequently repeated its determination "to avoid enshrining the terms of its new procedure in a formal provision of the collective bargaining agreement" (238 NLRB at 303). There are no such expressions herein of any determination to exclude sick leave from the formal contract.

I therefore conclude that the parties agreed to a provision on sick leave substantially in the language of the Company's September 29 proposal with some modification, and further agreed that this provision was to be incorporated into the written collective-bargaining agreement. By mutual mistake it was not included in the agreement.

Respondent presents additional arguments. Thus, it contends that the "zipper clause" makes it unnecessary to determine whether, in fact, there was any agreement on sick leave. This argument, if accepted, would make it impossible to correct any mistake in a written agreement, and would bind the parties to a contract which did not reflect their complete agreement. Such a conclusion would also be contrary to the provision in Section 8(d) of the Act requiring a party to reduce to writing any agreement reached, and the Supreme Court's holding that a party may be required to do so. *H. J. Heinz Co. v. NLRB*, 311 U.S. 514, 523–526 (1941).

The Company also argues that the Union "acquiesced" in the agreement, or is "estopped" from contesting its accuracy, because Dennison did not read the contract. Respondent cites a Federal labor arbitration and a Federal district court case and, also, *Alameda County Assn.*, 255 NLRB 603 (1981). The latter is inapposite. The Company in effect argues that mistakes in collective-bargaining agreements should be considered according to the theories of negligence in the law of torts.

In this connection, it should be noted that the credited evidence shows that, at the signing ceremony, Company Representative Dick told the union negotiators that it would not be necessary to proofread the contract. Although Union Representative Humphries said that the agreement was not printed as it had been negotiated, she did not bring up the issue of sick leave. Dennison admittedly did not read the contract in full for almost a year, but neither did the Company. Instead, it administered the contract as if the sick leave benefits were a part of it, inducing Humphries, at least, to believe there was no problem. These facts demonstrate the inadequacy of Respondent's negligence theories.

The better view is that, where a written agreement is not in conformity with the actual intention of the parties, a court of equity will reform the writing in accordance with that intention. Williston, *Contracts* § 1547 (3d ed.). It is clear that the courts will enforce Board orders requiring a party to execute a contract reflecting the actual agreement of the parties,[9] and this principle supports reformation of the written contract herein.

The General Counsel presents an alternative argument, to wit, that even in the absence of such agreement, Respondent's unilateral change of existing working conditions violated the Act. Respondent argues that it had a right to do so under the zipper clause.

In *Pepsi-Cola Distributing Co.*, 241 NLRB 869 (1979), enfd. 646 F.2d 1173 (6th Cir. 1981), a predecessor employer had been making yearend bonus payments to employees. During contract negotiations, the predecessor's president made a statement indicating that such payments would continue. There was no such provision in the contract, which contained a clause stating that each party "voluntarily and unqualifiedly waives the right . . . to bargain collectively with respect to any subject or matter, whether or not referred to in this Agreement." In addition, the contract stated that the agreement constituted the "complete understanding of the parties with respect to all issues between them and supersedes all written memoranda, agreement or benefits heretofore made or given by the parties." (241 NLRB at 869 fn. 2.) Nonetheless, the Board held that the employer and the Union "fully expected the continuation of the bonus payments and there was no clear specific and unmistakable waiver by the Union of this term and condition of employment" (241 NLRB 870). Moreover, the Board imposed the obligation to make bonus payments upon the successor employer, despite the fact that it had no knowledge of the practice at the time of purchase.

In *GTE Automatic Electric Inc.*, 261 NLRB 1491 (1982), the Board allowed the employer to rely on a zipper clause in its refusal to bargain over a new condition of employment, because it did not constitute a uni-

[9] *Retail Clerks v. NLRB*, 373 F.2d 655 (D.C. Cir. 1967); *NLRB v. Central Machine & Tool Co.*, 429 F.2d 1127 (10th Cir. 1970); *NLRB v. Raven Industries*, 508 F.2d 1289 (8th Cir. 1975). In *Raven*, the court failed to enforce that part of the Board's order requiring sick leave to be a part of the contract, based on its disagreement with the Board's finding that the parties had so agreed. The court's reasoning was grounded on the facts that the principal union witness' testimony was contradicted by her affidavit, that the notes of the bargaining indicated that the employer did not agree to sick leave, and that the testimony of other union witnesses was unpersuasive, vague, or uncertain (508 F.2d at 1292–93). This is a far different record from the one in the case at bar.

lateral change of existing working conditions and because the bargaining history was completely silent on the matter in issue. However, the Board added, its holding did not disturb cases involving "an employer unilaterally changing the employees' working conditions, then using the zipper clause as a 'sword' to justify its refusal to discuss the unilateral changes made to the status quo [citing *Pepsi-Cola*, supra]" or cases involving "deceptive conduct during negotiations, so that there is no conscious or knowing waiver of rights" (261 NLRB at 1492 fn. 3). Further, the Board has held, "in order to establish a waiver of a statutory right, there must be a clear relinquishment of the right." *McDonnell Douglas Corp.*, 224 NLRB 881, 887 (1976).

These principles negate Respondent's argument that it is entitled to rely on the zipper clause in its defense. Thus, whatever its nature, the parties did reach agreement during negotiations to continue sick leave benefits. It was an existing, not a new condition of employment, the parties discussed it and expressed agreement that it continue, and there was no clear relinquishment by the Union of its right to bargain over the issue.

Respondent argues that the Union did not make a bargaining demand after receipt of notice of termination of sick leave benefits. The record shows, however, that Dennison made repeated requests to discuss the matter with Company Attorney Becker, to whom he had been referred by Administrator Sheppard, and was met with responses which can fairly be characterized as evasive.

I do not accept Respondent's argument that it was motivated by the high costs of sick leave, because it continued these benefits for nonunit employees, despite the fact that their salaries were higher than those of the unit employees. This disparate treatment of sick leave, the Company's posted notice in December 1982 saying that the Union had left sick leave out of the contract, and similar statements from a nursing supervisor show that the Company's action was motivated by antiunion considerations.

It is established law that a unilateral change in working conditions is violative of the Act, and I find that Respondent, by unilaterally discontinuing sick leave benefits in January 1983, thereby violated Section 8(a)(5) and (1) of the Act. *Turnbull Enterprises*, 259 NLRB 934 (1982). Such action was also unlawful because Respondent had contractually agreed to continue such benefits, and had agreed to incorporate them in a collective-bargaining agreement. Although this issue was not alleged in the complaint, it was thoroughly litigated.

In accordance with my findings above, I make the following

CONCLUSIONS OF LAW

1. Americana Healthcare Center is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Laborers' International Union of North America, Local 438, is a labor organization within the meaning of Section 2(5) of the Act.

3. At all times material herein, the Union has been the exclusive bargaining representative of Respondent's employees in the bargaining unit described below within the meaning of Section 9(a) of the Act. The appropriate bargaining unit is:

> All full time and regular part time service and maintenance employees employed by the employer at its Decatur, Georgia facility including all nurses' aides, physical therapy aides, unit clerks, housekeeping employees, maintenance employees, dietary employees, and laundry employees, but excluding all office clerical employees, professional employees, technical employees, licensed practical nurses, and guards and supervisors as defined in the Act.

4. On December 9, 1981, during collective-bargaining negotiations, the parties agreed to include the following provision in a collective-bargaining agreement which described a sick leave program already in existence:

> SICK LEAVE
>
> The Company agrees to a sick leave program providing that after 600 hours of active employment an employee, on and after the second day of excused absence, shall accrue 4 hours of credit for use as sick leave for every 200 hours worked, said accrued credit not to exceed 120 hours, and providing further that pay for one-half of an employee's accrued, unused hours may be requested at Christmas and will be paid in the last payroll check before December 25.

5. On January 5, 1982, the parties executed a written collective-bargaining agreement which, by mutual mistake, omitted the agreed-upon sick leave provision.

6. Beginning in January 1983, Respondent unilaterally terminated the existing sick leave program to which it had agreed, and denied sick leave benefits to its employees.

7. Respondent's termination of said benefits constituted an unfair labor practice within the meaning of Section 8(a)(5) and (1) of the Act.

8. Respondent's unfair labor practice was an unfair labor practice affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Pursuant to the foregoing considerations, the collective-bargaining agreement should be reformed so as to reflect the actual agreement of the parties on sick leave.

Selection of the appropriate place in the contract for insertion of this article is not significant, since such placement does not affect substantive rights. Although the article might be placed next to the other articles on leave, I consider it more appropriately placed immediately precedent to article XVIII, which refers to sick leave. Accordingly, the sick leave article would become article XVIII, while the present article XVIII and those following it would be renumbered accordingly.

In addition, those employees who would have been entitled to sick leave benefits should be made whole by providing them with sick leave credit since the Company's unlawful discontinuance of same in 1983. Further, the employees should be compensated for their unused

sick leave at the end of 1983 in accordance with established procedure. Although they may not have "requested" same, such requests would have been futile in light of Respondent's unlawful action in discontinuing sick leave benefits. Accordingly, such requests shall be presumed. Compensation shall be made in accordance with *Turnbull Enterprises*, supra; *Ogle Protection Service*, 183 NLRB 682 (1970); and *Isis Plumbing Co.*, 138 NLRB 716 (1962). In addition, employees should be notified of these rights. *Turnbull Enterprises*, supra.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[10]

ORDER

The Respondent, Americana Healthcare Center, Decatur, Georgia, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Denying its employees existing sick leave benefits to which it had agreed.

(b) In any other like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On written request by the Union, correct its collective-bargaining agreement with the Union executed on January 5, 1982, so as to include therein, as article XVIII, the article on sick leave described in the section of this decision entitled "Conclusions of Law," subsection 4; renumber the current article XVIII as article XIX and the following articles accordingly; and furnish the Union with a duly signed copy thereof.

(b) Make its employees whole by granting them the sick leave to which they were entitled beginning in January 1983, including compensation for unused sick leave at the end of 1983, in the manner described in the section of this decision entitled "The Remedy."

(c) Notify in writing all persons employed in the bargaining unit after January 5, 1982, of their entitlement to sick leave including potential entitlement to compensation for unused sick leave in 1983.

(d) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, leave records, personnel records and reports, and all other records relevant or necessary to facilitate the determination of the amounts due to employees under the terms of this Order.

(e) Post at its Decatur, Georgia facility copies of the attached notice entitled "Appendix."[11] Copies of the notice, on forms provided by the Regional Director for Region 10, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[10] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[11] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT terminate the sick leave program to which we have agreed, and WE WILL NOT deny our employees the sick leave benefits to which they are entitled.

WE WILL NOT in any other like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by in Section 7 of the Act.

WE WILL, on written request, furnish the Union with a copy of our collective-bargaining agreement, corrected so as to include the sick leave program to which we agreed.

WE WILL grant all employees the sick leave to which they are entitled since January 1983, including compensation for unused sick leave at the end of 1983.

WE WILL notify in writing all employees employed on and after January 5, 1982, of their right to sick leave benefits.

AMERICANA HEALTHCARE CENTER

Alemite and Instrument Divisions of Stewart-Warner Corporation *and* International Union of Professional Security Guards, Petitioner. Case 13–RC–16423

31 January 1985

DECISION ON REVIEW AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS HUNTER AND DENNIS

On 3 May 1984 the Regional Director for Region 13 issued a Decision and Direction of Election in a unit of all security guards, sergeants, and lieutenants at the Employer's West Diversey Parkway and West Fullerton Street facilities in Chicago, Illinois. The Employer filed a timely request for review of the decision, contending, inter alia, that the Regional Director erred by failing to find that Petitioner is affiliated directly or indirectly with an organization which admits to membership employees other than guards, and that the Board is therefore precluded by Section 9(b)(3) of the Act from certifying Petitioner as the exclusive representative of the unit described above.

The Board has considered the entire record in this case and makes the following findings.

The Employer, a Virginia corporation, is engaged in the manufacture of electro-mechanical equipment at its Chicago, Illinois locations. On 26 January 1984[1] the Machinery, Scrap Iron, Metal and Steel Chauffeurs, Warehousemen, Handlers, Alloy Fabricators, Theatrical, Exposition, Convention and Trade Show Employees Union, Local No. 714, International Brotherhood of Teamsters, herein referred to as Local 714, filed a petition in Case 13–RC–16381 seeking to represent a unit of the Employer's security guards. On 8 February Local 714 withdrew its petition.

Sometime in early February Michael A. Vendafreddo, the president of International Union of Professional Security Guards, the Petitioner herein, had a conversation with a friend identified in the record only as "Benny." Benny told Vendafreddo that the Employer's security guards desired union representation, but that Local 714 encountered a problem because security guards had to be organized by a union which represents only guards.[2] Vendafreddo told Benny that this information "sounded interesting."[3]

About a week after his conversation with Benny, Vendafreddo met with Benny and Bob Riley, a business agent and organizer for Local 714, at a restaurant near Local 714's office. Although the record does not reveal how this meeting was arranged, Vendafreddo testified that Riley, a longtime friend of Vendafreddo's, "sought me as a person that could take off where they left off." In the meeting, Riley described to Vendafreddo the unsuccessful effort of Local 714 to organize the Employer's guards and said that the situation presented an opportunity for Vendafreddo to start a labor organization. According to Vendafreddo, Riley then "reiterated . . . basically what we wanted to put together."

Following this meeting, Vendafreddo began contacting several friends and acquaintances to solicit their assistance in becoming officers of a labor organization. Sometime later in February, Vendafreddo contacted Bob Riley and asked for information regarding the next steps in organizing the Employer's guards. Riley invited Vendafreddo to Local 714's offices, where Vendafreddo met with Riley and certain other officers and agents of Local 714 whom Vendafreddo had known for years.[4] At this meeting Riley explained that it would be necessary for Vendafreddo to obtain a showing of interest from the Employer's guards. Riley gave Vendafreddo a petition which had been prepared for this purpose, the text of which stated that employees signing the petition expressed their interest in joining Petitioner and understood that no dues would be required until Petitioner executed a collective-bargaining agreement with the Employer.

By mid-March Vendafreddo had contacted numerous friends and had obtained the agreement of Dorothy Olinger, Dale Torii, and Ronald Maxwell to serve as officers of Petitioner. None of these individuals had had any experience in forming or operating a labor organization. Sometime in mid-March Vendafreddo called a meeting attended by Vendafreddo, Olinger, Maxwell, Riley, and several of the Employer's guards. In the meeting Vendafreddo, with the consent of the prospective officers and the employees, appointed himself, Olinger, and Torii, president, secretary, and treasurer, respectively. Riley, who was ostensibly present to discuss Local 714's experience in attempting to organize the guards, spoke in support of Vendafreddo and the opportunity presented by Petitioner. In addition, Riley produced and gave to Vendafreddo a

[1] All dates are in 1984 unless otherwise indicated.

[2] Vendafreddo testified that he was unsure what Benny does for a living or whether Benny is affiliated with Local 714.

[3] Vendafreddo testified that for a number of years he had wanted to start a labor union.

[4] Vendafreddo testified that he had been to Local 714's offices four or five times before his initial conversation with Benny, and was a friend or neighbor of several officers or agents of Local 714 besides Riley.

showing of interest petition containing the signatures of some of the Employer's guards.[5]

Following this meeting, Riley presented Vendafreddo with a completed representation petition, requiring only Vendafreddo's signature. Vendafreddo signed the instant petition and turned it over to Petitioner's attorney, who filed the petition on 19 March. About 27 March Vendafreddo telephoned Riley and asked what procedures would follow the filing of the petition. Riley informed Vendafreddo that he would be contacted by the Board's Regional Office and informed of further steps in the proceeding. The record reflects that, at the time of the hearing herein, Petitioner had no funds or physical assets of any kind, and had not discussed with Local 714 the possibility of further assistance.

The Regional Director found, and it is undisputed herein, that Local 714 is a labor organization which admits to membership employees other than guards. Nevertheless, the Regional Director concluded that neither the extent nor the duration of Local 714's assistance to Petitioner established impermissible affiliation between the Unions and thus found that the Board was not precluded by Section 9(b)(3) of the Act from certifying Petitioner as the exclusive representative of the guards herein. We disagree.

Section 9(b)(3) of the Act states in relevant part that "no labor organization shall be certified as the representative of employees in a bargaining unit of guards if such organization admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees other than guards." The Board has held that assistance furnished a guards' union during its infancy by a union admitting to membership employees other than guards does not necessarily establish affiliation between the unions.[6] Nevertheless, while substantial latitude has been permitted in such circumstances, indirect affiliation will be found where the extent and duration of assistance indicates that the guards' union lacks freedom and independence in formulating its own policies and deciding its own course of action.[7]

Here, in the approximately 2 months from withdrawal of Local 714's petition in February to the hearing in April, Petitioner took almost no action independent of Local 714. Thus, Petitioner's president was a longtime friend of officers and agents of Local 714 and was "sought" by Local 714 to continue organizational efforts among the Employer's guards immediately after Local 714 withdrew its own petition. Local 714 prepared the showing of interest petition circulated among the Employer's guards, including therein language which waived dues until a collective-bargaining agreement was obtained by Petitioner. In addition, Local 714 obtained employee signatures on this petition and prepared the representation petition which was filed by Petitioner with the Board. The record also reveals that Petitioner has no assets or expertise suggesting its ability to function independently of Local 714, and Petitioner's president has been continuously dependent on Local 714's officers for advice and assistance regarding every significant aspect of Petitioner's formation. Under all the circumstances, we conclude that the extent and duration of Petitioner's dependence on Local 714 indicates a lack of freedom and independence in formulating its own policies and supports a finding that Petitioner is indirectly affiliated with Local 714.[8] Accordingly, we are precluded by Section 9(b)(3) of the Act from certifying the Petitioner as the exclusive representative of the unit herein, and we shall dismiss the petition.

ORDER

The petition is dismissed.

[5] The petition was of a type originally shown to Vendafreddo by Riley in February. Vendafreddo testified that Petitioner had engaged in no organizing activities at the Employer's premises before the mid-March meeting.

[6] *Wells Fargo Guard Services*, 236 NLRB 1196 (1978).

[7] *Wackenhut Corp.*, 223 NLRB 1131 (1976).

[8] See *Magnavox Co.*, 97 NLRB 1111 (1952).

Wedgewood Nursing Home *and* 115, Nursing Home and Hospital Employees Union, a Division of 1115 Joint Board. Case 29–CA–9996

31 January 1985

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS HUNTER AND DENNIS

On 26 August 1983 Administrative Law Judge Steven Davis issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed a statement in support of the judge's decision.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions, brief, and statement, and has decided to affirm the judge's rulings, findings,[1] and conclusions only to the extent consistent with this Decision and Order.

As more fully set forth in the attached decision, unit employees formed the Employee Council at the Respondent's health care facility in the spring of 1980. Employee Council meetings were initially attended by employees only, but after the first three or four meetings, the members invited the Respondent's administrator to attend. The judge found that the Respondent at a 27 May 1982[2] meeting adjusted employee grievances without providing an opportunity for the collective-bargaining representative to be present as required under Section 9(a) of the Act.[3] The judge found that the attendance of two union stewards at this meeting did not relieve the Respondent of its obligation under Section 9(a). The Respondent contends that it adjusted no grievances through the Employee Council and denies that it refused the Union its statutory right to be present at meetings of the Employee Council.

The pertinent proviso of Section 9(a) states that "any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further*, That the bargaining representative has been given opportunity to be present at such adjustment." The Board has frequently invoked the proviso to require an employer to permit stewards to participate in the grievance process. See, e.g., *Winter Garden Citrus Products Cooperative*, 116 NLRB 738, 753 (1956); *Square D. Co.*, 105 NLRB 253, 260 (1952).[4]

Union Shop Steward Elmina Kelly testified that she attended the 27 May meeting and had also attended other Employee Council meetings. Assistant Union Shop Steward Ronald Scott testified that over the course of his 2 years in office he had attended every Employee Council meeting prior to October 1982. Both stewards are responsible for investigating and processing grievances. It is therefore undisputed that the Union was not only allowed the opportunity to be present at the 27 May meeting, but it in fact had at least one representative in attendance at every meeting of the Employee Council since that organization's inception. Thus, whether or not the Respondent adjusted grievances at the council meetings—an issue we find unnecessary to reach—it did not deny the Union its right under Section 9(a) to have an opportunity to be present at such meetings.[5]

Accordingly, we find, contrary to the judge, that the Respondent did not violate Section 8(a)(5) and (1) of the Act by its participation in the Employee Council and shall dismiss the complaint.

ORDER

The complaint is dismissed.

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] All dates hereafter are 1982.

[3] The complaint alleges, and the judge found, that the Employee Council is a labor organization within the meaning of Sec. 2(5) of the Act. We note that the complaint does not allege that the Respondent violated Sec. 8(a)(2) of the Act in its dealings with the Employee Council. Nor does the General Counsel seek disestablishment of the Employee Council. Accordingly, the issue of whether the Employee Council is a labor organization is not material to the resolution of any of the issues presented in this case.

[4] We do not accept the judge's implication, in fn. 18 of his decision, that the second proviso to Sec. 9(a), quoted above, requires employers to notify particular union officials *in addition to* stewards or similar in-plant union representatives before holding meetings at which employees could air grievances.

[5] Having concluded that the Respondent did not unlawfully deny the Union an opportunity to be present at the 27 May Employee Council meeting, we also find it unnecessary to pass on the Respondent's argument that the complaint is time barred under Sec. 10(b) of the Act.

DECISION

STATEMENT OF THE CASE

STEVEN DAVIS, Administrative Law Judge. Pursuant to a charge filed on October 4, 1982,[1] by 1115, Nursing

[1] All dates hereafter are in 1982 unless otherwise stated.

Home and Hospital Employees Union, a division of 1115 Joint Board (the Union) a complaint was issued by Region 29 of the National Labor Relations Board on November 30 against Wedgewood Nursing Home (Respondent).

The complaint alleges that Respondent established an "Employee Council," a labor organization, on June 25, 1980, which "exists for the purpose of dealing with Respondent concerning, *inter alia*, grievances, labor disputes, wages, rates of pay, hours of employment, and conditions of work relating to the employees" in certain collective-bargaining units represented by the Union.

The complaint also alleges that on May 27, September 3, and other dates since April 4, in violation of Section 8(a)(1) and (5) of the Act, Respondent met with the Employee Council "for the purpose of adjusting grievances including, *inter alia*, scheduling of employee vacations and assignment of employee locker facilities, and during said meetings, Respondent bargained with the Employee Council and adjusted said grievances."

The case was heard on April 27 and 28, 1983, in Brooklyn, New York.

On the entire record, including my observation of the demeanor of the witnesses, and after due consideration of the brief filed by Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, owned jointly by Maxwell A. White, Isidore Segal, and Bruce Godt, copartners doing business as and operating under the name of Wedgewood Nursing Home, has maintained its principal office and place of business at 199 Community Drive, Great Neck, New York, where it is engaged in the operation of a residential health care facility providing skilled nursing care and related services. During the past year, Respondent derived gross revenues in excess of $400,000 from its operations, and during the same period purchased and received drugs and medical supplies valued in excess of $50,000 directly from suppliers located outside New York. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Facts*

Respondent is and has been a member of the Nassau County Health Facility Association, Inc. (the Association), an organization composed of employers engaged in the health care industry which bargains with the Union in behalf of Respondent.

Since about April 1, 1977, the Union has represented separate units of nursing supervisors, registered nurses, licensed practical nurses, and service and maintenance employees employed by Respondent, and about March 13, 1981, the Association and the Union executed separate collective-bargaining agreements, which run from January 1, 1981, to December 31, 1985, covering those unit employees.

Patricia Bartley, an assistant social worker employed by Respondent, conceived the idea of an Employee Council and recommended to Administrator Frederick E. White that such a council be formed.[2]

On June 25, 1980, White issued a notice to "all staff," signed by him, which stated:

> It has been suggested that perhaps we can improve interpersonal relationships through Employee Council Meetings. By discussing some of our mutual concerns openly we can find new solutions to them and we can better understand each other.
>
> The ultimate long term goal of these meetings is to improve patient care through cooperation and unity of purpose.

The notice stated that Bartley would conduct the first meeting, which was scheduled for July 3, 1980, "so that everyone can feel free to discuss his/her ideas and thoughts." The notice requested that each department select representatives to attend the meeting.[3]

About 20 meetings were held from July 3, 1980, to September 3, 1982. Bartley conducted the meetings and sometime after the end of each meeting prepared and typed the minutes, which were then posted at Respondent's facility and a copy given to White.

Bartley testified that the ultimate purpose of the Employee Council was to improve patient care. As a means toward that end, the Council was intended to improve interpersonal relations--to personalize the work environment and to establish a better means of communication.

As set forth in the minutes:

> The group felt the importance of the Council was to promote and maintain communication between employees and administration. It was felt that the Council was effective in diminishing tension between workers. A member mentioned that it has helped his shift feel as though they are part of the Nursing Home. They are now given an opportunity to make suggestions, mention problems and ventilate their feelinsg.[4]
>
> The Council felt . . . that the meetings should continue despite the poor attendance, as they continue to be an important means of communication between employees and administration.[5]

Meetings were held more frequently when the Council was first formed. Thus, in 1980 meetings were held about twice per month. Then in 1981 and early 1982 meetings were held once per month or once every 2 months and, finally, in late 1982 were held once every 3 months.

Employees were selected by their departments to attend the meetings. Two union shop stewards, Elmina

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[2] Bartley is neither an official of Respondent nor a member of a bargaining unit represented by the Union.

[3] The nursing department was asked to send eight representatives. The other five departments were asked to send 1 each.

[4] Minutes of the November 24, 1981 meeting.

[5] Minutes of the February 25, 1982 meeting.

Kelly and Ronald Scott, were among the employees chosen to be members of the Employee Council.

The meetings, held in the activities room or in Bartley's or in White's office, all took place in the afternoon. Employees who were on duty and attended the meeting received their regular pay for the time they spent in attendance.

Administrator White did not attend the first few meetings, and employees' questions and concerns brought up at the meetings were relayed to him by Bartley. His answers and responses to the matters raised were then given by Bartley to the Council members at the next meeting. This delay in response time caused the Council to invite White to the meetings so that a prompt answer could be given to the questions posed. White accordingly began his attendance at the Council with the third or fourth meeting in late 1980 or early 1981. The director of nursing also occasionally attended the meetings.

Inasmuch as the meeting of May 27, 1982, was the only meeting which actually took place within the 10(b) period, I have set forth in full the minutes of that meeting, at which White was present.[6]

> The Council agreed that the atmosphere within the Nursing Home has greatly improved since the initial Council meeting.
>
> The difficulties expressed at the previous meeting were mentioned, where the employees found difficulty in planning their vacations and when disciplined found difficulty working together. Both problems persist. The Council feels the Nursing Dept. is too large to establish communication between co-workers when planning vacations.
>
> The Council believes, however, that employees of different disciplines can and should work together on solving problems between departments.
>
> A problem was mentioned concerning Employee lockers. A notice was posted (near the time clock) by maintenance, asking employees to sign their name by the locker number and that the locker will be shared by three persons, one on every shift. The Employees are not responsive to this notice and will force the facility to assign lockers to employees. It was mentioned that attempts are being made for employees to decide with whom they would like to share their lockers. The staff's unresponsiveness is forcing the facility to assign lockers to employees.
>
> It was also stressed that employees fill out repair requisitions as this will insure that each requisition will be looked into by the Maintenance Dept.
>
> A staff member mentioned that the bulletin board is often cluttered with several notices, and an important notice may be overlooked. Mr. White informed that he will insure that the board is cleared periodically. He will also hold these notices for a few weeks in the event that someone may want it returned to them.
>
> A problem was mentioned concerning linens, as there is a shortage during the evening hours. Mr. White is aware of the situation but stressed that employees discuss this with their supervisors.
>
> Staff Appreciation day was mentioned as some staff were not aware of what occurred, i.e., who was given awards. It was mentioned that the Staff Appreciation program is extended to all staff/shifts. Recognition is given to department heads as representatives for that department. All staff members are invited to this event.
>
> The suggestion of an employee outing was discussed. All Council members agreed that this would be beneficial to all staff getting to know one another outside the work environment. The Council believed all staff should decide whether an employee picnic, or an outing to Atlantic City can be planned. Both options will be posted opposite from the time clock and representatives will be sought to present both options to the employees. This will possibly occur during late June or mid-July. An Employee Council may need to be scheduled after staff have decided on the outing.
>
> The plans for a Christmas party have been canceled due to lack of response and interest.
>
> The idea of introducing a dog to the facility as a pet was presented. Reportedly another facility has two pet dogs who have provided therapeutic gains for that nursing home's patients. A staff member has offered to donate a cage for the animal, for training purposes. Mr. White informed that a plan must be devised by the Recreation Dept. re: such a program before it can be introduced to the facility.
>
> A problem has occurred where staff have been careless with the patients' clothing and shoes. Often a patient's belongings will be found in another's closet, and will not be returned to him. It is asked that all staff work together to insure a patient is wearing his own clothes and that one's belongings are where they should be. Clothing is available to the patient who has a shortage of clothing through the Housekeeping Dept.
>
> The Council commented on the notable improvement of the first floor patio after being repaired. New patio furniture will be purchased to replace the tables and chairs which cannot be used. The benches will be used as they are salvageable.
>
> It is important that staff be careful while using the patio, not to discard cigarettes on the repaired ground.

The specific discussion which took place with respect to the issues raised at the May 27 meeting are as follows:

Vacations: Certain employees complained that they were required to give extensive notice of their requested summer vacation and that they were unable to determine, far in advance, the date that they wished to take such leave. They also mentioned that due to seniority rules certain workers did not receive the days for vacation that they requested.

White told the employees at the Council meeting that because so many of the employees requested summer vacations, it was necessary that requests be made by March

[6] The charge was filed on October 4. An unfair labor practice may not therefore be found based on any activity occurring prior to April 4. See fn. 9 infra.

so that he could hire temporary replacements in advance.[7]

Lockers: At a prior Council meeting, employees complained that there was an insufficient number of lockers to store their personal belongings. Some employees used the patients' closets for this purpose. In order to provide locker space to employees it was apparently decided that three employees (1) for each of the shifts) would share one locker. At the may 27 meeting, a Council member-employee from the maintenance department stated that a signup sheet had previously been posted requesting that employees note with whom they wanted to share a locker. Few employees responded to the signup sheet, and it was announced that assignments of lockers would therefore have to be made.

Linens: Employees complained that the supply of linens was insufficient and that therefore they were unable to provide patient care in that they were unable to change the patients. Bartley conceded that this condition made it difficult for them to perform their job. White responded, as set forth in the minutes, that he was aware of the problem and requested that the employees discuss the matter with their supervisors.

Other issues: I cannot credit the testimony of employees Elmina Kelly and Ronald Scott regarding matters that they believed were discussed at the May 27 meeting such as security, lateness, and calling in sick.[8] However, it is clear that such issues were discussed at prior Employee Council meetings as follows:[9]

Security: Employees complained that their cards were being tampered with in Respondent's parking lot, and requested that its gate be locked. White refused to do so because ambulances use that gate. Employee Scott stated that employees requested that a security guard be assigned to the lot and that floodlights be installed there.

White testified that this matter was raised at an Employee Council meeting and that he considered the employees' request for tighter security in light of certain other, unspecified information he had from sources other than the Council. He accordingly arranged for the hire of an evening security guard in late 1980 or early 1981, and in early April 1983 installed floodlights in the lot.

Lateness: According to employee Scott, Respondent docked employees if they were 15 minutes or more late. Certain employees complained at a Council meeting that workers had been docked when late only 2 to 4 minutes in bad weather. Scott stated that White's response to the complaint was that if the employees expected snow in the morning, they should park their cars close to the curb and not in a driveway, so that they could more easily get onto the street and arrive at work on time.

Calling in sick: Employee Scott and Kelly testified that workers complained that Respondent's rule requiring them to call in sick 3 hours before they were scheduled to report for work was oppressive because most employees have not yet awakened and thus do not know 3 hours before their starting time that they are ill. Scott and Kelly stated that after the complaint was made, Respondent changed its policy to require that employees call in 2 hours before the time that they are due to report to work.[10]

Bartley and White denied that Respondent ever changed its policy or rules as a result of an Employee Council meeting. Bartley stated that when the issue regarding calling-in time was raised, White and representatives of the nursing department, at a later meeting, explained and clarified Respondent's policy. White stated that Respondent's current policy of requiring 2 hours' notice of illness had been in effect on or before May 1980—prior to the inception of the Employee Council—and therefore no change in its call-in policy had been made as a result of the Employee Council meetings.[11]

White stated generally that when he was asked questions at a Council meeting, he explained Respondent's policy and told the employees that if there was a personal or individual problem, they should speak to their supervisor.

The Meeting of September 3

On September 3, Alex De Laurentis, vice president of the Union, made a random visit to the Respondent with Martin Geier, the Union's area director. The purpose of the visit was to ask the unit employees whether they had any complaints and to determine whether any problems they had were being handled properly by the Union's business agents.

While on the premises, De Laurentis heard an announcement which called all members of the Employee Council to White's office. De Laurentis asked some of the employees who were walking toward White's office about the nature and duration of the meetings, and he was told that such sessions have been held for "a while." De Laurentis told the employees not to enter the room until he and Geier accompanied them. White asked De Laurentis what the problem was and De Laurentis replied that White was circumventing ths Union by having an Employee Council which violates the law. De Laurentis and Geier then entered White's office.

[7] I do not credit Bartley's testimony that White invited the employees to speak to their supervisor if they had difficulty in submitting a vacation request and, if the supervisor could not resolve the problem, they should take it to the Union. Her testimony was not reflected in the minutes or supported by the testimony of White or the two employees who testified.

[8] I cannot credit such testimony because the minutes of the meeting did not reflect that such matters were discussed. I must regard the minutes, which were made contemporaneously, as having greater reliability than the memories of the witnesses as to events which occurred 1 year before their testimony. Moreover, the witnesses could not recall precisely when these issues were discussed, and Scott, who examined a copy of the minutes when they were issued, stated that they were accurate. In this connection, I credit the testimony of Bartley and White, as will be set forth infra, that these issues were discussed only at sessions held prior to the May 27 meeting.

[9] Evidence of conduct occurring more than 6 months before October 4, the date the charge was filed, may be relied on as background evidence to shed light on the motive for allegedly unlawful conduct occurring during the 10(b) period. *Machinists Local 1424 v. NLRB*, 362 U.S. 411 (1960); *Mechanics Laundry & Supply*, 240 NLRB 302, 303 (1979).

[10] Scott testified specifically that White said that it would be sufficient if a call was made 2 hours before the reporting time.

[11] Inasmuch as this meeting occurred outside the 10(b) period, I need not decide whether a change in Respondent's policy was in fact made.

White told them that all that was being discussed was a picnic. De Laurentis replied that he had no objection if that was the only topic to be discussed. Bartley then volunteered that she had minutes of all the meetings, and handed a copy of the May 27 meeting to De Laurentis, who looked at it briefly and asked how "vacations" were related to a picnic.

White then said: "[Y]ou ought to appreciate the fact that I'm doing you a favor—that I take care of problems before it gets you." De Laurentis responded: "That is the problem, that you have no right to take care of the problems without the Union present or without discussing it with the Union."[12] De Laurentis ended by saying that Respondent committed an unfair labor practice and that he would file a charge.[13]

De Laurentis testified that no representative of Respondent ever notified him that it planned to establish an Employee Council or requested to meet and bargain with him concerning such a Council. He first became aware of the Employee Council on September 3. He conceded that to his knowledge Respondent has never refused to arbitrate a grievance and has never refused to meet with him or with any union representative.

White testified without contradiction that in April 1982 he met with a union representative and with certain shop stewards concerning Respondent's vacation policy.

The Collective-Bargaining Contracts

Relevant portions of the parties' collective-bargaining contracts covering the employees involved herein are as follows:

Grievance and Arbitration Procedures

> A. All complaints, disputes or grievances whatsoever of whatever kind or nature arising between the Union and the Employer concerning any provisions of the contract, or with respect to any other acts, conduct or relations or terms or conditions of employment of whatsoever nature or otherwise, between the parties, directly or indirectly, shall be submitted for arbitration . . . .
>
> B. The procedure herein provided for settling all complaints, disputes or grievances shall be the sole and exclusive remedy of the Union, The Association, member Employer and employees covered by this Agreement, and shall be used to the exclusion of any other means available and such settlement procedure shall be (except to enforce, vacate or modify awards) in lieu of any which will or may be available to the Union, the Association, member Employer and employees. No individual employee may initiate any arbitration proceeding.
>
> It is agreed that the maintenance of a peaceful and constructive relationship between the Union, the Association, Member Employers and their employees, requires the establishment of cooperative use of the grievance and arbitration machinery for the settlement of all grievances and disputes, and that it would detract from this relationship if Member Employers and individual employees or groups of employees would either as such individuals or groups seek to interpret or enforce this Agreement on their own initiative or responsibility. It is, therefore, agreed that this Agreement shall not vest or create in any employee or group of employees covered thereby any rights or remedies which they or any of them may enforce either at law or in equity or otherwise. It is understood and agreed that all of the rights and privileges created by or implied from this Agreement shall be enforceable only by the Union, the Association and the Member Employers and only in the manner established by this Agreement.

Management Rights

> The management of the establishment and the direction and control of the property and work force shall remain with the Employer. The rights herein described shall include but not be limited to: the right to hire, lay-off, discharge for just cause, in case of emergencies to require that duties other than those normally assigned by [sic] performed, except that "emergencies" shall not exist for longer than two (2) days, to make reasonable working rules and regulations of procedure and conduct; and to determine work shifts, provided, however, that the exercise of all these rights must be consistent with the terms and conditions of this Agreement and are not to be used so as to discriminate against any person by reason of Union membership.

B. *The Positions of the Parties*

The General Counsel alleges that the Employee Council, a labor organization, exists for the purpose of dealing with Respondent concerning grievances and terms and conditions of employment, and that Respondent met with it, bargained with it, and in fact adjusted certain grievances during the meeting. Although the General Counsel concedes that, pursuant to Section 9(a) of the Act, employees have the right to present grievances to their employer and have them adjusted, she argues that the proviso to that section, that the Union must be given an opportunity to be present at the adjustment of the grievances, has not been met and that the effect of the Employee Council was therefore to undermine and bypass the Union.

Respondent argues that the complaint must be dismissed pursuant to Section 10(b) of the Act. It also contends that the purpose of the Employee Council was not to deal with Respondent concerning mandatory subjects of bargaining, but rather was to promote better communication between employees. Respondent denies that any actual grievances were discussed and further denies that it adjusted any grievances at or after any Council meeting. It contends that its officials merely restated and ex-

[12] This is based on the credited testimony of De Laurentis. White and Bartley did not contradict his testimony.

[13] Also discussed at the meeting was the issue of the discharge of employee Joan Brennan; Respondent's requirement that employees produce a doctor's note if they were out sick for 1 day, and its use of a form concerning an employee's being able to perform "heavy lifting" on returning from sick leave, which form was objected to by the Union.

plained the existing policy concerning issues raised by employees at the Council meetings.

C. *Analysis and Discussion*

1. The 10(b) issue

Respondent asserts that the complaint herein must be dismissed because it alleges that the Employee Council was established on June 25, 1980, more than 6 months prior to the filing of the instant charge on October 4, 1982.

Although it is true that the Council was formed more than 2 years before the filing of the charge, it is clear and I find that the Employee Council was continuously maintained and Respondent dealt with it within the 10(b) period.[14]

2. The merits

Section 9(a) of the Act provides as follows:

> Representative designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representative of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further*, That the bargaining representative has been given opportunity to be present at such adjustment.

The General Counsel argues essentially that the Employee Council, a creature of Respondent, functioned as a means by which Respondent adjusted grievances without the participation of the Union, thereby refusing to bargain with the Union in violation of Section 8(a)(1) and (5) of the Act.

It is apparent that the Employee Council was innocently begun by Bartley who, as a zealous social worker assistant, honestly believed that the purpose of the Council would be to "improve interpersonal relations" between employees, thereby benefiting patient care. It thus appears that the purpose of the Council, as initially conceived, was to act as a means by which employees could speak with *each other* (a) in order to reduce misunderstanding and improve communication between them and (b) to understand how each employee's function in the nursing home relates to the other employees.

However innocently the Council may have been created, and for whatever theoretical purpose it may have been started, it is clear that it was quickly transformed into a vehicle for the solicitation and adjustment by Respondent of employee grievances. Thus, the minutes of the November 24, 1981 meeting stated that the Council believed that its importance was to "promote and maintain communication between employees and *administration*." (Emphasis added.) The minutes further noted that the Council reduced tension between workers, and employees "are now given an opportunity to make suggestions, mention problems and ventilate their feelings."

There is no question that the problems, concerns, and issues raised by the employees at the Council meetings prior to May 27 and at the May meeting constituted grievances. Prior to May 27, such topics included the security of Respondent's premises with respect to employees' cars in its parking lot, complaints regarding being docked for lateness when the employee claimed he was not late, and opposition to Respondent's policy requiring that employees who call in sick do so by a certain number of hours prior to their scheduled arrival.

Similarly, the subjects raised at the May 27 meeting concerned areas of concern to employees: complaints by employees that they were required to state a preference for a vacation date too far in advance and, due to the seniority system, certain employees did not receive the time for vacation that they requested; complaints by workers that there was an insufficient number of lockers for them to store their personal belongings, and that they used patients' closets for that purpose. In this connection, a request was made that three employees volunteer to share each locker and that they designate who they wanted to share the locker with. The workers did not respond to that request and it was announced that assignments of lockers would be made. Employees also complained that the supply of linens was insufficient, causing them to be unable to provide optimum patient care. Bartley conceded that this situation made it difficult for the staff to perform its job.

There can be no question that the matters raised by the Employees at the May 27 meeting and the prior meetings constituted grievances.

> Grievances are usually more than mere personal dissatisfactions or complaints of employees and their adjustment frequently involves the interpretation and application of the terms of a contract or otherwise affects the terms and conditions of employment not covered by a contract. For this reason, these matters are unquestionably the concern of the bargaining representative.[15]

Respondent argues that, even assuming the issues raised by employees at the Council meetings were grievances, it did not adjust any such grievances as a result of such meeting, but rather simply stated Respondent's policy as to the matters brought up by the Council members. I cannot agree with Respondent. Although it is true that with respect to the vacation issue Respondent restated the reasons for its policy, nevertheless that restatement was a denial of the grievance that employees were required to state their vacation preference too far in advance, inasmuch as it does not appear that Respondent change its policy. The Board has held that the rejection

[14] *Child Day Care Center*, 252 NLRB 1177 (1980).

[15] *Bethlehem Steel Co.*, 89 NLRB 341, 344 (1950).

or a denial of a grievance constitutes an "adjustment" of a grievance within the meaning of Section 9(a) of the Act.[16] The Council members also complained that they did not have locker space. This grievance was adjusted at the May 27 meeting by the announcement that lockers would be assigned if employees did not designate whom they wanted to share a locker with. Similarly, the grievance of employees that an insufficient supply of linens prevented them from performing their work was apparently adjusted when White told them to speak to their supervisors. Employee Scott testified that after he raised the issue at the Employee Council, "Mr. White immediately increased the amount" of linens.

It is clear that Respondent did more than merely restate its policies. The Council members requested White's presence at the meetings so that they could receive prompt responses and answers to their questions and problems. If all that White was doing was restating company policy, he need only have given his statement of employer rules to Bartley and she would have read it to the employees.

In this regard I credit the testimony of De Laurentis that at the September 3 meeting he was told by White that "you ought to appreciate the fact that I'm doing you a favor—that I take care of problems before it gets to you."[17]

It is thus apparent that Respondent adjusted grievances without providing an opportuniuty for the collective-bargaining representative to be present at the adjustment. The Union first learned of the Employee Council 2 years after its creation, had not been advised of its formation, and was not present at the adjustment of any grievances through the Employee Council.[18]

I accordingly find and conclude that Respondent violated Section 8(a)(5) and (1) by adjusting grievances through the Employee Council without providing the Union an opportunitry to be present at the adjustment,[19]

Although not necessary to my decision herein, I note that the collective-bargaining agreement between the parties contains a broad grievance and arbitration clause[20] requiring all "complaints, disputes or grievances" to be submitted for arbitration, which shall be the sole and exclusive remedy of the Union, the Employer, and employees, and "shall be used to the exclusion of any other means available and such settlement procedure shall be . . . in lieu of any which will or may be available to the Union, the Association, member Employer and employees."

There is no provision for resolution between supervisor and employee of any grievance, and the clause states that it would detract from the peaceful and constructive relationship between the Employer and the Union if "employees and individual employees or groups of employees would . . . seek to interpret or enforce this agreement of their own initiative or responsibility." The contract is thus a clear, firm statement of policy between Respondent and the Union that only they will adjust grievances. Respondent's adjustment of grievances with employees through the Employee Council would appear therefore to be in violation of the contract.

One final issue remains. The complaint alleges that the Employee Council is a labor organization, but no charge alleging a violation of Section 8(a)(2) of the Act has been filed and the complaint does not contain such an allegation. Moreover, the General Counsel does not seek disestablishment of the Council, recognizing that Section 9(a) permits groups of employees to meet with employers to have their grievances adjusted.

Based on the evidence, particularly the fact that the Council discussed with management many grievable items, I find and conclude that the Employee Council is a labor organization in which employees participate and which exists for the purpose, in whole or in part, of meetings with the Employer concerning grievances, wages, hours, and conditions of work within the meaning of Section 2(5) of the Act.[21]

CONCLUSIONS OF LAW

1. Respondent Wedgewood Nursing Home is, and at all times material herein has been, an employer engaged in commerce within the meaning of the Act.

2. 1115, Nursing Home and Hospital Employees Union, a Division of 1115 Joint Board and the Employee Council are labor organizations within the meaning of the Act.

3. By unilaterally maintaining the Employee Council through which it solicited and adjusted grievances without permitting the collective-bargaining representative of its employees to be present, Respondent violated Section 8(a)(5) and (1) of the Act.

4. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices affecting commerce, I find it necessary to order Respondent to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. I shall not order the disestablishment of the Employee Council, but shall order that Respondent cease dealing with it as a labor organization in the solicitation and adjustment of grievances of the

[16] Id. at 348.

[17] In attacking the credibility of De Laurentis, Respondent correctly argues that he could not remember other issues discussed at the meeting, including the discharge of an employee and Respondent's requirement of a doctor's note after returning from being out sick. However, I credit De Laurentis' statement attributed to White because White and Bartley did not deny it, and Bartley's minutes of the meeting and the testimony of Bartley and White corroborated De Laurentis' account of his protest regarding the Council.

[18] The fact that two shop stewards were members of the Employee Council and present at the meetings does not relieve Respondent of its responsibility to give the Union an opportunity to be present at the adjustment of grievances. The statutory right to be in attendance under Sec. 9(a) runs to the Union, as the exclusive collective-bargaining representive of the employees.

[19] *Steelworkers v. NLRB*, 536 F.2d 550 (3d Cir. 1976); *Dow Chemical Co.*, 227 NLRB 1005 (1977).

[20] The clause is set out in full supra.

[21] *NLRB v. Cabot Carbon Co.*, 360 U.S. 203 (1959); *Money Oldsmobile Co.*, 201 NLRB 155, 167 (1973); *North American Rockwell Corp.*, 191 NLRB 833, 837 (1971).

employees of Respondent where the Union has not had an opportunity to be present at the adjustment of grievances.

[Recommended Order omitted from publication.]

United States Postal Service *and* American Postal Workers Union, Baltimore (Stu Filbey) Area Local, AFL–CIO. Case 5–CA–15203(P)

31 January 1985

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS HUNTER AND DENNIS

On 9 September 1983 Administrative Law Judge Mary Ellen R. Benard issued the attached decision. Counsel for the General Counsel, the Charging Party, and the Respondent each filed exceptions and a supporting brief, and the Respondent filed an answering brief to the exceptions of the General Counsel and the Charging Party.

On 23 September 1983 the American Postal Workers Union (APWU) filed a motion to intervene in these proceedings. By executive order of 9 March 1984, the Board granted APWU's motion and gave APWU the opportunity to file a separate brief on its behalf. By letter dated 21 March 1984, APWU notified the Board that it did not intend to submit a separate brief but instead joined in the Charging Party's brief.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order as modified.[2]

The judge found, and we agree, that the Respondent violated Section 8(a)(1) of the Act by threatening to suspend Union Steward Robert Ripoli because he stated that the Respondent had violated the parties' national agreement and committed an unfair labor practice and that, for that reason, he would leave a meeting of management and union representatives.[3]

The complaint further alleges that the Respondent violated Section 8(a)(5) and (1) of the Act by announcing and implementing a policy requiring the Union to process and file grievances within a specified period each day without affording the Union an opportunity to negotiate and bargain over the policy. The judge found that this matter should not be deferred to the parties' grievance-arbitration machinery. We disagree.

In *United Technologies Corp.*, 268 NLRB 557 (1984), we reaffirmed the principle stated in *Collyer Insulated Wire*, 192 NLRB 837 (1971), that when a dispute arises from a contract between the parties, it should be resolved in the manner that the contract prescribes. The parties' collective-bargaining agreement contains a grievance-arbitration procedure which culminates in "final and binding" arbitration and which defines a grievance as "a dispute, difference, disagreement or complaint between the parties related to wages, hours and conditions of employment [including but not limited to] the complaint of an employee or of the Union which involves the interpretation, application of or compliance with the provisions of the contract."

Article 17, section 3, of the parties' bargaining agreement provides in part:

> *Rights of Stewards*
>
> When it is necessary for a steward to leave his/her work area to investigate and adjust grievances or to investigate a specific problem to determine whether to file a grievance, the steward shall request permission from the immediate supervisor and such request shall not be unreasonably denied . . . .
>
> The steward, chief steward or other Union representative . . . may request and shall obtain access through the appropriate supervisor to receive the documents, files and other records necessary for processing a grievance or determining if a grievance exists and shall have the right to interview the aggrieved employee[s], supervisors and witnesses during working hours. Such requests shall not be unreasonably denied.

The contract also contains a "management rights" clause giving the Employer "the exclusive right subject to the provisions of this Agreement and consistent with applicable laws and regulations . . . [t]o direct employees of the Employer in the performance of official duties . . . [t]o maintain the efficiency of the operations entrusted to it . . . [and] to determine the methods, means and personnel by which such operations are to be conducted."

The facts of this case, no less so than those in *United Technologies*, make it "eminently well suited for deferral." The contract and its meaning in present circumstances lie at the heart of this dispute. The Respondent has also expressed its will-

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] The Charging Party has filed a motion to strike part of the Respondent's answering brief because the brief contains references to the answer filed by the Intervenor, America Postal Workers Union, to a complaint in *United States Postal Service*, Case 11–CA–1195(P), currently pending before the Board. Because it is well settled that the Board may take official notice of its own proceedings and rely thereon, *East Coast Equipment Corp.*, 229 NLRB 825, 826 (1977), we deny the Charging Party's motion.

[3] In the absence of exceptions, and noting that none of the parties has sought deferral of the 8(a)(1) allegation, we find it unnecessary to consider whether the allegation could have been deferred, if a proper and timely request for deferral had been made.

ingness to arbitrate the matter.[4] In these circumstances, we find that the dispute falls squarely within the pronouncement of *United Technologies* that complaint allegations should be deferred when it is established that the parties' collective-bargaining agreement contains a broad grievance-arbitration provision clearly encompassing the unfair labor practice allegations. We shall therefore order that the unfair labor practice allegations concerning the Respondent's policy restricting the time for union representatives to process grievances be deferred to the parties' grievance-arbitration procedure. As in *United Technologies*, however, we shall retain jurisdiction over these allegations for the purposes of entertaining a motion for further consideration on a showing that either (a) they have not been resolved through the grievance-arbitration procedure or submitted to arbitration, or (b) the grievance procedure has not been fair and regular or has reached a result that is repugnant to the Act.[5]

AMENDED CONCLUSIONS OF LAW

We adopt the administrative law judge's conclusions of law, with the following modification.

Delete Conclusion of Law 4.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, United States Postal Service, Bel Air, Maryland, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

Substitute the following for the final unnumbered paragraph.

"The complaint allegations not specifically found herein are dismissed, provided that: Jurisdiction over these proceedings is retained for the limited purpose of entertaining an appropriate and timely motion for further consideration upon a proper showing that either (a) the dispute has not, with reasonable promptness, been resolved by amicable settlement in the grievance procedure or submitted promptly to arbitration, or (b) the grievance or arbitration procedures have not been fair and regular or have reached a result which is repugnant to the Act."

DECISION

STATEMENT OF THE CASE

MARY ELLEN R. BENARD, Administrative Law Judge. The original charge in this case was filed on March 17, 1983,[1] and amended on April 4, by American Postal Workers Union, Baltimore (Stu Filbey) Area Local, AFL–CIO (the Union) against United States Postal Service (Respondent). On April 22 the complaint was issued alleging, in substance, that Respondent restricted the time alloted to stewards of the Union for the purpose of conducting union business without affording the Union an opportunity to bargain about the matter and thereby violated Section 8(a)(5) and (1) of the National Labor Relations Act and that Respondent further violated Section 8(a)(1) of the Act by threatening to suspend employees in response to their protest of this unilateral change. Respondent filed an answer in which it denied the commission of any unfair labor practices.

A hearing was held before me at Baltimore, Maryland, on June 22. Following the hearing the General Counsel and Respondent filed briefs, which have been considered.

On the entire record in the case and from my observation of the witnesses and their demeanor, I make the following

FINDINGS AND CONCLUSIONS

I. THE BUSINESS OF RESPONDENT

Pursuant to the Postal Reorganization Act, 39 U.S.C. § 1209(a),[2] Respondent's operations are subject to the Board's jurisdiction over unfair labor practices. Accordingly, I find, as the complaint alleges and the answer admits, that Respondent is subject to the Board's jurisdiction in this proceeding.

II. THE LABOR ORGANIZATION INVOLVED

The Union is a labor organization within the meaning of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

It is undisputed that, for some period of time not specified in this record, Respondent has recognized the American Postal Workers Union, AFL–CIO (the National Union) as the representative for separate nationwide units of maintenance employees, special delivery messengers, motor vehicle employees, and postal clerks. Respondent also recognizes other labor organizations as representatives of certain other classifications of employees in nationwide units; specifically, Respondent recog-

[4] The judge found the Respondent's deferral contention to be without merit because the record did not establish that the issues in this case were fully considered in the course of processing a pending grievance. We note, however, that the deferral policy stated in *United Technologies* does not preclude the Union from filing a second grievance specifically covering the subject matter of this unfair labor practice charge. Thus, the Respondent must waive any timeliness provisions of the grievance-arbitration clauses of the collective-bargaining agreement so that the Union's grievance may be processed in accordance with the following Order.

[5] Because we find deferral appropriate for resolution of the 8(a)(5) allegations, we find it unnecessary to pass on the other contentions related to those allegations that were raised before and considered by the judge.

[1] All dates herein are in 1983 unless otherwise indicated.

[2] That section provides: "Employee-Management Relations shall, to the extent not inconsistent with provisions of this title, be subject to the provisions of sub-chapter II of chapter 7 of title 29."

nizes the National Association of Letter Carriers (the Letter Carriers) as the representative of city letter carriers, and recognizes the National Association of Rural Carriers as the representative for rural letter carriers.[3]

The current collective-bargaining agreement, referred to in the record as the National Agreement, between Respondent and both the Letter Carriers and the National Union is in effect from July 21, 1981, to July 20, 1984, and applies nationwide. The contract includes a detailed grievance procedure which, in essence, provides for four steps prior to arbitration: At step 1 the aggrieved employee, accompanied and represented by a steward if the employee so desires, discusses the grievance with the immediate supervisor, who has authority to settle the grievance; if no resolution is reached at step 1 the grievance proceeds to step 2, at which the Union completes a standard grievance form to be filed with the installation head or other appropriate official; if no agreement is reached at that step, the grievance may be appealed in writing at step 3 to the Regional Director for Employee and Labor Relations; the grievant is at that stage represented by a Regional Representative of either the Letter Carriers or the National Union. The Union may appeal an adverse step 3 decision directly to arbitration at the Regional level if the Respondent's step 3 representative states in his or her decision that no interpretive issue under the National Agreement or supplement thereto which may be of general application is involved in the case; if such an issue is involved, the grievance may be appealed to step 4, the national level of the grievance procedure. The contract also provides that, "when it is necessary for a steward to leave his/her work area to investigate and adjust grievances or to investigate a specific problem to determine whether to file a grievance, the steward shall request permission from the immediate supervisor and such request shall not be unreasonably denied." Finally, insofar as is pertinent to this case, the contract provides for bargaining on a local level with respect to 22 specific items, primarily involving vacation schedules, procedures for reserving light duty assignments, the method of selecting employees to work on a holiday, assignment of employee parking spaces, local implementation of the contract with respect to seniority, reassignment and posting, washup periods, and whether days off would be fixed or rotating.

[3] In *Postal Service*, 208 NLRB 948 (1974), the petitioners sought to represent employees in separate bargaining units in various geographical locations of Respondent. The Board dismissed all the petitions on grounds that "any less-than-nationwide unit which does not at least encompass all employees within a district or sectional center is too fragmented for meaningful collective bargaining." (208 NLRB at 954.) However, the Board noted that its decision was "not to be construed as an administrative fiat to adhere to the preexisting national craft units which Congress, under the PRA [Postal Reorganization Act], continued during the transition period or as precluding a finding of unit appropriateness for a unit less than national in scope." (Ibid.) There have been no subsequent cases, at least of which I am aware, in which the Board has determined that a petitioned-for unit other than the national units reflected in the current collective-bargaining agreement is appropriate. Respondent concedes, and I thus find, that Respondent is obligated to bargain with the National Union for a nationwide unit of postal clerks.

B. *The Alleged Unilateral Change and Threat of Suspension*

1. The meeting on March 10

The Bel Air, Maryland post office, the only facility involved in this case, employs some 51 employees who are covered by collective-bargaining agreements. The 16 distribution clerks are included in the national unit of postal clerks represented by the National Union and their grievances on the local level are handled by Robert Ripoli, steward for the Union. The clerks are generally supervised by Robert Androsky, the supervisor of mails and delivery, but they are sometimes also supervised, especially when Androsky is not at the facility, by Kenneth Slagle, the superintendent of postal operations.

It is undisputed that during the morning of March 10 there was a meeting at the office of Mark Plakatoris, postmaster of the Bel Air Post Office. Present were Plakatoris, who called the meeting, Slagle, Acting Supervisor John Vitak, Ripoli, Michael Kennedy, alternate steward for the Union, and representatives from the Letter Carriers and the National Association of Rural Carriers. According to Slagle,[4] Plakatoris said that from then on the letter carriers and the rural carriers would conduct their union business from the time they returned from delivering mail until the end of their tour and that the Union's representative would conduct its business from 12:10 to 12:30 p.m.

Slagle further testified that the rural carriers' steward raised the question of whether even in an emergency situation the steward would have to wait until the allotted time to file a grievance and Plakatoris responded that the policy did not apply to emergencies and that in that situation the matter would be resolved immediately, but that was the only exception to the new rule.[5]

According to Ripoli and Kennedy, both of whom I credit on this point,[6] after Plakatoris made his announcement Ripoli said that he thought the new policy was a violation of the contract and an unfair labor practice, and Plakatoris replied that he was the postmaster and

[4] Slagle, who was an adverse witness for the General Counsel, was the most credible witness in this proceeding, for he testified in a straightforward and candid manner and appeared to generally exhibit a good recollection. Kennedy, who also testified for the General Counsel, also generally seemed to be a credible witness but did not impress me quite as favorably as did Slagle. Although Ripoli and Plakatoris also testified as to what occurred at this meeting, I do not find either of these witnesses as credible as Slagle or Kennedy. Ripoli tended to give evasive and unresponsive answers to questions, and much of his testimony appeared to be shaded in favor of his own position. Plakatoris' testimony was also at times unresponsive. Consequently, the account of what occurred at the March 10 meeting is based on a composite of the credible testimony of Slagle and Kennedy and on the testimony of Ripoli and Plakatoris where their testimony is not inconsistent with that of the other two witnesses.

[5] Kennedy testified that he did not remember such an exchange. I credit Slagle.

[6] With respect to this credibility determination and others involved in this case, it is worth repeating here the often-quoted maxim that "[i]t is no reason for refusing to accept everything that a witness says, because you do not believe all of it; nothing is more common in all kinds of judicial decisions than to believe some and not all. *NLRB v. Universal Camera Corp.*, 179 F.2d 749, 754 (2d Cir. 1950).

that was his policy.[7] Ripoli responded that in that case he would not be a part of the meeting and that he was leaving the office, and Plakatoris then said that if anyone left he would suspend them. Ripoli said that if Plakatoris changed his attitude and tone of voice the union representatives would stay but that they had to have some input and Plakatoris replied by saying that the meeting was over and everyone should go back to work. The entire meeting lasted about 15 minutes.[8]

2. The past policy with respect to time afforded to union representatives to conduct union business

Ripoli, Kennedy, and Slagle all testified that the preferential mail was usually out by 8:30 or 9 a.m. and that after that the clerks were free to discuss union business at any time with the permission of a supervisor. Plakatoris testified that he was not aware of any prior policy that grievances would not be discussed prior to 8:30 a.m. I find it unneccessary to make a finding regarding Plakatoris' credibility on this point, for, in any event, whether Plakatoris was aware of this policy or not,[9] I credit the testimony of Slagle, Ripoli, and Kennedy, that it existed.

3. The implementation of the new policy

It is undisputed that many of the clerks, including Ripoli, work from 4 a.m. to 12:30 p.m., 5 days out of 7. The end of the letter carriers' shift is at 3:30 p.m., and most of them return to the post office from their deliveries at 3:10 or 3:15; consequently, under the new policy, they, like the clerks, would have 15 to 20 minutes to process grievances each workday.

Slagle credibly testified that the policy as of March 10 was that the Union would be limited to interviewing its witnesses and reviewing documents and so on to the 12:10 to 12:30 p.m. period, and that although he did not recall whether Plakatoris specifically stated that the limitation applied to both union business and filing grievances with management, it was his impression that Plakatoris meant the limitation to apply to both. However, it is clear that Plakatoris did not clarify the policy at the March 10 meeting, and the record is not entirely clear as to the implementation of this policy and the consistency with which it was applied. Thus, Ripoli testified that following the March 10 meeting he was restricted to handling grievances to the time between 12:10 and 12:30 p.m. except on one occasion. However, Ripoli's testimony about this purported occasion was, at best, confused. He first testified that the one time he was permitted to continue discussing a grievance with an employee after the 12:30 p.m. deadline was on March 17, concerning a discrimination complaint by employee Charles Peaker. According to Ripoli, Peaker asked Supervisor Robert Androsky if he could talk to Ripoli and Androsky replied that he could discuss his problem between 12:15 and 12:30. Peaker and Ripoli went to the training room[10] to talk and were interrupted and told to leave at 12:30 because Ripoli was required to clock out. According to Ripoli, he and Peaker refused to leave and Ripoli was eventually paid for the amount of time he stayed overtime to talk with Peaker.[11] However, Ripoli later testified he was given extra time on the clock to write an appeal in the Peaker case. Although I credit Ripoli's testimony that he received extra time to work on grievances on each of these occasions, I obviously do not credit his testimony that there was only one time when the 20-minute limitation was not applied to him.

The record is also confused as to whether the Union was permitted only one 20-minute period to handle each grievance or whether, if a grievance could not be resolved in one session, it could be investigated or discussed further on subsequent days. Slagle credibly testified that at some time after the March 10 meeting Plakatoris told him that if 20 minutes were not enough time to resolve a matter the parties would arrange another meeting at a later date, but the initial discussion was limited to the 12:10 to 12:30 time period. Ripoli testified that on March 10 he had some union business which he could not complete between 12:10 and 12:30 and asked the acting supervisor if he could have additional time. According to Ripoli, the acting supervisor told him he would pass the request along to the supervisor, but when Ripoli asked again the next day he was told that the 12:10 to 12:30 period was a "one shot deal" and he would not get any additional time. However, Ripoli's demeanor as he gave this testimony was not impressive and I do not credit him on this point. Indeed, Ripoli further testified that on one occasion in April or May Thomas Keefe, president of the Union,[12] was supposed to come to the Bel Air Post Office to meet with Ripoli and represent him in a step 1 grievance at 10 or 10:30 a.m. but did not arrive until 12:10 or 12:15. According to Ripoli, neither he nor Keefe was wearing a watch that day, and when they received permission to go to the training room to discuss the grievance they inadvertently talked past 12:30, the end of Ripoli's tour of duty. Ripoli further testified that he and Keefe, thinking they may have talked too long, came back up stairs to reschedule another time when they could meet, and that permission was granted for him to meet again with Keefe.[13] Thus, even if Ripoli were told that he would only have one opportunity to use the twenty-minute period for each item

[7] Ripoli testified that Plakatoris said loudly that he "did not give a damn," he was the postmaster and he could do what he wanted to do, while Kennedy testified that Plakatoris got a little upset and said that he did not care, he was the postmaster and that was the policy. Slagle was not asked about this exchange. I credit Kennedy.

[8] Slagle was not asked about this exchange between Ripoli and Plakatoris. Although Plakatoris testified that he did not remember threatening Ripoli with suspension, he conceded that he may have done so, and that "the thing that flashed in my brain at that point, now what do you do. This is not a negotiation meeting where the Union could walk out. This is a case of calling my employees in; those who represent the Union and just stat[ing] my policy."

[9] I note that Plakatoris normally does not arrive at the post office until a few minutes before 8:30 a.m.

[10] This room is apparently downstairs from the work floor and is used by all the unions who represent employees in the Bel Air Post Office.

[11] Ripoli could not recall how much time was involved.

[12] Since both Keefe's and Plakatoris' last names are spelled various ways in the transcript and by the parties, I have taken the spelling of both names from a memo prepared by Plakatoris regarding a grievance filed by Ripoli and which is in evidence.

[13] However, the supervisor told him that the 12 minutes that they ran overtime on their first meeting would be disallowed.

of union business, it is clear that this aspect of the policy was not uniformly enforced.[14]

It is undisputed that Ripoli was allowed to discuss with his supervisor minor matters that would only take a couple of minutes to resolve outside the 12:10 to 12:30 p.m. period, and that he was also permitted to make telephone calls relating to union business at any time. However, Ripoli credibly testified that he was only allowed to interview employees with respect to potential grievances during the limited period. It is also undisputed that no management official ever retracted the policy announced March 10.

4. The reasons given by Plakatoris for the March 10 announcement

Plakatoris credibly testified that a survey team from Respondent's Baltimore Sectional Center was at the Bel Air Post Office on March 7 and 8 and that the function of this team was to see if they could make suggestions on the basis of their observations which would improve the operation. Plakatoris further credibly testified that the team told him that before he arrived at the post office in the morning they had noticed Ripoli leave his work area to discuss various matters with Slagle and they wanted to know if Ripoli was a supervisor. Although these discussions were short, the team suggested that it would be a good idea to set aside a specific time each day to listen to complaints.

According to Plakatoris, in light of the survey team's comments he decided to announce a new policy about grievances both in order to follow the survey team's recommendation and to prevent unnecessary waste of time during the period when the post office employees were getting mail ready for customers. Plakatoris also testified that he did not announce the new policy to try to prevent the Union from discussing grievances, but because he thought that the new policy would "present a case of better understanding and harmony between the unions and also the operation itself." On cross-examination, however, Plakatoris testified that two reasons for the new policy were that the clerks were filing grievances at inopportune times and that they were using an unreasonable amount of time on union business.[15]

Although Plakatoris testified that there was no intention to limit grievance discussions to 20 minutes and that if a grievance needed to be discussed further a time could be assigned to do so, I find that this clarification was not announced along with the new policy. Plakatoris also testified that in the event a supervisor and a steward were discussing a grievance at precisely 12:30 and the supervisor felt that it would be productive to spend an extra few minutes on overtime in order to finish the discussion, overtime would be permitted.[16]

Plakatoris further testified that following the March 10 meeting he prepared a memo on what had occurred there. That memo was introduced into evidence and states, in pertinent part, that:

> [F]or the sake of not interrupting our operations we will listen to the initial complaint or grievance as follows:
>
> . . . .
>
> Clerk Steward: at 12:10 PM
>
> Also if the complaint or grievance can be resolved during this time—then the matter is over.
>
> If Management and Labor believe that this matter should be looked into further, appropriate manager will arrange a time on the following day to meet with the Steward.

However, Plakatoris testified that he typed this memo after the meeting "so I could keep this as a record for myself," and there is no evidence that the memo was posted or otherwise publicized to the employees or the stewards as a clarification of the announcement as made.[17] I therefore find that even if Plakatoris meant to implement a policy of discussing grievances with the Union only between 12:10 and 12:30 p.m. and did not intend to restrict the time the Union spent processing grievances or indicate that each grievance would only be discussed for a maximum of 20 minutes with management, that is not what he said and the Union was not advised of what he meant for at least 2 weeks afterwards.

C. *Analysis and Conclusion*

1. The parties' contentions; the issues

The complaint, as effectively amended by stipulations at the hearing, alleges that the National Union represents all postal clerks in a nationwide unit. The complaint further alleges that, by announcing and implementing a policy requiring the Union to process and file grievances within a specified 20-minute period each day without affording the Union an opportunity to negotiate about the matter, Respondent violated Section 8(a)(5) and (1) of the Act. The complaint also alleges that by threatening Ripoli with suspension because he threatened to leave the March 10 meeting, Respondent independently violated Section 8(a)(1) of the Act.

With respect to the 8(a)(5) allegation, Respondent contends, in essence, that no unilateral change cognizable

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[14] Kennedy also testified that as far as he could observe following March 10 management permitted only the 20-minute period to process grievances and any grievance that was not finished in that time had to be done on the steward's own time. However, it appears that from the time of the announcement of the new policy until the hearing Kennedy had very little involvement with grievance processing, and his testimony on this point did not sound candid. I therefore do not credit him with respect to this matter.

[15] It is undisputed that for approximately 5 months prior to March 1 Ripoli was off work and on workmen's compensation. According to Plakatoris, whom I credit on this point, six or seven grievances filed by the Union had reached step 2 between March 1 and June 22.

[16] Ripoli testified that he felt that under the contract he was entitled to be paid for all of the time that he spent on union business. The contract, in art. 17, sec. 4, specifies that stewards will be compensated for time actually spent in grievance handling including investigation, meetings with Respondent, and writing grievances, and that such "payment . . . will be granted at the applicable straight time rate, providing the time spent is a part of the . . . steward's . . . regular workday."

[17] It appears that the memo was sent to Thomas Keefe in the course of a step 3 discussion of a grievance filed by Ripoli concerning the failure to pay him for time he spent processing grievances off the clock at home. Plakatoris discussed Ripoli's grievance on March 25 with Keefe but it is not clear whether he gave Keefe a copy of that memo at that time.

under the Act was implemented, that if there were such a unilateral change it was justified by business considerations, that the Board should not be involved in interpreting Respondent's collective-bargaining agreement with the National Union, that, in any event, Respondent has no obligation to bargain with the Union and there is no showing that Respondent has failed to bargain with the National Union,[18] and that the issues should be deferred to the pending grievance process under the Board's decision in *Dubo Mfg. Corp.*, 142 NLRB 431 (1963).

With respect to the alleged independent 8(a)(1) violation, Respondent contends, in substance, that the allegation should be dismissed because an employee has no right to disobey management's legitimate order during worktime when management is conveying to the employee the manner in which operations will be conducted and the contract will be implemented.

2. The deferral issue

In *Dubo Mfg. Corp.*, supra, the Board deferred action on certain allegations which were the subject of a court-ordered arbitration pending compliance with that order, holding:

> [T]he Board has recognized existing arbitration awards, and in certain circumstances has required parties before resorting to Board processes to utilize the grievance and arbitration procedure in agreements to which they are signatory. These policy considerations are clearly applicable here where not only do the parties have available a procedure to settle the dispute, but a United States District Court has ordered them to utilize it.[19]

In the instant case, Respondent contends that the Union has already invoked the grievance procedure to resolve the dispute at issue. However, that is not entirely clear from the record. The grievance to which Respondent refers is apparently one which Ripoli filed alleging that on March 10 management refused to allow him time on the clock to investigate, discuss, or write grievances, and requesting 6 hours' pay for time spent processing a grievance off the clock. On March 25 the grievance was discussed between Plakatoris and Keefe, but it is not clear when Keefe was advised of the policy restricting grievance handling to 20 minutes at the end of the steward's tour. As noted, although the memo itself bears the handwritten notation "cc: Tom Keefe Step 3," it is not clear when Keefe received it. In these circumstances, although there was a grievance filed which was pending at the time of the hearing in the instant case, the record does not establish that the issue in this case was fully considered in the course of processing that grievance. I therefore find no merit to Respondent's contention that the instant case should be deferred under *Dubo*, supra.

3. The contention that the Board should not inject itself into Respondent's collective-bargaining relationship with the National Union

Respondent introduced into evidence a number of documents indicating that in other cases where charges were filed alleging that Respondent violated Section 8(a)(5) and (1) of the Act by making unilateral changes in the amount of time permitted to stewards to investigate grievances, various regional directors of the Board had refused to issue a complaint, on grounds that the issue presented was one of contract interpretation and/or that the limitation imposed was not unreasonable. However, of course, actions of the regional directors in declining to issue a complaint are not precedent for either me or the Board in any case where a complaint has issued and I have held a hearing on the issues raised by the pleadings. Further, I note that in at least one case, *Postal Service*, 263 NLRB 357 (1982), the Board has addressed the question of unilateral changes in the grievance procedure.

4. Respondent's justification for the unilateral change

As discussed above, I have found that at the March 10 meeting Plakatoris announced that henceforth the Union would be permitted to process grievances between 12:10 and 12:30 p.m., and that prior to March 10 the Union representatives were allowed to file, process and investigate grievances at any time during their tour of duty after the preferential mail was finished i.e., after 8:30 or 9 a.m.

Respondent argues that the March 10 announcement was based on business necessity, that there was no showing that it had a negative impact on grievance processing or otherwise diminished employee benefits, and that the change was the type that is within the scope of normal management prerogative to direct the work force during the workday. I disagree.

First, although Plakatoris testified that the survey team from Baltimore suggested that he set aside a time each day for the discussion of grievances, he further testified that it was his option whether to implement the recommendations of the survey team or not; consequently the survey team's suggestion, standing alone, does not justify Respondent's unilateral change in the time allotted to the Union for handling grievances. Second, the mere fact that there may have been a real or perceived need for a change in the policy did not relieve Respondent of its obligation to bargain about it.[20] Third, although Respondent correctly contends that not every unilateral change in working conditions constitutes a breach of the bargaining obligation,[21] and argues that the instant change was not shown to have had any adverse impact on grievance processing or otherwise diminish employee benefits, Ripoli credibly testified that because of the unilateral change he was required to work on processing

[18] In this regard, Respondent notes that a grievance regarding the failure to pay Ripoli for time spent processing a grievance off the clock was, as of the time of the hearing in this case, at the third step of the grievance procedure and the National Union is thus involved in it. However, Respondent emphasizes, although the National Union was served with copies of the charge and complaint it did not enter an appearance at the hearing.

[19] 142 NLRB at 432.

[20] *Peerless Food Products*, 236 NLRB 161 (1978).

[21] *Peerless Food Products*, supra.

grievances at home.[22] Finally, although the management rights clause gives Respondent the right "[T]o direct employees of the Employer in the performance of official duties," the contract also specifically gives stewards the right to request permission to investigate and adjust grievances, "and such request shall not be unreasonably denied." I thus find that to the extent that the management rights clause might have given Respondent the right to determine when stewards could file grievances, the specific provision granting them reasonable time to attend to union business was a limitation on that management prerogative. Accordingly, I find that the March 10 announcement of a limited period each day for the stewards to handle union business constituted a unilateral change in the grievance and arbitration procedure, about which Respondent had an obligation to bargain.[23]

5. The contention that the Union is without standing to protest the change at issue

As noted above, the General Counsel concedes that the Union is not the designated representative of the employees in the Bel Air Post Office and that Respondent has no obligation to bargain with it.

In *Spector Freight System*, 260 NLRB 86 (1982), respondent was party to the National Master Freight Agreement, which provided that owner-operators employed by respondent would be paid rental at the rate of 13 percent of gross revenue for use of their trailers. Respondent canceled a number of trailer leases and thereafter some of the owner-operators whose leases had been canceled offered to enter into new leases for a lower rental rate than that required by the contract. Respondent told the employees to contact their union representative and declined to discuss the matter with them individually. Subsequently, a business agent for the local union informed respondent that the new proposed leases violated the contract but that he would not prevent employees from signing the leases "under protest," and respondent then executed the leases. The Board found, in agreement with the administrative law judge, that neither the international union nor the local union whose business agent had discussed the matter with respondent was the designated bargaining agent for the employees at issue, but that the bargaining representative was all locals affiliated with the international union and that these locals had authorized a national negotiating committee to act as their agent in negotiations. The administrative law judge further found that the union agents who had agreed to the new leases had no authority to negotiate modifications in the contract and that there was no evidence that the bargaining agent had agreed to those modifications. However, the Board reversed, on grounds that there was no showing that respondent failed to bargain with the designated bargaining representative and, thus, the General Counsel had not met his burden of showing that respondent had violated Section 8(a)(5) by the change. As the Board said, "the General Counsel was required to show that Respondent failed to bargain and reach agreement *with the designated bargaining representative* before implementing changes in the terms and conditions of the contract. Similarly, an element of direct dealing with employees is the lack of consent *by the designated bargaining representative* to the contacts made with employees—in this case, the signing of new leases containing terms which differ from those required by the NMFA."[24]

Similarly, in *Gulf-Wandes Corp.*, 236 NLRB 810 (1978), an international union was the certified representative of bargaining unit employees and unsuccessfully sought to have respondent recognize a local union as joint representative. Thereafter, respondent agreed to include a checkoff clause in the contract which provided that respondent had the right to approve the authorization form to be used. The forms subsequently supplied by the international union provided for the dues that were deducted to be paid to the local and respondent refused to use the form because the authorization was in favor of the local instead of the international. The Board found that respondent's refusal to use that form did not violate Section 8(a)(5), on grounds that the contract referred to the international union, the international was the bargaining representative, and therefore Respondent had the right to refuse to honor checkoff authorizations which did not require that the dues collected be remitted to the international.

In the instant case, as noted above, it is undisputed that theNational Union rather than the local Union is the designated bargainingagent for the postal clerks at the Bel Air Post Office.[25]Although Plakatoris testified that he did not discuss the new policy of when grievances could be handled with Keefe, president of the Union, before announcing the change, there is no record evidence of what discussions, if any, were held between Respondent and the National Union on this matter. In any event, the complaint does not allege that there was any refusal to bargain with the National Union, there is no evidence of such a refusal, and, even after the question was raised and discussed at the hearing, there was no motion to amend the complaint to include such an allegation. In these circumstances, I find that *Spector Freight*

[22] Although I credit Ripoli's testimony that he had to spend some of his own time in processing grievances I do not credit his testimony as to how much time he spent. In this regard, Ripoli appeared to be evasive and his demeanor was unimpressive.

[23] Respondent further contends that the General Counsel did not establish that the March 10 announcement constituted a change cognizable under Sec. 8(a)(5) of the Act because Ripoli, the General Counsel's lead witness, testified that there were severe restrictions on the time allotted to him for union activity even before March 10. However, although Ripoli testified that prior to March 10 he was denied time on the clock to handle grievances, his testimony in this regard struck me as prompted more by hostility to Respondent than by a due regard for truth, and I do not credit it. In any event, even if Ripoli was denied time to process grievances before March 10, there is no contention or evidence that Respondent ever, before that date, limited the Union's steward to handling grievances between 12:10 and 12:30 p.m. I therefore find no merit to Respondent's contention in this regard.

[24] 260 NLRB at 87. See also *Jones Motor Co.*, 260 NLRB 97 (1982), and *Branch Motor Express Co.*, 260 NLRB 108 (1982), involving similar fact patterns and issues.

[25] I recognize that the National Agreement provides for certain matters to be negotiated at the local level. However, the list of these matters does not include any item relating to the grievance and arbitration procedure.

System, supra, is controlling,[26] and I thus conclude that the General Counsel has not established by a preponderance of the evidence that Respondent has violated Section 8(a)(5) of the Act. I shall therefore recommend that this allegation be dismissed.[27]

6. The alleged threat of suspension

The complaint alleges that Respondent violated Section 8(a)(1) of the Act by Plakatoris' threat to suspend Ripoli if the latter left the March 10 meeting. As discussed above, after Plakatoris made his announcement at that meeting Ripoli said that he thought that the new policy was a violation of the contract and an unfair labor practice and then threatened to leave the meeting. At that point, Plakatoris said that anyone who left the meeting would be suspended.

Respondent contends Ripoli had no right to threaten to leave the meeting, and that Plakatoris' threat of suspension was therefore not unlawful. In support of this contention Respondent cites *American Ship Building Co.*, 226 NLRB 788 (1976). However, in that case, a union president was ordered to do some production work and refused to obey the order. In the instant case, the meeting which Ripoli threatened to leave was a meeting about how grievances would be handled, not one about normal work which might have been in Respondent's sole control. Respondent cites no cases, and I am unaware of any, where the Board has found that an employer has the absolute right to require a union representative to remain in a meeting to discuss union business. Further, it is well established that an employee's attempts to implement the terms of a collective-bargaining agreement are protected by Section 7 of the Act, whether or not the employee's interpretation of the contract is correct or whether the employee specifically refers to a contract clause while making his complaint.[28] Accordingly, I find that Ripoli was protected in threatening to leave the meeting even though I have found above that the record in this case does not establish that the unilateral change did not constitute an unfair labor practice under the circumstances of this case. I therefore further find that by threatening to suspend Ripoli, Respondent violated Section 8(a)(1) of the Act.[29]

On the basis of the above findings of fact and the entire record in this case, I make the following

CONCLUSIONS OF LAW

1. The United States Postal Service is subject to the Board's unfair labor practice jurisdiction.

2. Amerian Postal Workers Union Baltimore (Stu Filbey) Area Local, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. By threatening an employee with suspension because he stated that Respondent had violated the National Agreement and committed an unfair labor practice and that he would consequently leave a meeting of management and union representatives, Respondent has violated Section 8(a)(1) of the Act.

4. A preponderance of the credible evidence does not establish that Respondent has otherwise violated the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[30]

ORDER

The Respondent, United States Postal Service, Bel Air, Maryland, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees with suspension because they protest in a meeting to discuss grievance-related matters that Respondent is violating the national collective-bargaining agreement and/or committing an unfair labor practice and that they will not further participate in such a meeting.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights to engage in or refrain from engaging in any or all of the activities specified in Section 7 of the Act.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act.

(a) Post at its Bel Air, Maryland facility copies of the attached notice marked "Appendix."[31] Copies of the

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[26] In *Pittsburgh Postal Workers v. Postal Service*, 105 LRRM 2415 (W.D.Pa. 1978), a Federal district court considered the issue of the relationship between the National Union and the locals. In that case, there had been a settlement in 1976 over a local union's grievance concerning where mail would be broken down into individual carrier routes. In 1978 Respondent announced a new procedure which the local union contended violated that settlement, and the local union brought a district court action to enforce the settlement. The court found that the provisions in the then-national agreement regarding local unions did not include the right to sue on matters concerning the national contract and that although the action was brought to enforce a local settlement agreement, it was brought under the grievance procedures in the national agreement. Accordingly, the court found that the local's claim to the right to enforce the provisions of the contract without permission of the National Union was inconsistent with the terms of the contract and that this factor, together with the facts that the local was not signatory to the contract and that there was no showing of a special grant pursuant to the National Union's constitution or bylaws, "compels the conclusion that [the local] cannot bring this action."

[27] I note that in *Postal Service*, 263 NLRB 357 (1982), discussed above, Respondent did not raise the defense that it was not obligated to bargain with the local union which had filed the charge. However, I also note that in that case, apparently, Respondent had, after the local union had filed an earlier unfair labor practice charge on the matter, negotiated about when stewards should be permitted to process grievances with the local union, and, thus, it would appear that in that case Respondent waived any contention that it had no obligation to bargain with the local union about the matter. In any event, I also note, with respect to that case, that the administrative law judge, affirmed by the Board, dismissed this allegation on other grounds.

[28] *Firch Baking Co.*, 232 NLRB 772 (1977).

[29] I note that there is no evidence that when Ripoli threatened to leave the meeting he indicated that he would refuse to return to work as well. Indeed, Plakatoris credibly testified that when Ripoli said he was going to leave Plakatoris assumed that he was going back to work.

[30] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[31] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

notice, on forms provided by the Regional Director for Region 5, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint allegations not specifically found are dismissed.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT threaten employees with suspension because they refuse to participate further in a meeting regarding grievance-related matters on grounds that we have violated the National Agreement and/or have committed an unfair labor practice.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them in Section 7 of the Act.

UNITED STATES POSTAL SERVICE

Clare Community Hospital *and* Michigan Nurses Association, Petitioner. Case 7–RC–16921

31 January 1985

DECISION AND CERTIFICATION OF RESULTS OF ELECTION

BY CHAIRMAN DOTSON AND MEMBERS HUNTER AND DENNIS

The National Labor Relations Board has considered objections to an election[1] held 27 May 1983 and the hearing officer's report recommending disposition of them. The Board has reviewed the record in light of the exceptions and brief, and adopts the hearing officer's findings and recommendations,[2] as modified herein.

By letter on 4 May 1983 the nursing staff of Clare Community Hospital was notified of the creation of a Communications Task Force comprised of two supervisory RNs, the purpose of which was "to improve communication between Nursing and Administration and your supervisory staff" and "to assist your supervisors in assuring that you have access to the facts regarding the Michigan Nurses Association union and have answers to your questions." Shortly thereafter, prior to the election, the Task Force sent a letter to the staff listing eight questions which had been asked by the nurses, and the respective answers. The subjects treated in this undated letter covered (1) the completion date for the nursing policies and procedures manual; (2) the procedure for seeing one's personnel file; (3) whether the Task Force would continue after the election; (4) a description of the existing procedure for filing a grievance; (5) an update on an ongoing study of ways to improve the pension plan; (6) a description of the existing policy on vacation requests; (7) backup support for the intensive care and obstetrics units; and (8) Code Team assignments. The letter concluded with some general information on past improvements at the hospital, and a statement that there will always be problems, but that they can be solved by "working together as a team" and "without third party intervention."

After the election the Union filed objections, and a hearing was subsequently held thereon. Objection 4 alleges that the undated letter sent by the Task Force "contained the promise of benefit and reference to the union election." The hearing officer determined that the Task Force was set up in direct response to the employees' efforts to organize and to improve communication with the employees. Without stating his specific reasons, the hearing officer further found that, in sending the letters to the staff, the Employer solicited grievances and impliedly promised to remedy them, thereby engaging in objectionable conduct. The hearing officer added, however, that even if the employer was simply answering employee questions and had a procedure for filing grievances prior to the organizing drive, that the formation of the Task Force itself represented a "radical alteration" of its method of communication; this alteration constituted a grant of a new benefit, and therefore provided an alternative basis for setting aside the election. The Employer excepts to this finding, and we find merit in its exceptions.

The Board has long held that the solicitation of employee grievances during an organizational campaign interferes with an election, as such conduct carries with it an inference that the employer is implicitly promising to remedy the grievances, thereby mitigating the employees perceived need for union representation. *Reliance Electric Co.*, 191 NLRB 44 (1971). It is not the solicitation of grievances itself, however, that is objectionable, but the implied promise to correct them. *Uarco Inc.*, 216 NLRB 1 (1974). An exception to this rule is recognized where the employer has had a past policy and practice of soliciting employee grievances. In such circumstances, the employer may continue the practice during the organizing drive, but may not significantly alter its past manner and method of solicitation. *Carbonneau Industries*, 228 NLRB 597 (1977).

In the case before us, we find no solicitation of grievances, no promise of benefits, and no significant alteration in a past method of communication. Of the eight questions answered in the undated letter to the staff from the Task Force, the hearing officer found only one to be objectionable, and that dealt with the completion date for the nursing policies and procedures manual. The hearing officer

[1] The election was held 27 May 1983 pursuant to a Stipulation for Certification Upon Consent Election. The tally was 12 votes for, and 22 votes against, the Petitioner; there were 4 challenged ballots, a number insufficient to affect the results.

The Chairman and Member Hunter honor the parties' stipulation as to the appropriateness of the unit in this health care facility and note that they generally will accept unit stipulations in the health care field. In so doing, they recognize that acceptance of parties' unit stipulations fosters the statutory policy of encouraging the practice and procedure of collective bargaining, permits the expeditious resolution of questions concerning representation, and is consistent with Congress' concern that disruptions in health care institutions caused by initial organization activities be minimized. They also recognize, however, that a stipulated unit may so substantially contravene the congressional admonition to avoid undue proliferation of units as to increase significantly the likelihood of disruption of health care. Furthermore, there may be situations when the stipulation is derived from the mere convenience of the parties to the detriment of important rights and interests of the employees, or situations where the stipulation is otherwise contrary to the policies of the Act. In all such circumstances, the Chairman and Member Hunter will decline to honor the parties' stipulation since the public interest must outweigh the convenience of the private parties involved.

[2] In the absence of exceptions thereto, we adopt pro forma the hearing officer's recommendations to overrule Objections 1, 2, 3, 5, 6, and 7, and to approve withdrawal of Objection 8.

apparently viewed the inclusion of a target date for completion of the manual as the promise of a benefit. The testimony and the record evidence, however, indicate that this project had been in the works for some time, well before the filing of the petition. The mere inclusion of a completion date (which the hearing officer erroneously noted as being before the election) does not constitute a "benefit" sufficient to interfere with the employees' free choice.

Second, the evidence indicates that the Employer is a small hospital where people regularly change roles. The two supervisory RNs on the Task Force and others had participated in discussions of staff concerns in the past. Thus the "official" creation of the Task Force is not such a significant alteration in the method of communication so as to be perceived as a new "benefit" by the staff. Consequently, given the hearing officer's recommendation to overrule the Petitioner's other objections, the fact that he found the rest of the undated letter unobjectionable, and the absence of any other objectionable conduct on the part of the Employer, we will overrule Objection 4 and certify the results of the election.

CERTIFICATION OF RESULTS OF ELECTION

IT IS CERTIFIED that a majority of the valid ballots have not been cast for the Michigan Nurses Association and that it is not the exclusive representative of these bargaining unit employees.

MEMBER DENNIS, dissenting.

I would overturn the election. During the critical period, and in direct response to the Union's campaign, the Employer created a new, permanent, structured organization designed to improve communication between management and employees. I agree with the hearing officer that "the Employer radically altered and attempted to improve its method of communication with employees, thereby conferring a benefit upon them not previously enjoyed."

The Employer's president John MacLeod told employees in his 4 May 1983 letter that "[a]s a result of the union interest" among nurses "it has become apparent that there is a breakdown in communication." He announced that the board of directors had therefore formed "a special, high-level 'Communications Task Force'" to correct the problem. MacLeod stated that the supervisory Task Force members Crafard and Vieau were available to provide immediate assistance, and invited employees to telephone or page them. Later, in an undated letter issued before the election, Crafard and Vieau identified "questions and concerns" the employees had raised. Their letter promised the Task Force would continue after the election "on a permanent basis" and would include nonsupervisory personnel.

My colleagues conclude that, because Crafard and Vieau had informally discussed employee concerns in the past, the Task Force would not be perceived as a benefit. I disagree. The Employer for the first time established a permanent committee to air and adjust grievances through formalized cooperation between management and employees. The Employer emphasized its significant departure from past practice in letters to employees describing the Task Force, and the evidence confirms the Employer's representations. Because the Task Force was a significant new benefit, which the Employer admittedly instituted "[a]s a result of the union interest," I would order a new election.[1]

[1] In reaching this conclusion, I stress the structured, formal, and permanent nature of the Task Force. I would not ordinarily find an employer's generalized expressions of a desire for "better communications" to be a promise or grant of benefit.

Arizona Public Service Company *and* International Brotherhood of Electrical Workers, Local Union No. 387, AFL–CIO. Case 28–CA–7074

5 February 1985

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS HUNTER AND DENNIS

On 22 December 1983 Administrative Law Judge James S. Jenson issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel and the Charging Party filed briefs in support of the judge's decision.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings,[1] findings,[2] and conclusions only to the extent consistent with this Decision and Order.

The judge found that the Union had not waived the employees' right to participate in a sympathy strike and, therefore, the Respondent violated Section 8(a)(3) of the Act by suspending eight employees because they refused to cross a stranger picket line. For the following reasons we find the parties' contract permitted the discipline, and consequently we reverse the judge's decision and dismiss the complaint.

On 21 May 1982[3] the Respondent began laying cable and installing poles and street lights on a municipal building complex in Flagstaff, Arizona. On 28 July Construction Supervisor Herring ordered a 10-man crew to remove intersecting overhead lines on the project to make way for a large crane. Because a Carpenters Union picket line crossed the access road to the overhead lines,[4] eight crewmembers refused to perform work. Herring warned the eight employees they could be disciplined and told them to return to the office. That afternoon Herring suspended the sympathy strikers for 5 days. In response to IBEW business agent Stanfield's request on 28 July, the Carpenters Union agreed to remove its pickets. The Respondent's crew reported to work the next day. Herring told the sympathy strikers he thought the Respondent had lifted the 5-day suspensions because they were willing to work, but he thought they still would be disciplined.

On 29 July the Respondent advised that it might bring suit against the Union because of the employees' refusal to perform assigned work. By letter dated 29 July the Union answered that it had not authorized the "stoppage, strike, slowdown or suspension of work at the Flagstaff City Complex." On 2 August the Respondent suspended the eight employees for 3 days, informing them that their work stoppage violated article I, section 2 of the contract.

Article I, section 2, of the agreement provides:

> During the term of this Agreement, and during any period of time while negotiations are in progress between the parties hereto for the extension or renewal of this Agreement, the Union agrees on behalf of itself and each of its members that there will be no authorized concerted failure to report to work, cessation or interruption of work, slowdown, strike, boycott, or otherwise, with the Company's business.
>
> The Company agrees, as part of the consideration of this Agreement, that neither the Union, its officers, representatives, or members shall be liable for damages for unauthorized stoppages, strikes, intentional slowdowns, or suspensions of work in the Company's service, if:
>
> (a) The Union gives written notice to the Company within twenty-four (24) hours of such action that it has not authorized the stoppage, strike, slowdown, or suspension of work;
>
> (b) Copies of the notice described in (a) above are posted immediately by the Union on the bulletin board;
>
> (c) The Union further cooperates with the Company in getting the employees to return and remain at work.
>
> It is recognized that the Company has the right to take disciplinary action, including discharge, against any employees who engage in any unauthorized stoppage, strike, intentional slowdown, or suspension of work, subject to the Union's right to present a grievance on such discipline in accordance with Article VII of this Agreement in cases in which an issue of fact exists as to whether or not any particular employee has engaged in, participated in, or encouraged any such violation.

[1] The Respondent excepts to the judge's rejection of an affidavit the Respondent submitted after the hearing and has submitted an additional affidavit. We strike the Respondent's posthearing documentary submissions, as they are neither newly discovered nor were they unavailable at the time of the hearing. We have considered court decisions that the Respondent called to our attention.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[3] All dates are in 1982.

[4] Several unions had been picketing the project for some time without impeding the Respondent's work.

The article permits the Respondent to discipline employees who "engage in any unauthorized stoppage, strike, intentional slowdown, or suspension of work." The Union's 29 July letter states that it "has not authorized the stoppage, strike, slowdown or suspension of work" at the Flagstaff jobsite. Thus, by the terms of the parties' contract, and consistent with the Union's letter, the Respondent "has the right to take disciplinary action" against the eight employees.[5] Accordingly, we find that the Respondent did not violate the Act by suspending the eight employees for 3 days.

ORDER

The complaint is dismissed.

[5] In *Indianapolis Power & Light Co.*, 273 NLRB 1716 (1985), we stated that we agree with former Member Penello's dissent in *Operating Engineers Local 18 (Davis-McKee)*, 238 NLRB 652 (1978), to the effect that, absent extrinsic evidence that parties intended otherwise, a general no-strike clause waives the employees' right to engage in sympathy strikes. Accordingly, to the extent that the cases the judge relies on are inconsistent with our holding in *Indianapolis Power & Light*, they were overruled in that case.

DECISION

STATEMENT OF THE CASE

JAMES S. JENSON, Administrative Law Judge: This case was heard in Phoenix, Arizona, on February 8, 9, 10, and 11, 1983, pursuant to a charge filed on August 20, 1982,[1] and a complaint issued on October 4. The complaint alleges the Respondent violated Section 8(a)(1) and (3) of the Act by issuing 3-day suspensions to eight employees for having engaged in a sympathy strike and refusal to cross the picket line of the Carpenters Union at a municipal building project for the city of Flagstaff, Arizona. The principal issue was whether the Charging Union waived the Section 7 right of the Respondent's employees to engage in sympathy strikes and honor the picket lines of other unions at sites where Respondent's employees have been scheduled to work.

All parties were given full opportunity to appear, to introduce evidence, examine, and cross-examine witnesses, to argue orally, and to file briefs. Briefs were filed by all three parties and have been carefully considered.

Both the General Counsel and Respondent filed motions to correct the record. The motions are granted and have been added to the formal exhibit file as General Counsel's Exhibits 1(i) and (j), respectively.

On March 14, 1983, the time for filing briefs in this matter was "extended to all parties to the close of business April 1, 1983." The Respondent's brief was hand delivered by special messenger to a Federal building security guard at 5:40 p.m. on the due date, this office having closed at 5 p.m. Respondent's brief, therefore, was on my desk Monday morning, April 4. The General Counsel's brief, which is dated March 31, was apparently sent by certified mail, and was not received until the afternoon of April 4. Thus, both the Respondent's and the General Counsel's briefs, from a technical standpoint, were received after the "close of business April 1, 1983," and were therefore late. It is clear, however, that no party has suffered any prejudice because of the late filings by both parties. Accordingly, the General Counsel's motion to strike the Respondent's brief is denied.

The Respondent's brief contains two attachments, a decision of the Supreme Court of Arizona, and an affidavit from an employee who did not testify. Respondent's brief also contains several requests treated herein as motions. Respondent requests that the General Counsel be ordered to provide it "with copies of any and all statements in the Government's possession, from individuals other than the General Counsel's witnesses who testified at the hearing, dealing with matters to which these witnesses testified"; that "in the event that [Respondent] determines that, as a result of any such statements, additional testimony or other evidence should be provided, the hearing be reopened"; that in the event the Government asserts that whatever other statements it has do not deal with the testimony of the witnesses, that I should review the statements "in camera or otherwise"; and that in the event the Government asserts it has no other statements which relate to matters to which its witnesses testified, Respondent is entitled to cross-examine counsel for the General Counsel under oath. On April 13, the General Counsel filed (in addition to its motion to strike Respondent's brief), a motion to strike the documentary evidence which was attached to the Respondent's brief, and opposed the Respondent's renewed motion that the General Counsel make available for its inspection statements by individuals who did not testify. The General Counsel's motion to strike the documents attached to the Respondent's brief is granted. The additional evidence which Respondent seeks to have considered is neither newly discovered nor was it unavailable at the time of the hearing. As the Board stated in *Otis Elevator Co.*, 255 NLRB 235 at 239 (1981): "The responsibility of 'making a record' supporting one's position not only devolves upon the parties, but particularly devolves upon them during the hearing and before the record is closed." The Respondent's request with respect to the production of statements from individuals other than the General Counsel's witnesses, or that it be permitted to cross-examine the General Counsel under oath with respect to the existence of such statements, is also denied. Respondent's reliance on *Brady v. Maryland*, 373 U.S. 83 (1963), and *United States v. Agurs*, 427 U.S. 97 (1976), is completely misplaced. While a prosecutor in a criminal case has a duty to supply exculpatory material to a defendant, Respondent cites no authority suggesting that either case applies to a civil administrative proceeding. Clearly, the General Counsel was not required to supply Respondent with statements made by nonwitness employees solely because of Respondent's hope that the statements might be useful to it. See *Hedison Mfg. Co. v. NLRB*, 643 F.2d 32 (1st Cir. 1981); *NLRB v. Master Slack*, 618 F.2d 6 (6th Cir. 1980); *North American Rockwell Corp. v. NLRB*, 618

[1] All dates are in 1982 unless stated otherwise.

F.2d 866 (10th Cir. 1968); *Morrison-Knudson Co.*, 210 NLRB 174 fn. 1 (1974).

In its brief, the Respondent resubmitted a rejected offer of proof covering certain testimony of its witness Gelinas. I have reconsidered my ruling in light of the entire record, and reaffirm it.

On the entire record in the case, and from my observation of the witnesses and their demeanor, I make the following

FINDINGS OF FACT

I. JURISDICTION

Arizona Public Service Company (Respondent) is engaged in business as a public utility within the State of Arizona, furnishing electrical power and natural gas service to customers. During the past 12 months it derived gross revenue in excess of $250,000 and purchased goods and materials valued in excess of $50,000 which were received directly from suppliers located in States other than Arizona. It is alleged, admitted, and found that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

It is alleged, admitted, and found that International Brotherhood of Electrical Workers, Local Union No. 387, AFL–CIO and Arizona State District Council of Carpenters, United Brotherhood of Carpenters and Joiners of America, AFL–CIO are each labor organizations within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Setting*

Respondent is a public utility engaged in furnishing electrical power and natural gas services to its customers. Respondent employs approximately 7000 employees, approximately 2500 of whom are in the unit represented by the Union. There has been a collective-bargaining relationship between the Respondent and the Union since about 1945, the most recent collective-bargaining agreement being effective from April 1, 1982, to April 1, 1984. Since at least 1949, each of the agreements has contained the following provisions regarding strikes and lockouts:

ARTICLE I

Reciprocal Covenants—Union Recognition

Section 1. During the term of this Agreement, and during any period of time while negotiations are in progress between the parties hereto for the extension or renewal of this Agreement, the Company that there will be no lockout.

Section 2. During the term of this Agreement, and during any period of time while negotiations are in progress between the parties hereto for the extension of renewal of this Agreement, the Union agrees on behalf of itself and each of its members that there will be no authorized concerted failure to report to work, cessation or interruption of work, slowdown, strike, boycott, or otherwise, with the Company's business.

The Company agrees, as part of the consideration of this Agreement, that neither the Union, its officers, representatives, or members shall be liable for damages for unauthorized stoppages, strikes, intentional slowdowns, or suspensions of work in the Company's service, if:

(a) The Union gives written notice to the Company within twenty-four (24) hours of such action that it has not authorized the stoppage, strike, slowdown, or suspension of work;

(b) Copies of the notice described in (a) above are posted immediately by the Union on the bulletin board;

(c) The Union further cooperates with the Company in getting the employees to return and remain at work.

It is recognized that the Company has the right to take disciplinary action, including discharge, against any employees who engage in any unauthorized stoppage, strike, intentional slowdown, or suspension of work, subject to the Union's right to present a grievance on such discipline in accordance with Article VII of this Agreement in cases in which an issue of fact exists as to whether or not any particular employee has engaged in, participated in, or encouraged any such violation.

Article VII of the current agreement is entitled "Grievances and Arbitration." The present language was adopted in 1980. It reads, in pertinent part:

Section 1. A grievance for the purpose of this Agreement shall be considered as any complaint on the part of an employee or employees regarding the treatment he receives from fellow employees, foremen, or Company representatives, dissatisfaction with working conditions, or any action on the part of the Company or Company representatives which he considers to be a breach of this Agreement. Disputes over wages and wage scales shall not be deemed a grievance. (4–1–80)

. . . .

Section 3. Any grievance which cannot be adjusted under the provisions of this Article, and any difference that may arise between the Company and the Union concerning the overall application or interpretation of this Agreement or any provisions hereof (as distinguished from its application, or grievances of individual employees or group of employees) which the representatives of the Union and the Company are unable to settle, including differences concerning amendments to this Agreement at any termination date, may be referred to arbitration. (4–1–80)

The record shows that during negotiations leading up to the 1980–1982 agreement, the Respondent proposed the following change with respect to article I, section 2: "To clarify that any strike, slowdow, boycott or other

concerted activity will be a violation of this Agreement." Peter L. Joachim, Respondent's supervisor of labor relations, testified that the effect of the proposal was to change the wording to make it more clear that all strikes were prohibited. The Union rejected the proposal and it was withdrawn.

B. *1982–1984 Contract Negotiations*

Respondent proposed changes in the wording of article I, section 2 again during negotiations leading up to the 1982–1984 agreement. Joseph Gelinas, vice president of employee relations, was the chairman of the Respondent's negotiating committee and its principal spokesman. Other company representatives were Industrial Relations Manager Charles Nelson, Supervisor of Labor Relations Peter Joachim, Labor Relations Analyst John Patrick,[2] Division Vice President Jerry Human, and Vice President of Power Production Walt Eckstrom. Harold Sebring, the Union's president, was chairman of the Union's negotiating committee. Other union negotiators included Union Business Manager Bowden, Assistant Business Manager Gene Hill, and Respondent's employees Bill Burke, Ken Christopher, and Bob Edwards. On February 18, a preliminary negotiation meeting was held at which time the Company and the Union exchanged their lists of proposed changes and amendments to the contract. The first proposal by the Respondent was to delete the word "unauthorized" form article I, section 2. No substantive discussion took place on February 18.

The parties met again on February 22, at which time Gelinas gave the Union "Company Proposal Number 1" consisting of a copy of article I, section 2, with the words "authorized" and "unauthorized" crossed out. The proposal states that its purpose is to "Clarify that any of the activities listed are prohibited and cannot be authorized." While there is disagreement among the witnesses as to exactly what was said between the parties, I am convinced and find from a composite of the credited testimony that Bowden asked what the proposal meant; that Gelinas stated the Company wanted to make it clear that article I, section 2, encompassed all work stoppages; that Sebring asked if the proposal would force union members to cross picket lines; that Gelinas answered in the affirmative and cited as an example a sympathy strike at the Deer Valley warehouse; that Bowden stated that he didn't see any need for the change since the Company and the Union had always worked together and been able to dispose of problems involving picket lines, citing an example in Scottsdale where he had gotten the other union to remove its picket. Contrary to the position of the Respondent, the evidence does not disclose that the Union agreed on February 22 with the Respondent's position that article I, section 2, encompassed sympathy strikes. On March 4, the evidence shows, Sebring specifically rejected Respondent's proposal to change article I, section 2.

On March 8, the Union and Respondent met again. Gelinas testified as follows:

> Q. [By Mr. Morales] Okay. Tell us what was said in connection with that proposal, with that discussion, and who said it?
>
> A. I believe it was in context that we wanted to get on with trying to get some issues resolved that we were going through.
>
> Q. And if you can recall, Mr. Gelinas, just as specifically as you can, the words that you remember yourself that anybody else said on this topic?
>
> A. I believe I said words: I'd like to get on with this so that we can finish up by the 1st of April and I said that based upon the comments and understanding from our last meeting when we discussed this that since the language is all-encompassing or in broad enough terms to encompass the issue of sympathy strikes, that if we can, based upon that understand, we would withdraw our proposal.
>
> Q. All right. What did the union representative say to that?
>
> A. I don't believe there was any verbal commentary at all after that.
>
> Q. Was Mr. Bowden at that meeting?
>
> A. Yes.

Joachim testified:

> Our contract date is April 1st. And so we were, you know, we had a lot of issues to discuss. And so Joe, on the 8th, started trying to wrap some things up. And he said something to the effect that, well, we want to, you know, kind of get things moving and based on the—I think somewhere in here this had come up that the union had rejected our change. They had said, "No, we're not going to do anything on that." But, anyway, Joe brought this up and he said to kind of speed things up, he said, "Based on the fact that you have assured me that you believe that this clause as it stands covers everything, covers our concerns, "I think is what he said. And I think he may had even said, sympathy strike, I believe he did. "I'm going to withdraw that proposal." And nobody said anything like, well, if that's your belief, don't withdraw it. And it was at that point withdrawn.

Bowden denied Gelinas conditioned withdrawal of company proposal one upon any purported understanding or union representation regarding the application of the clause to sympathy strikes. He further denied he ever

[2] Witnesses were sequestered at the commencement of the hearing pursuant to the General Counsel's motion and without objection from the Respondent. Clyde Bowden, the Union's business manager, and a rebuttal witness, was selected by the General Counsel to remain in the hearing room and assist him. The Respondent was initially permitted two representatives, Duffey, who was not a witness, and Supervisor of Construction Richard Herring, who testified. Joachim was permitted to sit at Respondent counsel's table after one of the other men left. The parties were instructed to police the sequestration rule themselves, since I did not know who would be called to testify. Patrick, who had taken notes on behalf of the Company during all of the contract negotiations, was permitted to remain in the hearing room and was observed taking notes throughout the hearing. In violation of the sequestration rule, the Respondent called Patrick as a witness on surrebuttal. Pursuant to the General Counsel's objection, I did not permit Patrick to testify. I have reconsidered my ruling in the light of the entire record, and reaffirm it. I also reaffirm my ruling rejecting R. Exh. 8, which consists of Patrick's notes taken during negotiations and which were also offered during surrebuttal.

stated that the Respondent had the right under the contract to discipline employees who engaged in a sympathy strike, or that the contract language was already broad enough to cover the matter of disciplining employees for engaging in a sympathy strike. He also denied Gelinas used the term "resolved" as the basis for the withdrawal. Bowden's testimony is corroborated in material part by Sebring, Christopher, and Edwards. The testimony of the union negotiators is credited over that of Gelinas. In this regard, it is noted that Joachim's testimony supports that of the General Counsel's witnesses that the union negotiators had rejected the Respondent's proposed change prior to the March 8 meeting, and there is no evidence to show that the subject was discussed between the time it was brought up again by Gelinas on March 8, at which time the proposal was withdrawn. Gelinas testified that at the March 22 negotiations, while recapping negotiations to that point, "I indicated company proposal number 1, resolved, was my word, and then we moved on to the next." The Union made no response. I do not find, however, that the Union's silence was consent to adoption of the Respondent's proposal which had already been specifically rejected and withdrawn by the Respondent. Also, it is clear from the record that the Respondent never proposed to modify article I, section 2, by inserting the words "sympathy strike" as a prohibited activity.

On March 31, following the conclusion of negotiations, Gelinas sent Bowden the following letter:

> This letter will confirm our understandings we arrived at during our 1982 negotiations.
>
> (1) The administration of the Company's fringe benefits programs will remain within its sole discretion. It is understood that the company will not reduce these benefits for bargaining unit employees during the life of this agreement.
>
> (2) Regarding the new Article V, Section 1a, which pertains to an employee on vaction who becomes ill and is under a doctor's care substantiating his need to be absent, it is understood that the employee has the same obligation to report that illness as they now do under the current sick leave provisions of the Company.
>
> (3) Regarding the selection of arbitrators for grievances that have arisen subsequent to the effective date of this agreement that result in arbitrations relating to discharge, job selection and disciplinary suspension, shall be as follows:
>
> The Union and Company shall each submit a list of twelve (12) nationally known arbitrators, excluding those who currently reside in Arizona. From this list of twenty-four (24), each shall alternatively strike a name until six (6) such arbitrators remain. These six (6) arbitrators shall constitute the panel of arbitrators for purposes of the arbitration cases listed above.
>
> (4) The Company will continue its practice that if any employee is scheduled to work overtime and the Company calls the employee and cancels the overtime, the employee shall receive two (2) hours of straight time.
>
> (5) Regarding tardiness, it is not the Company's intention to issue no report letters for tardiness unless the tardiness becomes a problem.
>
> I believe, Clyde, that this documents the various understandings that we have arrived at during our negotiations.

Gelinas testified the items included in the above letter "were the ones where there may have been some area possibly of misunderstanding between the parties." He further testified that there were in fact other matters agreed upon which were not reduced to writing, including the breadth of article I, section 2.[3]

C. *Past Practices*

It is clear from the record that, prior to the incident giving rise to this case, no bargaining unit employee was ever disciplined by the Respondent for having engaged in a sympathy strike by refusing to cross another union's picket line to perform work for Respondent. Joachim testified he knew of no instances where bargaining unit employees ever refused a direct order to perform work for Respondent at a job location because of the existence of a picket line by another union, reciting several specific instances when unit employees in fact crossed picket lines. He testified that in 1978, a crew entered through a separate or neutral gate to hang a transformer at a Santa Fe yard. In 1979, he informed Bowden that a Carpenters Union had established a picket line on a job at the east end of Phoenix, that there was a separate gate, that Respondent was going to send a crew there to work, and that Bowden told him to go ahead. In 1980, a number of employees entered through a separate gate and performed work on a job being picketed on 19th Avenue. While Joachim testified he told the foreman to tell the men to "either go or we'll take disciplinary action," he did not know whether the foreman so informed the crew, and the record does not establish any reluctance on the part of the employees to enter the premises. In 1981, a number of employees entered the St. Joseph Hospital jobsite in Phoenix through a separate gate and performed work. Joachim also testified there were a number of occasions where various unions picketed a Del Webb construction site at Sun City, and Respondent's employees had entered when told through separate gates. While Richard Farthing, Respondent's customer service representative in Flagstaff, testified he had never encountered a situation where Respondent's employees refused to perform work because of a picket line, he had expressed concern that they would not remove the overhead line at the Flagstaff City Complex, the jobsite involved here, which was being picketed by the Carpenters Union.

Witnesses for the General Counsel testified to a number of instances when employees had declined to cross stranger picket lines to perform work for Respondent. Lineman Gary Smith testified that in August 1978,

[3] The final sentence in art. XI of the collective-bargaining agreement states that "It is distinctly understood and agreed that all previous agreements and understandings, if any, and all negotiations, whether oral or written, by and between the Company and the Union, are superseded by this Agreement."

he was on a crew assigned to put in underground lines on a project in Tempe. Upon observing pickets at the site, the men returned to the yard and were assigned to another job. No adverse action was taken against him. After the picketing ceased, the men returned and performed the work. Sebring testified that in 1970 or 1971, he was dispatched to work at O'Mally's Lumber Company in Phoenix. Upon observing pickets, he called Joachim, who was a supervisor or foreman at the time, and was told not to cross the picket line. Christopher testified that 17 or 18 years ago, he reported to a supervisor that he had declined to cross a picket line on a "meter run." No adverse action was taken. About 6 months later, he was on a crew assigned to work on an underground vault in Phoenix. Upon seeing pickets, the crew entered into a discussion among themselves. The work was not performed and no adverse action was taken against them. Edwards testified that 3 or 4 years ago he was sent to read a meter at Goettl's Metals in Phoenix. Upon observing pickets, he drove around the block and reported back to his foreman who said he would take care of it. No adverse action resulted. Bowden testified that employees refuse to work at sites where another union is picketing two or three times a year, and that he has never been informed that Respondent took any action against an employee because he engaged in a sympathy strike. The usual practice, he testified, was that he called Nelson, or Nelson called him, and "we try to get the pickets removed and have been very successful over the years really." Respondent's crews have been "pulled off" until the pickets were removed. He recited several examples. About 12 years ago he received a call from Tom Woods, Respondent's vice president of personnel, that the crew did not want to cross a picket line at a housing project near Casa Grande. Woods stated that they were going to have to go in "because their pump was out of water and that the developer had called the Corporation Commission [who] was putting pressure on the company." Bowden called the Corporation Commission and was informed it had not received any complaint. Woods response was, "Well, the hell with them then. If they're going to lie to me, just keep the guys out . . . . We won't put them back in there again." Three weeks later, after the Carpenters Union removed the picket, Respondent's crew did the work. Approximately 8 or 10 years ago, Bowden received a call that another union had placed a picket on a condominium development in Scottsdale. Bowden called Chuck Ammerman, Respondent's then manager of industrial relations, and the two went to the project and talked to the developer. Ammerman arranged to have the crew work on Saturday when the nonunion workers would not be working and there would be no pickets. No adverse action against the Union's members resulted. Approximately 8 or 9 years ago in Paradise Valley, a crew refused to cross a Carpenters Union picket line. No disciplinary action was taken. Approximately 4 or 5 years ago, the Union and the Respondent agreed that a crew would not be required to cross another union's picket line. The required work was performed by nonbargaining unit employees. No disciplinary action resulted. Bowden testified that during construction of the Four Corners Power Plant in the early 1970's, various building trades unions picketed at the bridge crossing the San Juan River, which was several miles from, but the only practical employee access to, the plant. According to Bowden, he told union representatives, including stewards, that the employees "have a right not to cross that picket line," but that he felt the Company would terminate them, but that at a primary gate, "depending on the urgency or criticalness of the job maybe, of being reinstated if you were terminated or permanently replaced, or you will take the shoes of a striker. On the secondary gate, I think your chances are somewhat less than at the primary gate." He denied he ever told anyone that the contract prohibited them from honoring a picket line, or that they could be discharged under the contract for honoring another union's picket line. Bill Walker, now a planning supervisor and a witness for the Respondent, was a union steward during the construction of the Four Corners Power Plant. He testified that when Respondent's employees expressed concern about crossing the picket line, "I told them *if they crossed* the pickets that *they were subject to disciplinary action*."[4] (Emphasis added.) His response, he claimed, was based on conversations with Bowden. Regarding the conversations with Bowden, he testified, "Well, in talking to Clyde [Bowden] about this, he told me that if you didn't cross the picket lines and if they weren't for 387 that you were subject to disciplinary action. The only way that you may not get disciplinary action would be if you was afraid of bodily—being hurt when you came across the picket line, somebody throwing rocks at you or whatever." As is readily seen, what Walker claims he told employees, which he claims was based upon what Bowden told him, is ambiguous. This leads me to conclude that his understanding and/or recollection is not accurate. Accordingly, I credit Bowden's testimony over his.

D. *The Flagstaff Job*

Construction of a new municipal building complex (City Complex) for the city of Flagstaff, Arizona was begun in early 1982. The City Complex was located in the east half of a four-block tract bordered on the north by Birch, on the south by Santa Fe, on the west by Sitgreaves, and on the east by Humphreys Streets. Kendricks bisects the tract in a north-south direction, and Aspen in an east-west direction. At all times material herein, Aspen was torn up and impassable because of construction materials piled in its path between Humphreys to the east and Kendricks to the west. Kendricks was also impassable and scheduled for abandonment between Aspen on the north and Santa Fe on the south. Thus, the area encompassing the new City Complex was bounded by Birch on the north, Humphreys on the east, Santa Fe on the south, and Kendricks to the west. Located a few feet west and paralleling Kendricks is located a drywash or ditch 10 to 15 feet wide and 8 to 10 feet deep which contains the Rio De Flagg River bed. Access to the City Complex from the west is through a gate (west gate) located near the intersection of Aspen

[4] Tr. 693–694.

and Kendricks just east of the bridge crossing the ditch. There is also an access road from the east located near the northeast corner of Humphreys and Birch. Paralleling and located along the entire eastern side of Kendricks was an overhead power line (north-south power line). There was also an overhead power line running east and west which was located south of the building site. As will be seen hereafter, removal of the two overhead power lines at a time when Carpenters Union pickets were located at the west gate precipitated a sympathy strike and refusal to perform work by several men on Respondent's crew assigned to remove them.

Work begun at the city Complex on May 21. Respondent's crews worked for 12 consecutive days laying underground cable in open trenches and installing switching cabinets. Thereafter, the crews worked sporadically on completing the cable laying and working on street lights and transition poles around the perimeter. While the date of the commencement of picketing at the west gate was not established, picketing by one or another of the various construction trades unions was going on in July while Respondent's crewmembers were working at the premises. The target of the picketing appears to have been J. R. Porter Company, one of the building contractors.

By mid-July, construction work had progressed on the building complex to the point it was felt it was necessary for safety reasons to deenergize and remove the north-south overhead power line in order that a large crane could be used for steel erection in the proximity of the overhead line. Concern had been expressed regarding the possibility that the crane might come in contact with the overhead line. Consequently, Herring, Respondent's supervisor of construction, was advised by the project manager that unless the overhead lines were removed, steel erection would be stopped, resulting in financial hardship for the city, J. R. Porter Company, and the steel erectors. Consequently, Farthing, Respondent's customer relations representative in Flagstaff, asked the Respondent's construction foreman to schedule the work for the following week. Farthing also informed his superior, Jim Spencer, that he did not know if the crew would remove the overhead lines because of the pickets. Herring had been informed by the Flagstaff city manager that there had been no picket line violence and that the city would provide necessary security for Respondent's crew. Herring testified he was concerned about reports of violence by Carpenters' pickets at other jobsites. He therefore called Joachim for the purpose of having Joachim contact the Union so there would not be any problem connected with the job. Joachim testified that Vince Cardinal of the District Council of Carpenters had informed him that he did not think there would be any problem.

Sometime during the morning on Monday, July 26, Union Steward Bruce Osborne went to Herring's office and said he had to see another steward, Jerry Murphy, and that they had to check into the City Complex job, apparently to talk to the Carpenters Union business agent. Herring made a company car available to them and told them to take the time they needed. They reported back to Herring about 2 p.m. that they had not seen the business agent but that they had driven by the picket line and told the pickets that they planned to work there the next day. According to Herring, they were told by the pickets, "If you come out here, we'll have 600 pickets here tomorrow."

Later that afternoon, Herring called a meeting of the linemen crews in Flagstaff, at which time he told them what work had to be done at the City Complex and that the city was putting pressure on to have the overhead lines removed immediately. Herring stated he was aware of the pickets and that the Union's stewards were going to talk to the Carpenters' business agent the next day and try to make peace with him. Several employees expressed reservations about working on the project because of union considerations and for fear of harm to themselves and their families.[5] Herring told them the city manager had tried to reassure him there had been no threat of violence at the job. Proposals to avoid working in the vicinity of the pickets were also suggested by several of the linemen and were rejected by Herring as impractical. According to Herring, he gave the men the option of one crew working all week, or all three crews working together to get the work done more quickly. The men chose to all work at once.

On Tuesday, July 27, Herring again provided Osborne and Murphy with a car so that they could talk to the Carpenters' business agent. Upon their return they reported that the Carpenters' representative said there would be no problem. In the meantime, Herring had called the Carpenters' representative and was advised that he had already talked to the stewards and there would not be any problem. Murphy also informed Herring that he did not trust the Carpenters' representative and that there would be a decision making meeting that night among the union members. Stanfield also attended the meeting. He testified he told the men that he "was not there to tell them to cross a picket line and go to work, or to refuse to cross the picket lines and not work. That I was merely there to explain the law to them as best I understood it. . . . I told the employees that I thought that if the Company offered the first gate to them, the primary gate and they refused, that the Company may replace them, or terminate them. And I said there was recourse there. I said if they offer the second gate to you, the one on the east side of the project and you refuse it, I said they may terminate you then and I don't believe we have any recourse." Osborne told the men that the Carpenters' representative had said there would be no problem with Respondent's crew working behind the picket line.

A safety meeting was held with the employees scheduled to work on the City Complex at 7 a.m. on July 28. About 8 a.m., they left for the jobsite. Jack Kelly, the foreman assigned to direct removal of the overhead lines, arrived first, parked his truck in an open lot near the southeast corner of Santa Fe and Kendricks, and proceeded to prepare for holding a "tailboard," a meeting to discuss the work and assign the men to certain tasks.

[5] Rumors had circulated regarding an underground cable that had been cut at the site and rock throwing incidents at another project where the Carpenters Union picketed.

Kelly observed approximately 8 to 10 pickets at the west gate which was located approximately a block north and a little to the east of his truck. It is undisputed that the pickets were located almost directly under the north-south overhead line which was scheduled for removal. The crew, consisting of Ross Thompson, Ed Wilson, Clifford Miles, Jerry Nelson, Bill Smith, Gary Smith, Mark Finfrock, Dale Hudson, Marvin Harper, and Nap Birner parked their trucks near Kelly's, and gathered around him. Upon seeing the pickets, several of the men informed Kelly that they would not cross the picket line. According to Gary Smith, Kelly responded that there was not any use in having a "tailboard" then, and told those that were not going to work to go over on the street so he could tell who was willing to work. Accordingly the crew, except for Thompson, Wilson, and Birner, congregated near an old hotel building located about 75 feet away at the intersection at Santa Fe and Kendricks. However, when Kelly told Wilson and Birner what work he wanted done, they joined the other men at the old hotel building.

In the meantime, Stanfield went to the jobsite about 7 a.m. and talked to the Carpenters Union business representative, Burt, who informed him that he did not think it was possible to have the picket line removed unless such a decision was made by that union's legal counsel. Burt also said he had already informed Herring and the Union's stewards that there would not be any problem with Respondent's employees crossing the picket line. One of the pickets told Stanfield of an incident involving a man who had appeared at the picket line with a gun and then driven off. Stanfield then drove to a point near the east gate of the project, parked on Humphreys, and waited for the men to arrive. When he saw the crews drive pass on Santa Fe, he walked south around the perimeter of the project to the old hotel building where the crewmembers were congregated. Herring also arrived at the project about this time. Noticing that work had not begun and that the men had congregated near the old hotel, he walked over to that area and asked why they were not working. Murphy responded that there was a picket line and that he did not want to work "for moral reasons and fear of my life, too," and that he would work any place else. According to Smith, Nelson told Herring that "we're fearful for harm for our families and us. Also, we're good union men, we don't want to cross their picket line. Also the job that has to be done we'll be working right over those men." Herring told the men they were engaging in a work stoppage, that their refusal to work was insubordination that could result in discipline, that the City Complex work was the only assignment for the day, and that, if they refused to work, they should report back to the office for individual meetings. After a short time Kelly returned to the group and was told that the men elected to return to the yard.

Upon returning to the yard, each of the linemen was interviewed by Herring and Spencer in Herring's office. Stanfield was also present during the interviews except for those with Thompson and Wilson. Herring asked each employee if he realized he was involved in a work stoppage, if he realized the City Complex work was the job assignment for the day, why he was refusing to work, and whether he understood he could be disciplined for his action. All of the linemen, with the exception of Thompson and Wilson, declined to work on the City Complex job. All stated they understood their refusals would be considered insubordination and could result in termination. Reasons for refusing ranged from fear of bodily harm, fear for safety of family or self, moral convictions, and unionism. With the exception of Thompson and Wilson, each of the linemen was told that he was relieved of his duties for 5 days and that he would probably be terminated. That afternoon Stanfield made arrangements with the Carpenters Union for removal of the pickets in the next 2 days. He immediately informed both Herring and the linemen of the development. Herring informed the men who reported for work the next morning that he could not guarantee that there would be no pickets on the job, that he thought their suspensions had been lifted since they returned to work, but that he could not guarantee anything and that they would probably be severely disciplined. The men completed the scheduled City Complex work by working both July 29 and 30.

In response to Nelson's indication to Bowden that the Respondent might file a lawsuit against the Union because of the refusal to work, the Union, over Assistant Business Manager Hill's signature, informed Gelinas in writing dated July 29, that it was notifying Respondent in accordance with article I of the collective-bargaining agreement that the Union did not authorize the "stoppage, strike, slowdown or suspension of work at the Flagstaff City Complex," and had made every effort to insure that the job assignments to the job would be manned and completed. A copy of the letter was posted in the Flagstaff construction yard on July 30. It is undisputed that this was the first occasion the Union has ever sent such a letter to the Respondent. Contrary to the Respondent's position, I do not view Hill's letter as an explicit, unmistakable waiver divesting the employees of their statutory right to refuse to engage in a sympathy strike which had already taken place.

On August 2, Herring issued the following identical memo to each of the men that had engaged in the sympathy strike at the City Complex:

> On July 28, 1982, you were in violation of Article I, Section 2, of the Bargaining Agreement by participating in a work stoppage.
>
> Your actions were unacceptable and could have resulted in termination of employment. However, because you did return to work the following day, on the same job, and perform your work in a safe efficient manner, you will only be suspended for three (3) working days. You will be advised as to when the suspension will take place.
>
> I must advise you that any further violation of Article I, Section 2, in the future can result in termination of your employment.

Staggered 3-day suspension resulted.

E. *Conclusions*

The complaint alleges the Respondent violated Section 8(a)(1) and (3) by issuing 3-day staggered suspensions of Jerry Murphy, Edwin M. Wilson, Gerald Nelson, Gary Smith, Clifford Miles, Nap Birner, Mark R. Finfrock, and Dale Hudson because they engaged in a sympathy strike and refused to cross the Carpenters Union's picket line to perform work at the City Complex.

The General Counsel contends the Union has never waived unit employees' Section 7 right to engage in sympathy strikes and honor lawful picket lines of other unions at sites where unit employees are scheduled to perform work for Respondent, and that by disciplining its employees for engaging in a sympathy strike at the City Complex, Respondent violated the Act as alleged in the complaint.

The Respondent points out that the collective-bargaining agreement contains a no-strike clause and that the Union clearly and unmistakenly waived the bargaining unit employees' right to participate in sympathy strikes through years of past practice, bargaining history, overt statements, and conduct by union representatives and clear and unequivocal contract language. Accordingly, it is contended, the disciplinary action taken against the employees for engaging in a sympathy strike was not unlawful.

Thus, the principal issue is whether the Union waived the Section 7 right of the Respondent's employees to engage in sympathy strikes and honor the picket lines of other unions at sites where the Respondent's employees have been scheduled to work.

It is fundamental that the right to strike is guaranteed by the Act, including the right to engage in a sympathy strike or honor another union's picket line. Such rights may, however, be waived by appropriate provisions in a collective-bargaining agreement. The Board and the courts have repeatedly emphasized that such waivers will not be readily inferred, and there must be a clear and unmistakable showing that waiver occurred. *Gary-Hobart Water Corp.*, 210 NLRB 742, 744 (1974), enfd. 511 F.2d 284 (7th Cir. 1975), cert. denied 423 U.S. 925 (1975). In the Board's view, broad no-strike clauses, without more, are insufficient to establish waiver of the right to engage in sympathy strikes. Rather, any waiver of the right to engage in a sympathy strike may be found only "in express contractual language or in unequivocal extrinsic evidence bearing upon ambiguous contractual language." *Operating Engineers Local 18 (Davis-McKee, Inc.)*, 238 NLRB 652 (1978). As is clear from a reading of article I, section 2, no mention is made of sympathy strikes or refusals to cross another union's picket line. Therefore, a waiver, if any, must be implied; "however, the waiver of statutory rights is not lightly to be inferred." *Gary-Hobart Water*, supra at 745. I find no basis for inferring that Respondent's employees' right to engage in sympathy strikes was relinquished. The no-strike prohibition in article I, section 2, of the contract clearly is posed as the quid pro quo for recourse to a grievance procedure. Article VII, sections 1 and 3, limit grievances to those matters concerning a "breach" of or "application or interpretaton of this agreement." It is obvious that the dispute between the Carpenters and the City Complex contractors was not capable of being heard and determined under the Respondent's grievance machinery. Consequently, by joining the Carpenters' union strike, Respondent's employees were engaging in an activity that was not arbitrable and therefore not proscribed by the no-strike clause. *Inland Steel Co.*, 264 NLRB 84 (1982); *Southern California Edison Co.*, 243 NLRB 372 (1979), enfd. as modified 646 F.2d 1352 (9th Cir. 1981); *Gary-Hobart Water*, supra.

Additional evidence shows that the parties' intent or belief as to what the no-strike provision covered was unclear. At the outset, it is noted that the record is void of any evidence regarding any intent, understanding, or discussion had in 1949 when it first appeared in the contract, regarding the applicability of article I, section 2, to sympathy strikes or refusals to cross other unions' picket lines. Over the 30 plus intervening years that article I, section 2, had been in the contract, there have been numerous instances when employees performed work behind stranger picket lines, and numerous instances when they have refused to do so with impunity. In fact, Farthing, Respondent's customer service representative in Flagstaff, was doubtful whether the linemen would work on the City Complex because of the pickets. The only positive conclusion that may be drawn from past practice is that the Respondent had maintained a general policy of deferring service in the face of stranger picket lines, and of enlisting the services of the Union in obtaining removal of the pickets so that its employees would perform work at premises where disputes existed between other unions and employers.

Further evidence indicated there was no clear and unmistakable understanding that the no-strike clause covered sympathy strikes. During both the 1980 and 1982 negotiations, Respondent proposed changes in the language of article I, section 2, to "clarify" that sympathy strikes were prohibited. On both occasions the Union rejected the proposals and they were withdrawn. As the Board stated in *Gary-Hobart*, supra at 746, "By such conduct the Respondent demonstrated its uncertainty as to whether it had obtained a waiver of the right to engage in a sympathy strike in the no-strike clause it sought to change. The Union, on the other hand, by rejecting the proposed changes demonstrated its determination not to waive the right to honor another union's picket line." In the posthearing brief, Respondent states: "In the 1982 negotiations, it is clear that Gelinas proposed to modify Article I, Section 2 to include sympathy strikes, carefully explained what APS meant by the term sympathy strike, and he and other APS representatives fully answered all questions from Union representatives relating to that issue." It is argued that statements made by Bowden led the Respondent's negotiators to believe that the Union agreed that the language of article I, section 2, was broad enough to cover sympathy strikes, and it was on that basis that the proposed language change was withdrawn. The Union's negotiators denied Bowden made such a commitment. The evidence does not convince me that Bowden conceded that the language already encompassed sympathy strikes.

Other factors convince me there has never been an understanding or agreement between the Respondent and the Union that the language of article I, section 2, encompassed sympathy strikes. Article XI of the contract provides that "all previous agreements and understandings . . . and all negotiations, whether oral or written . . . are superseded by this agreement." Obviously the language of article I, section 2, does not contain express language waiving the right to engage in sympathy strikes. Nor, for that matter, do any of the letters of mutual agreement appended to the current collective-bargaining agreement, including the March 31 letter from Gelinas to Bowden confirming understandings arrived at during 1982 negotiations. While there was testimony that other oral understandings were made, I am convinced that an agreement on sympathy strikes—which Respondent admits was an important item—would have been recorded in the March 31 letter of understanding if in fact reached.

In sum, I conclude that Respondent's attempt to broaden the no-strike clause to cover "sympathy strikes" was not successful. The collective-bargaining agreement does not prohibit unit employees from honoring picket lines of other unions, and the evidence fails to establish that the parties had a clear understanding when they executed the last contract that it barred sympathy strikes. The contract is a complex document that obviously was not written by amateurs. If the parties had intended that sympathy strikes should be included within the prohibition of article I, section 2, they could have said so in clear unequivocal terms. Instead, the Respondent has sought to include it by amending article I, section 2, during the last two negotiation terms. Accordingly, I find that Murphy, Wilson, Nelson, Smith, Miles, Birner, Finfrock, and Hudson were engaged in protected concerted activity when they refused to work on the Flagstaff City Complex.

Respondent also argues that disciplining the eight men for refusing to carry out their job assignments on July 28 was justified because supported by a legitimate and substantial business necessity, in that: (1) erection of the steel columns presented grave danger of contact with the energized overhead lines scheduled for removal; (2) Respondent had already postponed the work at the site because of the pickets and it had been ordered by the city to complete the work immediately; and (3) it had obtained assurances from the Carpenters Union that its employees would not be in danger of violence. Respondent contends that since under *Redwing Carriers*, 137 NLRB 1545 (1962), and *Newberry Energy Corp.*, 227 NLRB 436 (1976), it would have been justified in discharging the eight employees, "a three day suspension was certainly lawful." It contends, "To read *Redwing* and its progeny to hold that permanent replacement is the Employer's only alternative to complete business disruption and incredibly high liability exposure is patently unfair and elevates form over substance."

The Board's position is set forth in *Gary-Hobart Water*, supra at 746 thusly:

> The Board has held in cases involving sympathy strikes, although primarily when the activity was engaged in at the premises of another employer, that although the refusal to cross the picket line of another union is protected this right must be balanced against the business interest of the employer, and that it is only when the employer's business interest to replace employees is such as clearly to outweigh the employees' protected right that an invasion of the statutory right is justified (*Redwing Carriers, Inc.*, 137 NLRB 1545; *Overnite Transportation Co.*, 154 NLRB 1271). The termination of employees is justified where the employer "acted only to preserve efficient operation of his business, and terminated the . . . employees only so it could *immediately or within a short period thereafter replace them*. . . ." (*Redwing Carriers, supra*, 1547). [Emphasis added.]

In *Southern California Edison*, supra at 372, the Board went on to state that "an employer may not merely equate the employee's refusal to cross the picket line with an act of insubordination." In the instant case it is clear that the suspensions were not to preserve Respondent's efficient operations, but were in fact punitive. Upon their return to the yard from the City Complex, Herring asked each of the sympathy strikers if he realized he was taking part in a work stoppage and told them "if they continued to refuse to work this job, it would be considered insubordination and could result in their termination." Moreover, as the work was completed in the following 2 days by the alleged discriminatees—prior to replacement or issuance of the disciplinary letters—the Respondent could no longer claim economic necessity as a basis for the discipline. It is clear that the discipline was imposed for engaging in a sympathy strike on July 28.

In sum, I find that the eight linemen were not disciplined because of economic necessity but for engaging in a sympathy strike, a protected concerted activity. None of the men was either replaced or terminated, and the work was in fact performed by them prior to the issuance of the disciplinary suspensions. Accordingly, by issuing staggered 3-day suspensions to the eight employees, Respondent violated Section 8(a)(1) and (3) of the Act.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union and Arizona State District Council of Carpenters, United Brotherhood of Carpenters and Joiners of America, AFL–CIO are each labor organizations within the meaning of Section 2(5) of the Act.

3. By issuing 3-day staggered suspensions to Jerry Murphy, Edwin M. Wilson, Gerald Nelson, Gary Smith, Clifford Miles, Nap Birner, Mark R. Finfrock, and Dale Hudson for engaging in a sympathy strike, Respondent has engaged in unfair labor practices in violation of Section 8(a)(1) and (3) of the Act.

4. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found the Respondent has engaged in certain unfair labor practices, I shall recommend that it cease and desist therefrom and that it take certain affirmative action designed to effectuate the policies of the Act.

Having found that Respondent unlawfully suspended Jerry Murphy, Edwin M. Wilson, Gerald Nelson, Gary Smith, Clifford Miles, Nap Birner, Mark R. Finfrock, and Dale Hudson in violation of Section 8(a)(1) and (3) of the Act, it is recommended that Respondent expunge from its records any reference to such suspensions because they refused to cross a picket line establised at the Flagstaff City Complex premises by the Carpenters Union, and notify each of them in writing that this has been done and that evidence of this unlawful discharge will not be used as a basis for future personnel actions against him. It is further recommended that each of the above discriminatees be made whole for any loss of pay or other employment benefits he may have suffered as a result of said suspensions. Backpay and interest thereon shall be computed in the manner prescribed by *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and *Florida Steel Corp.*, 231 NLRB 651 (1977).[6]

[Recommended Order omitted from publication.]

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[6] See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962).

The Cooper Union for the Advancement of Science and Art *and* Cooper Union Federation of College Teachers, affiliated with New York State United Teachers, American Federation of Teachers, AFL–CIO. Case 2–CA–17483

5 February 1985

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS HUNTER AND DENNIS

On 15 December 1983 Administrative Law Judge Robert T. Snyder issued the attached decision. The General Counsel and the Charging Party filed exceptions and supporting briefs, the Respondent filed cross-exceptions and a brief in support of the order dismissing the complaint, and the New York City Central Labor Council, AFL–CIO filed an amicus brief in support of the Charging Party's exceptions.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions only to the extent consistent with this Decision and Order.

The judge found that the Respondent did not violate Section 8(a)(5) and (1) of the Act by withdrawing recognition from and refusing to bargain with the Union. For the reasons set forth below, we do not agree.

The Respondent is a private, state-chartered, tuition-free institution of higher education consisting of three professional degree-granting schools: Engineering, Art, and Architecture. It has a student body of approximately 900, about half of whom are engineering students, and a full-time faculty of approximately 60. In 1974 the Union was certified to represent a unit of full-time faculty members and librarians. Part-time (adjunct) faculty were not included in the bargaining unit. In 1978 the parties entered into their only collective-bargaining agreement, which expired in August 1980. Shortly before the expiration of the agreement the Respondent by its president Lacy informed the Union that it would not negotiate with the Union for a new agreement because it considered the faculty to be managerial employees within the meaning of the Supreme Court's opinion in *NLRB v. Yeshiva University*, 444 U.S. 672 (1980). The issue in this case is whether the faculty employed by the Respondent "formulate and effectuate management policies by expressing and making operative the decisions of their employer,"[2] such that they are managerial employees excluded from the coverge of the Act. We summarize below the facts which we regard as determinative of the issues. We review first the formal governance structure for faculty participation in institutional decision making and then actual governance practice.

Formal Governance

The Respondent's charter vests ultimate management and control in a board of trustees. Currently there are 16 trustees, 3 of whom are alumni representatives. There are no faculty representatives. The Respondent's bylaws vest in the president general supervisory powers over its activities, subject to the trustees' control. The bylaws provide that the president's powers include the appointment and removal of administrators, faculty, and staff, and the determination of their duties. The bylaws also vest general supervisory powers over academic affairs and academic officers in a provost. Since 1964 the faculty's role in institutional decision making has been defined formally in a faculty policy manual and a set of "governances." Each professional school has its own governance. The governances have been amended a number of times. Pursuant to the governances, the faculty members of each school meet as a separate deliberative body, collectively referrred to as the school's faculty. The governances define the faculty of each school to include, as voting members, the dean and any assistant or associate deans, as well as all full-time faculty members of the school. The dean of each school is designated the permanent chairperson of its faculty with responsibility for calling and presiding over faculty meetings, preparing the agenda, and communicating faculty actions to the president. The governances call for two or three regular faculty meetings each year (depending on the school) and any number of special meetings. The governances also provide for institutionwide joint faculty meetings to be called and presided over by the president. No frequency for such meetings is specified. Each governance provides that it may be amended by a vote of two-thirds of the school's faculty and approval by the trustees.

Under the governances, the duties and responsibilities of the faculties are to be carried out primarily through members' participation in standing committees. Each school has its own administrative, admissions, academic standards, and curricu-

[1] No exceptions were taken to the judge's findings that the Respondent's assistant librarians excercise neither supervisory nor managerial authority.

[2] *Yeshiva*, supra at 682, quoting *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 288 (1974).

lum committees.[3] There are also two institutionwide standing committees, Academic Freedom and Tenure (AF&T) and Student Activities, and an institutionwide student-faculty Senate.

According to the governances, the administrative committee of each school is responsible for the "general administration" of the school including financial and personnel matters; for approval of curriculum changes proposed by the curriculum committee; and for nomination of candidates for positions on the standing committees. The administrative committee is required to represent faculty interests and to interpret those interests to the president, and it is to serve as advisor to the dean. The dean of each school chairs its administrative committee. In the Schools of Art and Architecture, full-time faculty members constitute both a numerical and a voting minority on the administrative committees, sharing seats with administrators, students, and adjunct faculty members.

The curriculum committees have responsibility for receiving, formulating, and processing proposed curriculum changes. The curriculum committee in each school must forward proposals for curriculum changes to the administrative committee, which may approve minor changes (such as the substitution of one course for a similar course), but must forward proposals for major changes to the faculty for its approval. The faculty must then submit major curriculum changes which it approves to the president. In the Schools of Art and Architecture, the membership of the respective curriculum committees consists of two full-time faculty members, one adjunct faculty member, and one student as voting members; and the dean of the school, the dean of admissions, and an alumni representative as nonvoting members. The chairperson must be a full-time faculty member. In the Engineering school, the committee is composed of one full-time faculty member from each of the four disciplines. The dean of the Engineering school is designated an "ex officio" member, but the Engineering governance, unlike the governances for Art and Architecture, does not provide that the dean has no vote.

The academic standards committees have responsibility for receiving and considering proposed changes in the grading system and academic standards. Minor changes may be acted on by the committee. Major changes must be approved by the faculty and the president. The committees also have final authority to pass on petitions for readmission from students who have withdrawn or have been dropped for academic reasons, as well as responsibility for compiling a list of recommended candidates for graduation. In the Schools of Art and Architecture, each academic standards committee is composed of three full-time faculty members, one student, and one adjunct faculty member as voting members; and the dean of the school, the dean of admissions, and the dean of students as nonvoting members. The chairperson must be a full-time faculty member. In Engineering, the committee is composed of four full-time faculty members and three deans. Again, the deans are designated "ex officio," but, unlike the deans on the corresponding committees in the other two schools, are not designated as nonvoting.

The admissions committees are responsibile for establishing and reviewing admissions procedures pursuant to institutional and faculty policies. In the Schools of Art and Architecture, the committees are each composed of two full-time faculty members, one student, and one adjunct faculty member as voting members; and the dean of the school, the dean of admissions, and an alumnus as nonvoting members. The chairperson must be a full-time faculty member. In Engineering, the committee is composed of three full-time faculty members, the dean of admissions, and a student as voting members; with the dean of the school as an ex officio member.

The Academic Freedom and Tenure Committee is an all faculty, institutionwide body with limited authority set forth in the faculty policy manual to hear disputes involving alleged infringements of faculty members' academic freedom and termination of tenured faculty allegedly without adequate cause. Adequate cause for termination of tenured faculty is defined as professional incompetence, conviction of a crime involving moral turpitude, or a change in academic program or the existence of a financial condition that requires elimination of the position. Actions of the AF&T Committee are subject to review by the trustees. The committee has no authority to consider types of disciplinary action or other grievance matters beyond those specified in the manual.

The Student Activities Committee is an institutionwide committee with responsibility for formulating, proposing, and monitoring student policy. Students constitute a majority of the voting members; the dean of students is a voting member.

The Senate's role is to study the goals, standards, facilities, planning, development, and problems of Cooper Union, and to serve as advisor to the president. Its voting membership is approximately balanced between full-time faculty members and stu-

[3] According to the governances, each school also has a calendar and schedules committee. However, the record reflects that the calendar and schedules committees have been inoperative for most of the 10 years preceding the hearing.

dents,[4] with four administrators including the president serving as nonvoting members.

An examination of the composition of the governance committees reveals that full-time faculty (bargaining unit) members are a numerical minority on most and are a voting majority on only about half of the committees. In two of the Respondent's three schools, Art and Architecture, full-time faculty members are a voting majority only on the academic standards committees. Full-time faculty members chair most of the committees. However, the administrative committee in each school, which has the broadest authority of any committee (including the authority to review actions of certain other committees and authority to nominate members to the other committees), is chaired by the dean.

The governances give the faculty certain responsibilities beyond those exercised through standing committees and the Senate. These include recommending degree candidates to the president, advising the respective deans on the filling of faculty positions, and recommending candidates to fill vacancies in the offices of dean and president. In the filling of faculty positions, the governances require only that the dean "consult" with faculty members. When a deanship or the presidency is to be filled, the governances call for the formation of a special faculty committee to submit a list of recommended candidates.

The faculty policy manual sets forth certain rights of faculty members beyond the rights and duties specified in the governances. It provides that a faculty member is eligible for sabbatical leave after each consecutive 7 years of service, but that the granting of sabbaticals to eligible members is in the discretion of the president. The manual sets time limits for achieving tenure. It provides that a faculty member should be granted tenure "as soon as he has demonstrated his competence and a satisfactory development of his teaching and scholarship." It encourages faculty members to engage in their own research, writing, artistic endeavors, and professional activities including consulting, so long as such activities do not conflict with academic duties.

Faculty Authority in Practice

Having reviewed the faculty's formally defined status, we now examine the role actually played by the faculty in the affairs of the Respondent during the approximately 10 years preceding the hearing in the present case.

Prior to 1972 the teaching staff of Cooper Union was organized in departments chaired by faculty members. By action of the trustees that year, taken without faculty vote or other faculty approval, the departments were consolidated into larger divisions, with division heads appointed by the president. The administration thereafter rejected a faculty recommendation that the departmental structure be restored and rejected a separate faculty recommendation that division heads be elected by faculty members.[5] Among other changes brought about by the elimination of the departmental structure was a decrease in faculty authority over the academically related activities of nonteaching staff such as laboratory assistants and secretaries. In addition to replacing the departmental structure with a divisional structure, the trustees in 1972 also created new degrees in mathematics and science. They also created and filled the position of provost. The faculties did not have an opportunity to vote on or otherwise approve or disapprove these changes.

In 1973 the provost, Kaplan, issued a report recommending increasing class size, increasing the student-faculty ratio, increasing teaching loads, severely limiting grants of tenure, reducing the number of full-time faculty through attrition, and increasing the proportion of adjunct faculty. While the Senate was considering these proposals, they were implemented without faculty approval and over strong faculty opposition. When members of the Senate confronted the provost with the fact that the proposals were being implemented while still under Senate consideration, the provost responded to the effect that the Senate could be most useful by simply approving the proposals. In accord with the provost's recommendation, then president White began rejecting many tenure recommendations even where a candidate had received unanimous faculty support. The decisions denying tenure were made largely for financial reasons, ignoring the exclusively academic criteria for the granting of tenure set forth in the faculty policy manual.

In 1975 the trustees again restructured the institution without faculty participation and over strong faculty opposition. The 1975 reorganization eliminated the divisions and the division head positions, leaving the schools the primary structural academic units. It divided what had been the School of Art and Architecture into two separate schools. It es-

[4] Two Senate seats may be filled either by full-time faculty members or by adjuncts. Therefore, full-time faculty members may or may not be a voting majority of the Senate, depending on whether those seats are filled by full-time faculty members.

[5] The Respondent's then president White rejected a governance amendment passed by the faculty of the School of Art and Architecture (then a single unit) requiring division heads to be elected by the faculty.

tablished a new "Faculty of Liberal Arts and Science" (LA&S) entirely outside of the degree-granting schools, placing nearly half the faculty members (some from Art and Architecture and some from Engineering) in the new group. The LA&S faculty members were thereby disenfranchised, no longer having a vote on the faculty of any degree-granting school, or authority to participate in its governance committees. (No governance was established for the LA&S faculty.) Provost Kaplan was designated acting dean of the new faculty. Also in the 1975 restructuring, the trustees eliminated the curricula leading to degrees in mathematics, physics, and distributive science, and eliminated physical education as a regular part of the curriculum. As a result, a number of tenured faculty members were permanently laid off.

Faculty opposition to the changes brought about in 1975 was widespread and sustained, particularly with respect to the creation of the LA&S faculty and the elimination of the degree programs. During a senate meeting in which strong criticism of the 1975 changes and the way in which they were implemented was voiced, White informed the Senate that he was neither required to consult with the Senate nor to accept its advice. The Senate then voted to cease meeting because it was a group without any power. It remained defunct for approximately 3 years, until after the collective-bargaining agreement was entered into. During the same period, the administration successfully resisted an attempt by the tenured faculty members who had been laid off to gain a hearing before the Academic Freedom and Tenure Committee.[6]

Also following the 1975 reogranization, the dean of the School of Engineering, without faculty consideration, promulgated an amended governance for that school. The dean's governance eliminated the administrative committee, delegating all administrative functions to the dean. It also created a new interim curriculum committee chaired by the dean. These amendments apparently remained in effect for approximately 4 years until newly revised governances were issued after the bargaining agreement was entered into.

In the late spring of 1977 President White announced plans for Cooper Union to enter into a library consortium agreement with New York University (N.Y.U.) and another university under which, among other things, administrative control and purchasing for the libraries of all three schools would be delegated to an N.Y.U. administrator. White asked for faculty response to the plan. The faculties of all three schools strongly opposed implementation of any such consortium agreement, pending further study. They voiced concerns on academic grounds including fear of loss of valuable library materials from Cooper Union's libraries and inability to readily procure new materials for the library. During the summer recess, before the faculties had had further opportunity to consider the matter, and over their expressed opposition, the Respondent entered into the consortium agreement. Two years later, in the summer of 1979, the library consortium agreement was extended prematurely and without notice to the faculty at a time when a faculty committee was at work on proposed revisions to the agreement.

In 1978 an organization responsible for accrediting educational institutions, the Middle States Association of Colleges and Schools, issued a report on Cooper Union, following a detailed review of all aspects of the institution. The report commended Cooper Union in certain areas, particularly the handling of its financial resources, but found serious problems in the areas of faculty morale, faculty governance, long range planning, and the library consortium. The report found that the Respondent's deans were unusually strong and its faculty unusually weak. The report noted that the administration of Cooper Union had asserted the right to take actions affecting the institution in the absence of advice from the faculty or the Senate, and even contrary to such advice and then commented, "No doubt the right exists but to the degree it is exercised, confidence in faculty governance is subverted, and faculty morale declines." The report was especially critical of the Respondent for the morale problems caused by the creation of the academically isolated and disenfranchised LA&S faculty. The report also noted the absence of any provision for faculty review of institutionwide academic policies and indicated that the writers shared the concerns of the faculty that the library consortium would not lead to an improvement in the institution's library services.

The collective-bargaining agreement, entered into in 1978, contained, among others, provisions setting salary levels; stating principles of academic freedom; setting procedural guidelines for the appointment, promotion, and tenure of faculty members; defining workload; establishing a grievance and arbitration procedure; and defining manage-

[6] The Respondent took the position that the elimination of the degree programs was not a change in academic program within the meaning of the academic freedom and tenure provisions of the faculty policy manual, and therefore was not cognizable by the Academic Freedom and Tenure Committee. The laid-off faculty members sought to gain a hearing before that committee by bringing a state court suit. The Respondent took the position before the state court that the trustees had an unreviewable right to make decisions on academic programs and cited other examples of the trustees having done so without faculty input. The state court denied the laid-off faculty members' request for a hearing before the Academic Freedom and Tenure Committee.

ment rights. Shortly after the agreement went into effect, the Union's president Tulchin and the Respondent's president White jointly issued governances which reflected changes necessitated by the bargaining agreement, such as the elimination of the Academic Freedom and Tenure Committee in view of its functions having been taken over by the grievance and arbitration procedure. Tulchin also entered into discussions with Provost Kaplan concerning the LA&S faculty. These discussions, sanctioned by the Union's executive committee, resulted in a 1979 decision to reintegrate the LA&S faculty into the faculties of the degree-granting schools, reenfranchising them as members of those faculties.

Following the Respondent's 1980 withdrawal of recognition from the Union, the Respondent's new president Lacy revised the governances to reinsert those provisions taken out because of the bargaining agreement and to reflect the structural changes brought about by the reintegration of the LA&S faculty. The faculty did not participate in or vote on these revisions. In conformance with the revised governances, Lacy reinstituted the Academic Freedom and Tenure Committee.[7] Elected faculty members agreed to serve on that committee under protest. In 1981 Lacy announced certain increases in faculty salary levels. The faculty did not participate in setting the amounts of these increases.

In addition to the major institutional decisions and events outlined above, certain other facts are indicative of the relative authority of the Respondent's faculty and its administration. As described more fully in the judge's decision, faculty members regularly participate, primarily through the governance committees, in decisions regarding admissions, academic standards (including student retention, readmission, and graduation), and curriculum. Yet the effectiveness of the faculty's role in each of these areas is limited. A limitation on the faculty's authority which pervades all three areas is the extent of administration and other nonfaculty representation on the committees, as described above.

In the area of admissions, although faculty members play a major role in setting admissions standards and, in the Schools of Art and Architecture, passing on the applications of individual candidates, goals for the numbers of students to be admitted are determined by the administration. In the School of Engineering, the exact number to be admitted is set by the administration. Further, the dean of admissions testified that he implemented a program for admissions of minority students in engineering without faculty or admissions committee approval and in the presence of mixed faculty opinion.

In the curriculum area, courses suggested by individual bargaining unit or nonbargaining unit teaching staff are frequently instituted on the approval of the dean without going through the curriculum and administrative committees. In addition to the major curriculum changes noted above brought about by decision of the trustees to create and eliminate degree programs, a curriculum-related change was brought about by the dean of the Engineering school in the area of physics over the unanimous opposition of the full-time physics faculty.[8]

In the area of academic standards, the faculty plays perhaps its strongest role. The governances make decisions of the academic standards committees final in the area of student petitions for readmission. Grade point averages required to remain enrolled and to graduate are set by the committees with faculty approval. Although theoretically subject to administrative approval, there is no evidence that committee and faculty recommendations in this area have ever been overturned. Nevertheless, the authority of faculty members in the academic standards area is mitigated by the admitted active participation and voting—in contravention of the governances—of the deans of admissions and students on all three academic standards committees.[9] This means that although a theoretical voting majority on these committees, faculty members in fact are a voting minority. Faculty and administrators share responsibility for developing the academic calendar and course schedules, but the deans assign faculty members to teach required courses. Although faculty members have some input, the dean's view prevails in the event of a conflict.

A final limitation on the exercise of faculty authority in academic matters is the ability of administrators in key positions to prevent faculty groups from meeting. The Respondent's president has sole authority to call joint faculty meetings. Following a 1975 joint faculty meeting in which a motion was

[7] When Lacy reinstituted the AF&T Committee it had been inoperative for approximately 6 years. Its members had resigned in 1975 during a dispute over whether the committee should hear the complaint of a faculty member who had been denied tenure.

[8] The dean determined that two physics courses should be among the courses used for an experimental program employing innovative teaching methods. The full-time physics faculty, for academic reasons, unanimously opposed using the new program in the physics courses. The dean insisted that the courses be taught in the experimental mode and brought in a retired physics professor to teach them when the full-time faculty members refused.

[9] We further note that in two instances the dean of the School of Architecture, in contravention of normal procedure and over the apparent opposition of the faculty involved, permitted students who had failed a required fourth year course, which was prerequisite to a required fifth year course, to take both courses simultaneously in their fifth year, thereby also permitting the students to exceed the normal credit limit in their fifth year.

made to censure President White for allegedly interfering with the Academic Freedom and Tenure Committee, White called no more faculty meetings for the remaining 4 years of his presidency. Similarly, the dean of the Architecture school prevented its administrative committee from meeting for a period of 4 years from 1977 to 1981 by failing to call any meetings. During that time the administrative committee's function in reviewing proposed curriculum changes was simply bypassed.

In nonacademic matters, the very limited effective role played by the faculty has been set forth fully in the judge's decision. Certain points in this regard bear emphasis. The faculty has virtually no role in the areas of budget and facilities. Major decisions to sell and renovate facilities and to relocate personnel and activities within them have been made without faculty input or over faculty opposition. Similarly, faculty office space is assigned by the administration and, at least in the Engineering school, even faculty access to ordinary office supplies is restricted. Faculty members have no input into the appointment, retention, or employment conditions of nonteaching staff such as laboratory assistants, shop assistants, library personnel, and secretaries. In regard to the appointment of teaching staff, although the governances call for a consultative faculty role, such a role has frequently been bypassed. Similarly, although faculty members have regularly been consulted on tenure decisions, their recommendations have frequently been reversed. Faculty members have no role in granting sabbatical leaves. In the selection of deans, the faculty role called for in the governances has sometimes been ignored. In the selection of a president to take White's place in 1979, the procedure for faculty input called for in the governance was not followed.[10] Other administrative positions have been created and filled without faculty input.

The Legal Standard—*Yeshiva* and Its Progeny

In *NLRB v. Yeshiva University*, 444 U.S. 672 (1980), the Supreme Court found that the faculty members were managerial employees excluded from the coverage of the Act. It defined managerial employees, as both the Board and the Court previously had, to be those who "formulate and effectuate management policies by expressing and making operative the decisions of their employer."[11] The Court refined this definition by holding that managerial employees "must exercise discretion within or even independently of established employer policy and must be aligned with management" and normally must "represent management interests by taking or recommending discretionary actions that effectively control or implement employer policy."[12] The Court held that the purpose of excluding managerial employees, like the purpose of excluding supervisors from the Act's coverage, is to assure employers of the undivided loyalty of their representatives.

The Court found that the faculty at Yeshiva, through participation in faculty meetings and on faculty committees, determined each school's curriculum, academic calendar, course schedules, admissions and matriculation standards, teaching methods and grading policies, and sometimes determined tuition, the size of the student body, and the location of a school. The Court concluded that the faculty's control of academic matters was absolute. In nonacademic matters, the Court found that the faculty played the predominant role in decisions on faculty hiring, tenure, sabbaticals, termination, and promotion. The Court noted that although the final decisions on such personnel matters are made by the administration, the faculty makes recommendations in all cases and "the overwhelming majority of faculty recommendations are implemented."[13] The Court also noted that, at least in some of the schools, budget requests were made by faculty, and that in the case of one school such requests had never been rejected. The Court found unpersuasive the fact that many faculty decisions were subject to rarely exercised veto power in the administration. In concluding that the Yeshiva University faculty were managerial employees, the Court relied primarily on their extensive authority over academic affairs, but also noted their predominant authority in nonacademic matters. The Court noted that at other institutions, unlike Yeshiva, faculty members may be nonmanagerial, depending on the extent of their authority, commenting, "It is plain, for example, that professors may not be excluded merely because they determine the content of their own courses, evaluate their own students, and supervise their own research."[14]

Since the Supreme Court decided *Yeshiva*, the Board has determined the managerial or nonmanagerial status of college and university faculty members in a variety of faculty settings. For example, in

[10] Instead of forming the special faculty committee called for in the governances to submit names of qualified candidates to the trustees, a large number of candidates were screened and interviewed with no faculty input. The Senate was then permitted to interview and make recommendations on the top two candidates previously selected by the administration. The candidate whom the Senate recommended, Lacy, was chosen by the trustees.

[11] 444 U.S. at 682, quoting *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 288 (1974).

[12] Id. at 683.

[13] Id. at 677.

[14] Id. at 690–691 fn. 31.

Ithaca College, 261 NLRB 577 (1982), the Board found that the faculty, through participation in both institutionwide and divisional bodies, determined curriculum, admissions policies, academic standards, class size, course schedules, teaching assignments, graduation requirements, and other academic matters. The Board noted that although recommendations of institutionwide academic policy subcommittees composed entirely of faculty members must be approved by a committee on which students and administrators also participate, the student-faculty-administration committee had invariably approved the recommendations of the faculty subcommittees. In concluding that the faculty controlled curriculum changes, the Board noted that, although the deans in some schools must approve curriculum changes, the dean in one school had approved all of about 500 such changes recommended by the faculty. The Board also found that the faculty controlled the hiring of faculty members and deans, faculty tenure, and had an effective voice in facilities planning and budgetary matters. The Board concluded that the faculty were managerial employees under *Yeshiva*.

By contrast, in *Bradford College*, 261 NLRB 565 (1982), the Board found that the faculty were nonmanagerial where governance documents indicated they had substantial authority, but in practice they had little. The Board found that the faculty did not effectively determine teaching loads, salaries, budget, the filling of administrative positions, faculty evaluations, or certain faculty personnel actions. The Board also found that the adminstration had canceled an academic session without faculty approval, had sometimes altered grades given by faculty members, and at least in some cases had failed to follow faculty recommendations for the hiring of new faculty members. In determining that the faculty lacked effective authority, the Board noted a statement of the president of the college to the effect that it was the administration and not the faculty which set academic and administrative policy. The Board also noted an accrediting agency's report which found disregard for stated procedures and for faculty participation in the administration of the college. The Board concluded, "In sum, while the faculty and division chairs have the written right to make recommendations, the record shows that such recommendations were often ignored or reversed by the president, by the academic dean, or by both with respect to curriculum, admission policies, graduation of students, course loads, course scheduling, grading of students, faculty hiring or retention, tuition, and faculty salaries."[15]

In a case which, like the present one, involved the faculty of a professional degree-granting institution, *College of Osteopathic Medicine & Surgery*, 265 NLRB 295 (1982), the Board found that the faculty were managerial employees. There the faculty had drafted its own constitution providing for monthly faculty meetings, and had established faculty committees. All voting members of many of the committees, including those concerned with promotion, tenure, postgraduate education, and student promotion and evaluation, were elected by the faculty. In addition to determining curriculum and other academic matters, the college's faculty also was instrumental in bringing about a fundamental change in academic program (conversion from a 3-year to a 4-year course of study). Further, the faculty had considerable authority in faculty hiring, rank, promotion, and tenure decisions. The Board concluded that the faculty had "almost plenary authority in academic matters and significant input into important nonacademic matters."[16] Citing *Yeshiva*, the Board held that the fact that many faculty actions were in the form of recommendations with final authority resting in the administration was not determinative since "faculty recommendations are almost always followed."[17]

Analysis

In the instant case, the judge concluded that under *Yeshiva* and subsequent Board decisions the faculty of Cooper Union have sufficient authority to formulate and effectuate policy to be excluded from the coverage of the Act as managerial employees, and consequently recommended dismissing the complaint. Our disagreement with the judge's conclusion and recommendation stems from our disagreement with certain of his factual findings and from our disagreement with his application of *Yeshiva* principles to the facts of this case.

The judge based his conclusion that the Respondent's faculty members are managerial employees partly on his findings (1) that the faculty predominate in "almost all" of the governance committees; (2) that the administrative committees play a central role in faculty involvement in both academic and administrative (financial and personnel) matters; and (3) that significant faculty input into nonacademic matters was shown in the Union's 1979 negotiations with the Respondent resulting in

[15] *Bradford College*, 261 NLRB at 566–567. The Board also noted that faculty were not granted tenure as a factor indicating lack of faculty authority.

[16] *College of Osteopathic Medicine & Surgery*, 265 NLRB at 297.

[17] Id.

the reintegration of the Liberal Arts and Science faculty into the degree-granting schools. These key findings misinterpret the evidence. It is clear, as noted above, that even according to the terms of the governances, full-time faculty (bargaining unit) members constitute a numerical minority on most of the governance committees and constitute something less than a voting majority on about half of them. The proportion of faculty members who vote on the committees is further reduced in some cases by administrators voting on committees in contravention of the terms of the governances.

We further disagree with the judge's finding that the faculty's role on the administrative committees is indicative of extensive faculty authority. First, as the judge noted, each administrative committee is chaired by a dean who sets the agenda and may prevent the committee from meeting, as the dean of the School of Architecture did for 4 years. Second, as noted above, the academic standards committee of the largest school, Engineering, apparently was entirely eliminated for a 4-year period by the dean's unilateral governance amendment. Third, the record reflects an extremely limited role played by the administrative committees, when they are functioning, in personnel, financial, and other nonacademic matters. Finally, full-time faculty members constitute a voting minority on the administrative committees in the Schools of Art and Architecture.

Although the judge found, and we agree, that the faculty play a weaker role in nonacademic than in academic matters, he found a significant instance of faculty input into nonacademic decision making in the Union's role in negotiating the 1979 reintegration of the LA&S faculty into the degree-granting schools. While these negotiations did represent faculty involvement in matters which had both academic and nonacademic aspects, we note that the reintegration and reenfranchisement of the LA&S faculty represented a return to the status quo ante which had been pressed by the faculty in a variety of forums for the 4-year period since the administration created the separate faculty. Further, the Respondent's agreement to return to the status quo ante came only after the Middle States Association accrediting agency had strongly criticized it for the isolation, disenfranchisement, and consequent demoralization of the LA&S faculty. Under these circumstances, we do not think it indicative of strong faculty involvement in institutional policy making that the negotiations succeeded in 1979. The entire episode of the creation of the LA&S faculty, its persistence as an isolated group for 4 years, followed by its reintegration into the rest of the institution's governance system, is more illustrative of the ability of the administration to effectively resist faculty pressure than of the faculty's active participation in institutionwide decision making.[18]

Although the Respondent's faculty clearly exercise considerable authority in academic areas such as curriculum, admissions, academic standards, course assignments, and scheduling, such authority not only is not absolute as was the authority of the *Yeshiva* faculty, but frequently has been made ineffective by the administration in the variety of ways described above. Of particular significance in this regard are the administration's creation and elimination of entire degree programs without faculty input or over faculty opposition,[19] the exclusion from academic governance of a large proportion of the faculty for a number of years, the amendment of governances without faculty vote,[20] creation of a special admissions program without faculty approval, and the key roles played by administrators in chairing the faculties, chairing the joint faculty, chairing the administrative committees, and participating actively in other committees. Also highly significant is the fact that the administration first entered into and later extended the library consortium agreement over massive faculty opposition based on academic grounds. In this context, we regard the fact that faculty members are actively involved in making more routine academic decisions such as the substitution of one course for another and, in the Schools of Art and Architecture, the admission of individual applicants does not rise to the level of "represent[ing] management interests by taking or recommending discretionary actions that effectively control or implement employer policy," or "formulat[ing] and effectuat[ing] management policies by expressing and making operative the decisions of their employer" within the meaning of *Yeshiva*. It is clear that the Cooper Union faculty have considerably less effective authority in the academic sphere than did the faculty in *Yeshiva* and the faculties in various Board deci-

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[18] Further, we do not regard the faculty's participation in the Academic Freedom and Tenure Committee as indicative of a strong faculty role in nonacademic matters in view of the fact that that committee did not function from 1975 to 1981, and in view of the Respondent's role in preventing it from hearing certain issues involving faculty tenure prior to that time.

[19] In this respect, the present case is similar to *Bradford College*, supra, where the elimination of an academic program without faculty input was a factor relied on by the Board in finding the faculty nonmanagerial.

[20] In this and the other ways, noted above, where stated governance requirements for faculty input have been overlooked by the administration, the present case bears further similarity to *Bradford College*. Similarities also include accredidation agency reports critical of the relative lack of faculty authority in each institution and statements by the respective presidents minimizing faculty authority.

sions following *Yeshiva* in which the faculty have been held managerial.[21]

Moreover, unlike the *Yeshiva* faculty and the faculties involved in subsequent Board decisions, the Cooper Union faculty lacks substantial input into nonacademic matters such as budget, facilities planning, and personnel decisions. In this regard we note particularly that decisions on the hiring, promotion, tenure, and retention of teaching staff are frequently made in the absence of faculty recommendations, and when they are made following faculty recommendations, those recommendations are frequently rejected.[22]

For the reasons stated above, we conclude that the Respondent's full-time faculty members are not managerial employees under *Yeshiva*, but are employees entitled to the protection of the Act.[23] Accordingly, the Respondent was required to bargain with the Union as the certified representative of the Respondent's full-time faculty and librarians. Therefore, we conclude that, by withdrawing recognition from the Union and thereafter refusing to bargain with it, the Respondent has violated Section 8(a)(5) and (1) of the Act, as alleged.

THE REMEDY

Having found that by engaging in the above-described conduct the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist therefrom and from any like or related unfair labor practices, and to bargain on request with the Union.

ORDER

The National Labor Relations Board orders that the Respondent, The Cooper Union for the Advancement of Science and Art, New York, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Withdrawing recognition from and thereafter failing and refusing to bargain collectively with the Union as the exclusive bargaining representative of the employees in the bargaining unit described below.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, recognize and bargain with the Union as the exclusive representative of the employees in the following appropriate unit on terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement; and provide the Union, on request, information necessary for collective bargaining:

> All faculty on full-time appointment including instructors, assistant professors, associate professors, full professors and librarians and assistant librarians but excluding all other employees, including the president, deans, assistant deans, acting deans, division heads, acting division heads, visiting faculty, secretaries, guards, library head, library assistants, library technicians, researchers, laboratory managers, directors, administrators, administrative assistants, administrative counselors, controller, registrar, provost, maintenance employees, laboratory technicians, laboratory assistants, engineering technicians, shop assistants and all supervisors as defined in the Act.

(b) Post at its facility in New York, New York, copies of the attached notice marked "Appendix."[24] Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[21] For example, in *Ithaca College*, supra, the Board relied on the invariable adoption of faculty recommendations in academic areas as indicative of faculty authority. In the present case, faculty wishes in academic areas have frequently been ignored. Similarly, in *College of Osteopathic Medicine & Surgery*, supra, the Board relied on 100 percent faculty composition of key committees and faculty initiation of a major change in the entire academic curriculum as indicative of faculty authority. In the present case, by contrast, only 1 of some 14 faculty committees is 100 percent faculty in composition, and it was inoperative for most of the 10 years prior to the hearing, and major changes in academic curricula, such as creation and elimination of degree programs, have been made without effective faculty input.

[22] This pattern of ineffective faculty voice in faculty personnel decisions stands in contrast to the strong role played by the faculty in such cases as *Ithaca College and College of Osteopathic Medicine & Surgery*.

[23] In light of our finding that the Respondent's full-time faculty members are employees entitled to the protection of the Act, we further find that the Union is a labor organization within the meaning of Sec. 2(5) of the Act.

[24] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT withdraw recognition from and fail and refuse to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Cooper Union Federation of College Teachers, affiliated with New York State United Teachers, American Federation of Teachers, AFL–CIO as the exclusive representative of the employees in the bargaining unit described below.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, recognize and bargain with the above-named Union as the exclusive representative of all employees in the bargaining unit described below, with respect to rates of pay, wages, hours and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

> All faculty on full-time appointment including instructors, assistant professors, associate professors, full professors and librarians and assistant librarians but excluding all other employees, including the president, deans, assistant deans, acting deans, division heads, acting division heads, visiting faculty, secretaries, guards, library head, library assistants, library technicians, researchers, laboratory managers, directors, administrators, administrative assistants, administrative counselors, controller, registrar, provost, maintenance employees, laboratory technicians, laboratory assistants, engineering technicians, shop assistants and all supervisors as defined in the Act.

THE COOPER UNION FOR THE ADVANCEMENT OF SCIENCE AND ART

DECISION

STATEMENT OF THE CASE

ROBERT T. SNYDER, Administrative Law Judge. This case was tried before me on 31 days during the period from January 4 through March 4, 1982, at New York, New York, pursuant to a complaint issued by the Regional Director for Region 2 of the National Labor Relations Board on April 30, 1981. The complaint was based on a charge filed by Cooper Union Federation of College Teachers, affiliated with New York State United Teachers, American Federation of Teachers, AFL–CIO (CUFCT or the Union) against The Cooper Union for the Advancement of Science and Art (Respondent or Cooper Union). The complaint alleges, in substance, that Respondent violated Section 8(a)(1) and (5) of the National Labor Relations Act by withdrawing recognition, about June 26, 1980, from the Union as the exclusive collective-bargaining representative of employees in a unit certified by the National Labor Relations Board (the Board) and by failing and refusing thereafter to recognize and bargain with the Union as the exclusive collective-bargaining representative of its employees in the unit.

Respondent, by its answer, denies the alleged violations and as affirmative defenses contends that all of the unit employees are supervisory employees and managerial employees, thereby excluded from the categories of employees entitled to the benefits of collective bargaining under the Act, and that the described unit is an inappropriate bargaining unit.

All parties were given full opportunity to participate in the proceeding to introduce all relevant evidence, to cross-examine witnesses, to argue orally, and to file briefs. Respondent, the General Counsel, and the Union each filed extensive posthearing briefs. Respondent thereafter filed a reply brief, which, by subsequent order over objections of the other parties, I determined to receive and review and to which I provided the Charging Party and the General Counsel an opportunity to respond. Both parties have filed responsive briefs. These briefs have all been duly considered.

Leave having been sought by the New York City Central Labor Council, AFL–CIO to file a brief amicus curiae in support of the Charging party in this proceeding, such leave is hereby granted, and the brief it subsequently filed has also been duly considered.

On the entire record in this case, and from my observation of the demeanor of the witnesses, I make the following

FINDINGS AND CONCLUSIONS

I. JURISDICTION

Respondent is a New York educational corporation chartered by a special legislative act, "Chapter 279 of the Laws of 1859," with its offices and educational facilities located in New York, New York, where it is engaged in the operation of a private, not-for-profit educational institution. Its gross annual revenue from all sources exceeds $1 million, excluding contributions, which, because of limitation by the grantor, are not available for operating expenses. Annually, Respondent in the course and conduct of its operations, purchases and receives at its facilities goods and materials valued in excess of $5000 directly from points outside the State of New York. The parties admit, and I find, that Respondent is, and has been at all times material herein, an employer engaged in com-

merce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

At the opening of the hearing, Respondent was permitted to amend its answer to admit the status of the Union as a labor organization within the meaning of the Act. However, in view of its position consistently maintained throughout the proceeding, that the employees who make up the unit regarding which it has, since June 26, 1980, refused to bargain are not employees within the meaning of the Act, and since membership in the Union is limited to employees employed by Respondent in the bargaining unit, I do not deem Respondent's admission regarding the Union's status as a labor organization as controlling. That status will turn on my conclusions regarding the employee status under the Act of the members of the bargaining unit based on the record in this case, ruling on which will, accordingly, be deferred until that conclusion is made in a later portion of this decision.

III. THE REPRESENTATION PROCEEDING AND COLLECTIVE-BARGAINING HISTORY

On April 11, 1974, in Case 2–RC–16460, the Regional Director for Region 2, based on a petition previously filed by the Union, approved a Stipulation for Certification Upon Consent Election providing for a representation election in a bargaining unit of Respondent's employees, including all faculty on full-time appointment, including instructors, assistant professors, associate professors, full professors, librarians and assistant librarians, but excluding all other employees, including the president, deans, assistant deans, acting deans, division heads, acting division heads, visiting faculty, researchers, laboratory managers, directors, administrators, administrative assistants, administrative counselors, controller, registrar, provost, maintenance employees, laboratory technicians, laboratory assistants, engineering technicians, shop assistants and all supervisors as defined in the Act.

Thereafter, pursuant to an election held on October 15 and 16, 1974, in which the Union received a majority of the valid ballots cast, on October 24, 1974, the Regional Director for Region 2 issued a Certification of Representative, certifying the Union as exclusive representative for the purposes of collective bargaining of Respondent's employees in the unit previously described.

Bargaining between the parties commenced in early 1975 and continued for close to 100 sessions until March 1978, when agreement was finally reached on the terms of an initial agreement. In 1976, when negotiations broke down, services of a Federal mediator were sought. The mediation effort, which extended for a year into the fall of 1977, was unsuccessful. A series of ad hoc meetings followed between Michael Wurmfeld, associate professor of architecture, then secretary of the union and member of its bargaining team, at times accompanied by several other members of the faculty, and President John F. White, who had not previously been directly involved in negotiations. These meetings finally led to the breaking of the impasse and final agreement on terms of an agreement. Substantive contract terms as they relate to the nature of faculty authority in various academic and nonacademic areas will be examined at various later points in this decision.

Agreement was finally consummated on April 11, 1978, with the terms made effective from that date until August 31, 1980. Pursuant to a wage reopener clause, subsequent negotiations resulted in agreement made on September 25, 1979, on wage rates for the contract year beginning on September 1, 1979, through August 31, 1980.

President White retired and was succeeded by a new President, Bill N. Lacy, on January 1, 1980. In May 1980, during the course of an informal union discussion in his office, President Lacy informed Eugene Tulchin, associate professor of art and union president, that since he was fairly new at Cooper Union he would really appreciate not opening up the whole contract and wished to extend the union contract for 1 year without any changes except for a salary reopener. Tulchin responded there might be some problems, made reference to the Supreme Court ruling in *Yeshiva University* which had issued in February 1980, and said he was reluctant merely to be left without any protections in a successor agreement. At Lacy's suggeston, Tulchin prepared proposed language representing the sense of the parties that the Cooper Union faculty did not fall under the definition of management as set forth in *Yeshiva*, and submitted a draft to Lacy, at a subsequent meeting, who said he would consider it.

When Tulchin left for Europe early in the summer of 1980, without resolution of the problem of the Union's concern for some protection from the impact of *Yeshiva* or other issues he had discussed with Lacy concerning the length of a new contract and salaries, he advised Lacy that Professor Wurmfelf and Thaddeus Gatza, a professor of humanities, treasurer, and member of the Union's executive board, were authorized to continue talks in his absence.

By letter dated June 9, 1980, the Union, by Wurmfeld, its secretary, informed Lacy of the availability of its negotiating team at any time after July 1, 1980, to begin negotiations. In a responsive letter dated June 26, 1980, Cooper Union, by Lacy for the first time, asserted the faculty's claimed managerial status as the basis for a decision not to meet for the purpose of negotiating a renewal of the present contract, thus effectively withdrawing recognition and refusing to bargain any longer with the Union. In the letter, Lacy stated, in part, "I have conducted an investigation into the applicability of the *Yeshiva* decision to Cooper Union, and I have conscientiously pondered the content of the Court's reasoning. As a result I have come to the conclusion that continued recognition of the [Union] under the [Act] is inconsistent not only with the law, but also with the conditions necessary to foster full faculty participation in policy making within the school."

In a later letter dated July 8, 1980, distributed to the faculty, Lacy amplified his views, concurred in by the board of trustees, which led him to the decision to withdraw recognition. He stated that part of the reason for his decision was the basic incompatibility and contradic-

tion between the policy making role of the faculty and unionization. Lacy also noted that because of its size and special professional character, the faculty's managerial role was a precondition of quality education. This position was also asserted by Lacy in a meeting he held with faculty members Wurmfeld and Gatza the same day. On August 1, 1980, the charge which led to the issuance of the complaint herein was filed by the Union.

IV. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

Cooper Union was founded by Peter Cooper as an educational institution before the Civil War. It was chartered in 1859 by an act of the New York State Legislature. It has always been maintained as a tuition-fee institution. Its operating funds are derived from gifts, grants, endowments, and the like. One major source of funding is the income derived from its ownership of real estate, both improved by buildings and unimproved, in the vicinity of the facilities and in midtown Manhattan.

The institution is located at Cooper Square, New York City, and consists of three buildings: the Foundation Building, the Hewitt Building, and the Engineering Building. Cooper Union also has maintained a facility called Green Camp at Ringwood, New Jersey. In the 1970s, the improved portion of this property was sold.

Peter Cooper's purpose in establishing Cooper Union, as set forth in its charter, was to create a school of design and engineering equal to the best schools "now established or, hereafter, to be established."

B. *Organizational Structure of Cooper Union*

The charter vests ultimate authority in a board of trustees, whose membership was fixed at 16 in bylaws adopted May 12, 1972. Three members are nominated by the Cooper Union Alumni Association. The remainder are nominated and elected by the board itself. Between regular meetings, held quarterly, and special meetings convened at the request of the chairman or on written request of any three trustees, its powers are exercised by an executive committee consisting of the chairman, the chief policy officer, and four trustees. Other committees include a finance committee, a nominating committee, and such other committees as may be created from time to time as deemed desirable.

The bylaws also provided for the establishment of various officers of the institution with prescribed duties who exercise their powers and duties with the approval of the trustees. They include a president, the chief executive officer, a vice president for business affairs, a secretary, a treasurer responsible for managing investments, a provost, the chief academic officer who exercises general supervisory power over the academic affairs and over the academic officers subject to the control of the president and trustees, an assistant secretary, and an assistant treasurer. The president and provost may, and the secretary shall, attend all meetings of the board. The president's duties include appointment or removal from offices, with the approval of the board, of such administrative officers, faculty, and staff as may be necessary and to prescribe the power and duties incident to such positions, with the approval of the board. He also may attend and vote at all committee meetings.

As described in the faculty policy manual, effective April 2, 1964, Cooper Union is organized in divisions: the Division of Adult Education, at that time the School of Art and Architecture, the School of Engineering, and at that time the Museum for the Arts of Decoration. The manual noted the School of Art and Architecture and School of Engineering offered curricula leading to baccalaureate degrees in architecture, engineering, fine arts and science. Evening sessions of the School of Art and Architecture offered programs leading to certificates in architecture and fine arts. Reference was made to a Division of Graduate Studies being established in the School of Engineering.

C. *The 1964 Governances*

The 1964 faculty policy manual is described in a foreword as a revision of the 1957 "Policies and Procedures for Teaching Personnel of the Cooper Union." It includes in appendices the governances of the then School of Art and Architecture and the School of Engineering. The preamble of the governances described them as documents defining the functions, rights, responsibilities, and authority of the faculty.

In article I, section 2, of each governance, the faculty is recognized as the professional group responsible, collectively and as individuals, for the educational programs of the respective school as approved by the trustees and interpreted by the president. The faculty shall exercise its responsibility by providing instructions, participating in committee work and administrative work associated with the instructional programs, fostering creative scholarship, advancing professional education, considering and acting on other matters of common academic interest, and advising the president.

The governances are noted as becoming effective on their approval by the board of trustees.

In article II, the membership of the faculty is defined as including the dean and his associate or assistant and three members of the adjunct teaching staff, in addition to all full-time faculty. Various administrators are listed as ex-officio members of each faculty and at meetings of the joint faculties. The respective deans of the two schools are chairmen of their respective faculties and the secretaries are to be elected by the respective faculties.

In article III, "Meetings," two regular meetings per academic year, in October and April, are specified. Special meetings may be called by the chairman acting on his own, and shall be called by him when voted by the faculty, petitioned for by three members, or requested by a standing committee or the president. Joint meetings of the faculties may be called by the president or by the deans of both schools acting under direction of the Senate. The president shall normally preside, and in his absence, the chairman of the Senate shall do so.

Article IV lists faculty duties and responsibilities as including implementation of the educational program and other matters itemized in article I, making recommendations for awarding degrees, and other honors and awards, and advising with respect to appointments and

promotions. As to the latter responsibility, department heads, after consultation with members of the department, shall recommend a candidate to fill the staff vacancy. On a department head vacancy, the dean shall appoint a committee to include two members of professional rank to advise the dean, who shall recommend a candidate to the president. Acting department heads shall be named on the dean's recommendation after consultation with faculty.

Recommendation to select a new dean shall come from a committee consisting of all department heads and one member from each department, who shall prepare a list of qualified candidates for the president. To fill the office of president, a committee consisting of the deans, department heads of the two schools, and the business officer shall prepare a list of persons it deems qualified for the trustees, submitting specific recommendations at its request.

Article VI requires amendments be approved by a vote of two-thirds of the faculty.

D. *Committees Under the Goverances*

Standing committees include the administrative, curriculum, admissions, academic standards, calender and schedules, Student Activities, and Academic Freedom and Tenure, the latter two being joint committees for both schools. When elected by the faculty, a slate of nominees is to be prepared by the administrative committee and circulated to the faculty 2 weeks prior to the April meeting at which additional nominations may be made from the floor. Normally, each committee shall have three members, with the president and dean as ex-officio members. Standing committees report to the faculty, but may tender a report to the administrative committee for evaluation and guidance.

In addition to schoolwide and the two joint committees, the governances provide for an institutionwide body—the Senate. Under the 1964 governances, it consisted of the president, deans of the two schools, two members elected by the faculty of each school who shall be heads of departments, and one member elected by the four from a slate nominated by the president. The chairman and vice chairman are the two deans, alternating each year.

As described in the governances, the Senate shall concern itself with the study of goals, standards, and physical facilities. It shall study problems that involve the two schools and their relationship with other divisions. It shall also concern itself with educational trends, and with planning and development, and advise the president.

A review of the makeup and role of the standing committees under the 1964 governances now follows:

1. Administrative Committee

Membership to include dean as chairman, associate or assistant dean, heads of departments and director of evening session. Responsibility is for general administration of the operations of the school, and for matters not delegated to nor within the purview of other standing committees and shall serve as advisor to the dean.

In carrying out their duties of administration of financial and personnel matters, the activities of members of the committee shall reflect the interests of the faculty.

In addition, it may receive reports of standing committees, evaluate them, and make recommendations to the faculty for appropriate action.

It may also establish ad hoc committees of the faculty.

2. Curriculums Committee

Committee made up of heads of departments offering curriculum leading to degrees and director of evening session.

Its responsibility is for policies relating to the formulation of curriculums, and it shall approve new curriculums and major revisions of curriculums. It is also responsible for coordinating and planning revisions of curriculums.

The procedure for adoption of a curriculum is as follows: A proposal is prepared by the curriculum committee and forwarded to the administrative committee for its review and possible revision and then placed on the agenda of the next regular faculty meeting. If approved, it is transmitted to the president who, if he approves, shall notify the dean, and if he does not, shall return the proposal to the administrative committee with his comments.

If the president fails to act, on recommendation by the administrative committee, the Senate may make a direct approach to the board of trustees.

Minor revisions of curriculums involving changes of subject title, or substitution of subject in the same general subject-matter category, shall be acted on by the curriculum committee after consultation with appropriate department heads, and shall be effective after approval by the administrative committee.

3. Admissions Committee

Membership includes director of admissions and three members elected by the faculty.

It shall establish and continually review general principles with respect to admission of students under policies approved by the board of trustees and shall review administration of faculty rules and policy by the admissions office.

It shall also carry out long-range studies of the correlation between the admissions process and the success of students in curriculm departments. As an aid it may request necessary statistical studies by the admissions office.

4. Academic Standards Committee

Made up of one representative from each department of instruction. Three members elected to serve terms of 3 years. The dean of students and registrar are ex-officio members.

It is responsible for defining the grading system, recommending standards and regulations for aca-

demic performance, reviewing petitions from students, and recommending candidates for degrees.

As to grading system, academic standards, and regulations, it shall receive and consider individual faculty proposals for changes, submitting major changes for approval by the faculty and then the president. Minor changes, such as changes in wording for clarification, may be acted on by the committee and reported to the faculty.

The committee has final authority to take action on petitions for reinstatement from students who have resigned, withdrawn, or been dropped for failure to maintain required academic standards. In making decisions in this area, it shall be guided by the specific circumstances, potentional benefit to the student, and the currently existing state of enrollment.

In May, the committee receives from the registrar a list of candidates for graduation who have attained the necessary standing and have satisfied all other academic requirements in their respective courses. It reviews the list for possible addition or deletion and has final responsibility for certifying the candidates for graduation by a favorable vote by recommending their approval to a May faculty meeting.

5. Student Activities Committee

This committee is a joint one, made up of one member elected by Engineering and another by Art and Architecture, dean of students, and director of Green Camp. It shall prepare a policy, study, evaluate, and report periodically to the faculty on how the policy is meeting the needs of students and objectives of the institution.

6. Calendar and Schedules Committee

The committees of each school, acting jointly, are responsible for working out details of the calendar, consistent with requirements of accreditation agencies and taking into account special needs of other divisions and the institution's administrative offices, and coordinating schedules between the two schools.

A prospective calendar for the following academic year is presented to the faculty at a meeting in February. The calendar each committee finally adopts is forwarded to the Senate for final action.

The committee also prepares assignments of instructors to classes and schedules of day and evening classes based on information furnished by heads of departments.

7. Academic Freedom and Tenure Committee

It consists of four members having rank of professor or associate professor, with representation from both schools and elected by the joint faculties. The Senate prepares a slate of nominees for election.

Its first responsibility is to formulate and recommend to the joint faculties a code to be followed in proceedings concerning the fitness of a member of the faculty. In doing so, it shall be guided by the principles adopted jointly by the Association of American Colleges and the American Association of University Professors.

The code shall be submitted to the president for review by the Senate and transmitted to the board of trustees. Upon approval by all parties, it shall become official policy of Cooper Union.

Appendix III to the 1964 faculty policy manual sets forth principles and procedures concerning academic freedom and tenure. The document has as a stated purpose the ensuring of agreement on the procedural methods of preserving academic freedom and tenure rights. The preamble notes that the responsibility of formulating principles and policies that bear on the freedom and security of faculty members should be shared by both the faculty and the administration in order that the experience and wisdom of each may be utilized.

In a discussion as to acquisition of tenure, the manual notes that "The services of each faculty member on a probationary appointment should be evaluated by the Administration in order to determine whether he should be continued on a probationary appointment or be granted tenure." A maximum period of service required for achieving tenure is listed for each faculty rank, ranging from 7 years (for instructors) to 2 years (for professors).

Procedures regarding timing of notice of nonrenewal of a probationary appointment and provisions limiting dismissal of tenured faculty for adequate cause, as defined, are next set forth.

The document next describes procedures to be followed in hearings on dismissal of a faculty member or in cases of a claim of suppression of academic freedom by means other than threats of expulsion or unjust withholding of tenure or promotion. Provision is made for a hearing committee made up of the members of the Academic Freedom and Tenure Committee. When either the administration or faculty member requests review of his dismissal as a member of the tenured faculty or probationary appointee, or claims other suppression of his academic freedom, the hearing committee should inquire informally into the situation, effecting an agreement if possible. Failing an agreement, the committee should determine whether, in its view, formal proceedings should be considered. A detailed hearing procedure is outlined, if formal proceedings result, on joinder of issue arising from the president's statement of grounds for dismissal and the faculty member's written response or in the case of a particular breach of academic freedom arising from the faculty member's claim and the administration's response. In case of dismissal the administration bears the burden of proof. Both parties may appear by representatives, present testimony, and confront adverse witnesses, and informal presentations may be made, by statement outside the hearing, where appropriate. The committee may proceed to decision with or without availability of the record. It should make explicit findings with respect to each ground of removal presented or means of alleged suppression of academic freedom. The committee's decision should be transmitted to the trustees by the president, and, according to the document, its acceptance

would normally be expected. If the trustees do not sustain the hearing committee on the record of the proceeding, the matter should be returned to the committee with objections specified for its reconsideration.

E. *Structural Changes in Organization of the Institution During the 1970s and Their Impact*

During the 1970s, Cooper Union grappled with many of the problems facing institutions of higher learning in the United States resulting from growing inflation and increased costs, and the ongoing debate about the relevance and usefulness of the traditional colleges curricular and experience and proposals to modify the Cooper Union professional curriculum in art, architecture, and engineering. Furthermore, Cooper Union, as an institution specializing in engineering, architecture, and art education, but with a strong humanistic bent, has continually faced the issue of how to integrate the arts studies into its curriculum. This issue has raised a host of related questions having to do with the kinds of degrees the institution should grant, the number and content of required liberal arts studies, the placement of faculty teaching in the traditional liberal arts and science areas in its degree-granting schools, and the role such faculty should or may play in the goverance committee structure which as has been shown, has been structured on a school-by-school basis.

As early as 1965, the then called department of humanities, since 1961 located within the School of Engineering with its own chairman, was reorganized by assignment for administrative purposes to the president. In a memorandum dated November 5, 1965, directed to the deans and humanities chairman, the then president Richard F. Humphreys acknowledged that the manner in which the department of humanities can best participate in the organizational structures of the School of Art and Architecture and the School of Engineering and Science was a subject that was under discussion for many months. Humphreys next referred to the proposal he attached which Professor Haselton, humanities chairman, formulated "after consultation with his faculty." That process did not involve putting to a vote of the humanities faculty the proposal to reorganize their department.

Professor Thaddeus Gatza, professor of humanities in literature and music appreciation, testified that Professor Haselton presented to the faculty the proposal, the imminent occurrence of the change, but as a conclusion already reached. Besides the president assuming direct administration of the department, the members of the department were assigned to the two schools, with all rights, privileges, and responsibilities provided in the faculty policy manual, except the right to vote at meetings of the faculty. With respect to joint faculty committees and joint meetings of the faculties, the humanities faculty were entitled to full participation, including the right to vote and serve on all joint committees and the Senate.

By April 1969, Humphreys had died and an interim president, Henry T. Heald, was serving in his place. A complaint from the Humanities faculty to the Academic Freedom and Tenure Committee that they had been disenfranchised by the 1965 reorganization was made to interim President Heald. By responsive letter to the committee dated April 16, 1969, Heald disputed that the AF&T Committee had jurisdiction and suggested, instead, that the way to improve the situation was by study and action with administration and faculty working together to develop a new program for the goverance of Cooper Union.

Heald was succeeded by new President John F. White later in 1969. After personally receiving complaints from the humanities faculty, he formed an ad hoc committee on structure to deal with this and other organizational problems. It included the deans of the two schools, some students, adjuncts, and members of the full-time faculty, all apparently appointed by the president to advise him, outside the goverance structure. By memorandum dated October 15, 1969, White, on behalf of himself and the trustees, advised that the Humanities faculty—five in Art and Architecture and seven in Engineering and Science—would immediately regain their vote and that another suggestion of the committee on structure to permit faculty and student representatives of a proposed new Senate to observe discussions of the board of trustees was approved for 1 academic year, limited to one faculty member and one student. The caveat was added that during trustee executive sessions representatives would be excluded.

On February 8, 1971, the board of trustees issued a policy statement entitled, "Cooper Union For the Seventies and Eighties." Among other groups whose input was acknowledged was the faculty through the Engineering and Science faculty advisory committee and the administrative committee of the School of Art and Architecture. At the same time, the trustees acknowledged that they had had the advisory services of Heald, Hobson and Associates, and a group of educators they had brought to the Cooper Union to assist in their assessment. Heald was the same educator who had recently a few years prior served as interim president. The policy statement examined and analyzed in depth the goals and aims of the institution and how they could best be achieved in light, in particular, of the present, and anticipated future, difficult financial situation, made more difficult because of its tuition-free operation. Among other changes proposed in engineering were revisions of the curriculum, requiring common first-year and almost totally common second-year studies, with design of individualized programs thereafter, increasing minimum class size to 35, adding a fifth year leading to a masters degree, and merging the present four departments into one division of engineering with a chairman appointed by the dean and president from a slate of two to four selected by tenured members of the division. Science and mathematics curriculum were to be consolidated, with a single bachelor of science degree offered, graduate study in those areas to be eliminated, and the physics, math, and chemists in the present chemical engineering faculty merged into a single science and math division. Recognizing the limited size and scope of social science and humanities offerings and that they provide a service and not studies leading to a degree, the trustees proposed the present humanities department become the Division of Humanities and Social Sciences and become a part of the faculty in

the School of Engineering and Science, with a chairman chosen in the same way as those of engineering and science and mathematics.

For students in Art and Architecture the report urged a minimum 30 credit hours in the humanities and social sciences, with 18 of these being electives, and the students be permitted to take science, math, and engineering courses. The trustees also concluded that the architecture department be merged with painting and Sculpture and Photography and Design.

The trustees also urged development of a single governance for this entire faculty, with the Senate changed to include a faculty each from art and architecture, engineering, science, and math and one from the humanities faculty, and three students each from art and architecture, engineering, science and math, and humanities.

Prior to the issuance of the trustees' statement, the Faculty Advisory Committee of the School of Engineering and Science, chaired by Stephen Haselton, who was also chairman of humanities, and staffed by seven other faculty, two of whom were department heads, and the dean had issued its own lengthy report on January 22, 1971.

A major recommendation of this committee was a new academic administrative structure reconstituting the faculties into three divisions: a Division of Engineering, a Division of Art and Architecture, and a Division of Sciences and Liberal Arts. The new division would include all members of the present Departments of humanities, mathematics, physics, and physical education, together with pure chemists. Each division was to be administered by a faculty member elected by members of his division or rotating for a stated term who would report to a single appointed administrative officer (dean, provost, or vice president). The basic administration of the educational program in each major field of study would be handled by a standing committee of the faculty with its own elected chairman.

By open letter from the department of humanities to the trustees and president dated March 31, 1971, signed by 11 of the 12 humanities faculty, including Haselton, the members expressed strong criticism of the trustees' characterization of them as being unable to develop and teach a proper elective program and of the proposal, claimed most damaging (and contrary to the faculty advisory committee's recommendation), of withdrawing the humanities department from the School of Art and Architecture and placing it wholly within the school of Engineering and Science. The Humanities faculty reminded the trustees that 6 years before they were removed from the same administrative position now proposed and urgently advised the trustees to reconsider and continue the present administrative location of the department, now approximately divided in its membership between the two professional schools.

After it appeared to Chairman Haselton that the trustees had disregarded and would continue to disregard the report and recommendation of the faculty advisory committee and at the same time the trustees and outside consultants and advisors had been working on a plan without his knowledge (or that of other faculty) which was clearly going to be followed, he resigned at the end of the 1970–1971 academic year.

By memorandum dated October 9, 1972, the board of trustees informed the Cooper Union community of their decisions about the development of the institution in the coming period. They broke down into three areas. Regarding structure, the present School of Art and Architecture would consist of two divisions, Art and Architecture, and the School of Engineering and Science would consist of two divisions, Engineering, including all members of engineering departments except chemists, and Science and Mathematics, including all members of departments of physics and math plus the chemists. A fifth division of Humanities and Social Sciences would consist of all present members of the department of humanities, who would continue to be represented on the faculties of the two schools as at present. Two to four candidates to become division heads would be recommended by the faculty to the deans of the respective schools, for appointment by the president before December 1, 1972, for a term of 3 years. The division heads would thereafter convene meetings of their respective divisions to organize internal structure, present curriculum proposals to appropriate faculty, and handle other matters. Division heads were also to make budget and personnel recommendations to the respective deans in conjunction with current department heads after consultation with relevant faculty members.

Since the preexisting academic departments had now been consolidated into five divisions, the position of department head was abolished. According to Professor Knapp the loss of department heads and the departmental structure meant a loss in local professional faculty control over many details of the day-to-day administration of the curriculum. Previously, faculty in each subject academic department had input in establishing a laboratory budget, local control over laboratory technicians who were assigned, or at least, associated with particular laboratories in particular disciplines, the services of a local departmental secretary, continuous coordination with other departmental members in developing changes and modifications in curriculum, and day-to-day involvement in housekeeping matters relating to the academic department. All of these local controls and direct participation in subject curriculum were lost on the elimination of the department setup. Faculty concern with and criticism of the changes wrought in 1972 have been continuously voiced in informal groups and directly with the dean over the subsequent 10-year period, particularly in Engineering, but to no avail.

As to degrees and curricula, new degrees to be offered would be a B.S. with a major in the various engineering options; a B.S. with a major in mathematics; a B.S. With a major in distributed science; and a B.S. with a major in architecture. Curriculum proposals for these degrees were to originate in the relevant divisions for presentation to the appropriate faculties at the earliest possible time following appointment of the division heads.

Regarding governance, the trustees wrote that the Senate would be asked to form a committee to draft a new governance in keeping with the new structure. On

the report of the committee, the Senate was to propose the governance to the faculty and the trustees for approval.

Associate Professor of Architecture Michael Wurmfeld testified without contradiction that when these structural changes took place effective for the academic year 1973–1974, the faculty did not participate in recommending or voting as a body on them. Wurmfeld stated that the structure was changed by a memorandum from the president. The faculty of which he was a member—of the School of Art and Architecture—did not vote to make the change for departments to divisions, nor did it recommend the change, nor did any governance committee deal with the matter. Neither did the faculty of Architecture—when it became a separate division—vote to recommend John Hejduk as division head of Architecture, although he had been department head of architecture prior to the change.

In June 1973, at a meeting of the faculty of the then School of Art and Architecture, under consideration were amendments to the governance which had been prepared by the administrative committee after having received recommendations from the ad hoc committee on governance, appointed by the dean. One of the proposed amendments provided that when there is a vacancy in the post of division head (the position newly created by the trustees), a committee predominated by full-time faculty shall prepare a list of qualified candidates for the dean; the president and dean shall then present a slate to the members of the faculty, who shall elect the head of the division by a majority. When the post of division head is unfilled for an interval, the dean, in consultation with members of the division, shall promptly recommend to the president a member of the division to serve as acting division head.

Provost Kaplan spoke against the amendment, believing that the position differed from department head and the ultimate choice should be by the administration. By letter dated September 13, 1973, White informed Dean Sadek of the School of Art and Architecture that the trustees, at its September 12, 1973 meeting, approved the amendments to the governance previously submitted, with the exception of the one concerning division head. The trustees specifically disapproved the amendment dealing with the method of appointment, believing that while the appointee should be acceptable to both the faculty and the administration, "the level of administrative and academic responsibility of the position is such that the appointment should be made by the President, after consultation with the dean, from a slate presented by appropriate members of the faculty."

As a consequence of the administration's rejection of the faculty's proposal, now including the division head as an administrator, the makeup of the curriculum committee of the School of Art and Architecture after adoption of the 1973 amendments included only one full-time faculty member.

After Haselton left the institution, Humanities Professor Leo Kaplan was appointed by White as acting head of the department of humanities to succeed him. While Kaplan had informal faculty support for the position, he was named without faculty vote. Then, in April 1972, Kaplan was named as the institution's first provost and academic vice president by the board of trustees. The position of provost was created, and Professor Kaplan was selected to fill it, without any consultation with, recommendation or vote by, the faculties of Cooper Union.

When the Division of Humanities and Social Sciences was created in 1972, Professor Raymond Brown was appointed its acting chairman. By memorandum dated May 21, 1973, the members of the faculty of the division unanimously recommended Brown as the permanent chairman after a report and recommendation of a department search committee headed by Humanities Professor Richard Bowman. That recommendation was never followed by the administration.

In May 1973, Provost Kaplan presented a report he had prepared to the Senate, since 1971 made up of student and faculty representatives as recommended by the trustees. In it, Kaplan presented quantitative data bearing on possible policy decisions to be taken because of mounting deficits and the need to economize to assure the continued viability of the institution. Kaplan had been asked by White to prepare a report outlining his thoughts on optimizing the allocation of Cooper Union's limited resources while cutting costs without sacrificing quality. Key factors examined were (1) student-faculty ratios, (2) class size, (3) teaching loads, and (4) tenure. Kaplan saw the possibility of a reasonable increase in the student-faculty ratio, particularly in Engineering and Science where a combination of dropping enrollment and faculty increases had led to more than a 15-percent increase in the ratio. In light of the marked increase in proportions of class sections of exceptionally small size over the last decade, Kaplan saw some improvement likely in judiciously combining small sections but little likelihood in avoiding small classes in a small school offering an appropriate variety of courses. Kaplan was hopeful that real savings could be accomplished through increasing teaching loads for full-time faculty, many of whom no longer had administrative duties as department heads since their abolition on the 1972 reorganization into divisions. On tenure, Kaplan was convinced the data on the ratios, class size, and teaching loads reinforced the position recently taken by the board of trustees severely limiting grants of tenure if any meaningful reduction in the proportion of faculty on tenure was to be achieved while reducing the absolute size of the faculty. Kaplan suggested that policy should continue over a 5-year period.

In sum, Kaplan recommended reducing full-time equivalent faculty between 10 and 15 by attrition over the next 5-year period without replacement of retiring faculty and increasing teaching loads; a severe policy on granting of tenure over the same period; and reasonable, selective increases in class size on a case-by-case basis.

The provost insisted on the witness stand that before preparation of his report, he had held many discussions with individual faculty members, particularly senior members in Humanities, on limiting full-time faculty and increasing hiring of adjuncts, and with many people, he had raised the subject of teaching loads, particularly asking members of the Humanities Department if they could tolerate an increase in load. Nevertheless, at no

point in his report does Kaplan acknowledge any input from faculty in his discussion and resolution of the issues raised in light of the analyzed data. Neither did Kaplan claim that his own recommendations were previously disclosed to the faculty.

The Senate continued discussions on the report into the 1973–1974 academic year. By that point it had become obvious to a number of the faculty members of the Senate that the recommendations in the report were already in the process of being implemented. When this was brought to Kaplan's attention the provost responded that he thought the Senate could be useful by a resolution that would advocate support of the recommendations made that were being implemented. Various faculty members, among them Professor of Electrical Engineering Ralph Knapp, then a member of the Senate, stated objections to being put in the position of being a rubber stamp to an action that was already being put into effect.

Thus, at a Senate meeting held December 18, 1973, a first draft of a resolution for adoption by the Senate prepared by its chairman, Richard Bowman, was circulated for discussions. It noted at the beginning of its preamble: "The major difficulty in preparing this resolution is that the Senate is being asked now to advise on actions previously adopted by Trustees and Administration without consulting the Senate." As an example, the preamble went on to note that although the Faculty was told no teaching jobs would be lost because of adoption of the new divisional structure, a considerable credibility gap was created when subsequently eight well-thought-of teachers were denied tenure. Further noted was the sacrifice of a uniquely favorable financial position by the $10 million renovation of the Foundation Building rather than following spendthrift education practices. The preamble continues: "The Faculties, too, have felt that they were greeted by ukase from on high, rather than playing a responsible part in decision making."

The draft resolution went on to recommend more study and consultation prior to diminishing the size of the faculty by 1 to 15 members; to recommend a need for the Senate to increase its competence in studying balance sheets and financial reports in order to offer competent advice on the data compiled by Provost Kaplan (a Senate request for an administration-supplied accountant to aid its study of the provost's report had been rejected); to dispute an increase in teaching load which did not take into account other needs, such as for diversification of faculty and participation in committee work; and to reject any increase in class size because of a resulting decrease in variety of courses offered. The draft concluded with language highly critical of the apparent adoption by the trustees of the provost's report calling for more discussion in a variety of areas, including the dangers and desirability of restricted tenure policy, effective decision making by trustees in academic areas, standard fiscal approach to educational policy in a free tuition private college, converting faculty into predominantly adjunct part-time status, violating governance and having no new governance, and continuing the dichotomy of the Cooper Union in two uncooperating and misunderstanding professional schools.

By the senate meeting of March 5, 1974, the issue of collective bargaining had been interjected and predominated in the Senate's consideration of a response to the provost's May 1973 report. When Bowman's December 1973 draft resolution came up for continued consideration, Senator Tulchin urged the Senate to consider and endorse the concept of collective bargaining in dealing with the various issues raised in the provost's report. After a ruling by the chairman that consideration of the matter was in order, Senator Knapp, at the request of several senators, distributed materials announcing the formation of the CUFCT, a meeting of its organizing committee held in February, and a collective-bargaining election petition. On a motion made by Tulchin, seconded by Knapp, and subsequently rephrased following discussion, the Senate adopted by a vote of seven in favor, none opposed, and one abstention, the following resolution, proposed as an addition to Bowman's original draft resolution:

> The Senate recommends to the faculties and notifies the administration that the issues raised in the Provost's May 1973 report should be dealt with in the formal procedures of collective bargaining.

During consideration of the motion, both Dean Sadek of the School of Art and Architecture and Dean Volpe of the School of Engineering and Science questioned the legality of their presence during the debate and excused themselves from the meeting.

It is thus apparent that the economic problems confronting the institution in the early 1970s as well as the provost's report, unilaterally prepared, issued, and implemented, dealing with these problems in terms of restricting tenure and increasing adjunct faculty and teaching loads crystallized faculty discontent with administration handling of these concerns with limited and belated faculty input to the point of encouraging faculty collective bargaining on the one hand and energizing the Senate to serve as a focal point of faculty sentiment for an independent and effective faculty voice on broad academic policy and structure on the other hand. The interest in collective bargaining led almost immediately to the filing of the representation petition and to the lengthy bargaining history following union certification and ultimately to the initial contract entered in 1978. As will be seen, in 1979 the CUFCT played a significant role in a later continued restructuring of the institution involving in particular the place and relationship to other faculty of the Humanities members. The faculty interest in strengthening the role of the 1972 revamped faculty-student Senate continued to be frustrated when a subsequent reorganization of the institution announced in 1975 was implemented without consultation with it, and its voluntary involvement in a matter of alleged breach of academic freedom in the case of Professor Gormley also in 1975 led to White's rejection of its role in the matter. White also expressed the view at a meeting of the Senate held March 4, 1975, that the faculty policy manual did not require that the president must consult with the Senate or that he must agree with the Senate's recommendations. As a consequence of these continued defeats in making

its voice heard in matters of significance in academic and financial policy areas, the Senate at a meeting held December 2, 1975, adopted a motion that since it was a group without any powers it should cease to meet any longer. No further Senate meetings were held until after adoption of the 1978 collective-bargaining agreement.

In a memorandum dated November 15, 1973, White addressed faculty and students about his concern that the trustees report for the seventies and eighties which had been designed to open a dialogue about the future role of the institution had not led to a resolution of the continuing issues still troubling it. Chief among them was the place of the liberal arts, social science, and other general education features in the professional curriculum and the administrative, organizational, and structural relationships between them. Since conflict and irrationality continued to mark the faculty's consideration of these concerns, the president now assigned the provost to undertake a thorough study of the general education program. To assist him, he also appointed a special committee under the provost's chairmanship, consisting of the two academic deans and the five division heads. Their charge was to develop a philosophy and rationale of general education in the professional curricula, to outline the general principles of an appropriate curricula approach to achieve it, and to recommend an effective organization, structural relationship, and administration of this program within Cooper Union. Their report should have been available for the faculties and president and trustees by early in the 1974–1975 academic year. The president urged all persons and groups of the Cooper community to communicate their views to the committee.

In view of the charge of the president's special committee, Architecture Professor Michael Wurmfeld had serious reservations about accepting the chairmanship of the Curriculum Committee of the School of Art and Architecture at its meeting held November 19, 1973. He believed that the president's announcement of November 15 precluded a review by the faculty of the humanities curriculum, and, in fact, constituted an improper superseding of the authority vested by the governances in the curriculum committee. Professor Wurmfeld sought clarification of the work of the curriculum committee from Dean Sadek. The dean stated that the three representatives from the School of Art and Architecture on the president's special committee would be bound by the recommendations of the A&A curriculum committee, and that the A&A curriculum committee should concern itself with what it believes are the general studies requirements within professional programs and how a complimentary program can be developed for the degree requirements, leaving for the special committee the questions of organization, structural relationship, and administration.

By memorandum dated January 23, 1975, White announced a further reorganization of the institution and elimination of certain programs. He referred to consultation and discussion involving every part of the Cooper community of ways of overcoming its serious financial problems which had taken place for at least the past 5 years. He noted discussions with the faculty as a whole beginning with the 1970s and 1980s report, and in the Senate, but without any positive cost-cutting plans being proposed or endorsed. He made no mention of the report of work or his special committee of administrators appointed November 15, 1973. The decisions taken by the trustees were as follows:

I. *Programs*

A. Cooper Union will discontinue immediately the admission of students to curricula leading to degrees in mathematics, physics, and distributed science. Current third and fourth year students in those disciplines will be permitted to fulfill academic requirements and will be granted Cooper Union degrees. Current first and second year students in these programs may continue through the 1975–76 academic year and will be offered the option of transferring into the School of Engineering, subject only to the condition that choice of a particular engineering curriculum will be limited by the maximum number that can reasonably be absorbed.

B. Effective July 1, 1976, the physical education program will be discontinued. A limited health program will be continued and those activities will be reassigned to the Office of Student-Services.

II. *Organization*

Effective July 1, 1975, the Cooper Union will consist of three degree-granting schools, each with a dean as its responsible administrative officer:

Art	George Sadek
Architecture	John Hejduk
Engineering	Chor Weng Tan

Each of the above degree-granting faculties will have primary responsibility, as usual, for such matters as curriculm, faculty status, academic standards, granting of degrees, admissions, and so forth.

In addition, the Faculty of Liberal Arts and Science—including art and architecture history, science and mathematics, humanities and social sciences—will provide the necessary academic studies in these disciplines as required by the three degree-granting schools in their several curricula. Provost Leo S. Kaplan will serve temporarily as acting dean of this faculty. It is essential that adequate representation from the Faculty of Liberal Arts and Sciences be provided on the relevant committees of the degree-granting schools so that the vital cooperation needed to optimize our educational efforts can be realized. The current elected student and alumni representatives should also be assigned to appropriate committees of the several schools for the same reason.

It will also be necessary to start work immediately on an overall governance for the Cooper Union in order to incorporate these changes and to provide a codified format for the required all-Cooper Union committees. Meanwhile, those committees now in existence, e.g. the Academic Freedom and

Tenure Committee, will continue to function as constituted.

III. *Other Reductions*

In conjunction with the changes announced above, major curtailment of expenditures will be effected throughout every section of activity within The Cooper Union. [Emphasis added.]

President White went on to note that the decisions he was announcing were taken after a great deal of agonizing and soul searching but that they represented, in his opinion and that of the trustees, what was absolutely essential to continue the school in a form consistent with its historic past.

Humanities Professor Thaddeus Gatza recalled one meeting which members of the humanities faculty held with President White during the 1974–1975 academic year relating to the status of humanities curriculum at Cooper Union. This was during the year in which the math and science degree programs were eliminated and the faculty of Liberal Arts and Science was created.

President White asked members present to express their views about the position of the faculty of Liberal Arts and Science and Chemistry Professor Avi Kornblum asked White if the administration had considered the possibility of having Cooper Union Engineering School students take their nonprofessional courses in humanities, physics, chemistry, and mathematics at another institution such as New York University because Cooper Union already had a relationship with it. As Professor Gatza noted, this would, in effect, be doing away with the faculty of Liberal Arts and Science at Cooper Union. President White replied that the administration had considered that possibility. It considered it in economic terms, and found that it was cheaper to retain the present faculty, and have students take their courses at the Cooper Union than have them take them elsewhere, and perhaps have Cooper Union pay for the tuition for those courses. Professor Kornblum asked in effect whether their jobs were in jeopardy, and White said no, as long as it was determined that they were cheaper labor than was available outside. The faculty never considered nor did the administration ever propose that the faculty consider whether it was economical to have students take courses at NYU and eliminate faculty members.

With respect to the terms of the 1975 reorganization, Provost Kaplan confirmed that the faculty was opposed to the termination of the degree program in mathematics among others but that the board of trustees, the provost, and president all recommended its elimination and it was eliminated.

After sophomore students in physics complained to the administration they were permitted to continue in the physics degree-granting program along with the juniors and seniors. Freshmen students in the degree-granting program of the physics department were ultimately permitted to transfer to the School of Engineering, mostly into the electrical engineering curriculum.

Electrical Engineering Professor Knapp and Humanities Professor Thaddeus Gatza confirmed that there had been no faculty input into the trustees' determination announced by President White to terminate the physics, math, and distributed science degree programs. At a regular faculty meeting of the School of Engineering and Science held on March 11, 1975, a motion was adopted by a vote of 18 to 7 in which the faculty expressed criticism to the president and trustees as to their decision to discontinue degree programs, describing the unilateral actions taken with negligible faculty consultation as serious violations of generally accepted standards of college governance and a breach of Cooper Union's own governance. The faculty called upon the trustees and the administration to suspend the decisions annouced and to initiate intensive discussions among all segments of the Cooper Union community to seek viable ways of meeting the current crises. The resolutions were not acted upon by the administration.

The minutes of the Senate meeting of February 4, 1975, contain a paragraph relating to President White's January 23, 1975 memorandum. In it, Chairman Bowman stated that "the administration had no consultation whatever with the Senate concerning the 23 January memorandum. No disagreement with this statement by the Chairman was voiced. All senators participated in the far ranging discussion." By memorandum dated March 12, 1975, and addressed to Senate Secretary Jamell Ahmad, Provost Kaplan sought to correct the minute's references to the Senate's consideration of the president's announcement of reorganization and program eliminations. Kaplan, referring to his own statement at the Senate meeting, stated that "it was a matter of interpretation, to say the least, as to whether there had been consultation." Kaplan went on to note the consultations on academic and financial questions which had taken place over a period of years between all groups at the Cooper Union, including trustees, administration, faculty, students, the Senate, AAUP, etc., as well as alumni, and expert consultants. The provost did not claim that the specific changes in organization and degree-granting subjects made effective July 1, 1975, had been the subject of any prior notice to, or consultation with, the Senate or any other faculty body.

Prior to the 1975 changes, the Art history faculty had been located in the School of Art and Architecture and the professors of physics, mathematics, and chemistry had been in the School of Engineering. The new faculty of Liberal Arts and Science comprised 26 of the 58 total full-time faculty complement in the whole institution. These 26 faculty members played no role in the creation of their new body. They were now excluded from membership on the committees of the three degree-granting schools, and had no vote in the meetings of the faculties of those schools.

The new faculty of Liberal Arts and Science, without governance, periodically held their own meetings, initially chaired by the acting dean, Provost Kaplan. After objections were raised to the existence of the faculty and the provost's role by the third meeting, the group elected Professor Julius Klerer as acting head and he called meetings subsequently.

Before Klerer was elected as acting head, Acting Dean Kaplan had notified the LA&S faculty of a meet-

ing for December 9, 1975, the agenda for which included the selection of an academic standards committee, designation of representatives to other faculties as requested by them, and selection of a secretary of the faculty. At the meeting, the members present voted by a one vote margin to place other items on the agenda relating to the structure and positions of the LA&S faculty ahead of Kaplan's. As he had another engagement, he left. A few days later, by memorandum dated December 12, 1975, Acting Dean Kaplan informed the faculty that in order to serve the current needs for a committee on academic standards he had appointed four faculty members he then named to serve temporarily in this capacity.

At a meeting of the Liberal Arts and Science faculty held on February 17, 1976, a resolution was adopted by a vote of 15 to 0, without dissent, which criticized the administration for continuing as acting dean its chief bargainer in dealings with the Union, thereby creating a conflict of interest in which the provost is supposed to exercise independent judgment in articulating the needs and recommendations of his faculty and also at the same time the positions of the administration in bargaining. The resolution recommended appointment of a new dean in consultation with the LA&S faculty. This resolution was ignored and the provost continued as acting dean until 1979 when the faculty of Liberal Arts and Science was dissolved, the science and mathematics faculty were returned to the School of Engineering, and the humanities and art history faculty became the department of humanities with their own chairman.

At another meeting of the LA&S faculty held on March 23, 1976, another resolution was adopted by a vote of seven in favor, two opposed, with two abstentions, which urged the administration to restore the status quo ante of including the members of the newly created faculty in the degree-granting schools with full rights of participation in governance committees. The initial paragraph of the resolution noted that the so-called faculty of Liberal Arts and Science "was created by fiat as a repository of the disenfranchised, with neither consultation nor the processes of mutual cooperation which should characterize academic decision making; the group having no status in the Faculty Governances and its members having no legitimate institutional functions." The faculty also resolved to attend all meetings of the faculty and committees to which they were previously assigned or elected and to continue fully to participate and vote in fulfillment of their academic responsibilities. There was no administration response to this resolution.

There were subsequently proposals in the form of memoranda forwarded to the deans of the three respective schools and through them to the respective faculties to have the LA&S faculty members included as voting members on the committees of the degree-granting schools to which they had been previously assigned. Chemists and mathematicians sought reassignment to Engineering, and the rest of the humanities faculty sought full reinstatement divided between the two other schools. These requests were also ignored.

Finally, on November 23, 1976, the LA&S faculty approved, by a vote of six to none with one abstention, a draft governance. This proposal was likewise ignored by the administration. The anomaly here was that only a faculty already covered by a governance could amend a governance provision by a vote of two-thirds of its members, subject to approval by the board of trustees. Since the newly created LA&S faculty had no standing under the existing governances, and they were not added to the governance when created by the administration, the members themselves lacked the authority to add themselves as a unit to the governance structure.

At the same time that the members of the newly created faculty started protesting their exclusion from the governance and full participation in the faculty deliberative processes, the dean of the School of Engineering took unilateral action to bring that school's governance into conformity with his view of the structural changes made since 1972 and to reconstitute certain committees which reflected abandoned titles.

In a memorandum dated September 18, 1975, Dean Tan reconstituted his school's committees, without invoking the governance amendment process, in light of the recent restructuring and until the governance was finally revised or rewritten. Certain committees, admissions, academic standards, Student Activities, calendar and schedules, and Academic Freedom and Tenure, he formed, as he put it, "in reasonable agreement with the Governance in terms of the new school organization." Since the heads of departments no longer existed, he found it impossible to form two other standing committees—administrative and curriculum—and, instead, announced he was appointing an interim curriculum committee to act on pressing academic matters and assumed the day-to-day administrative responsibilities himself. When special administrative matters arose, he would either convene the entire faculty for a meeting or appoint another interim committee to deal with the issues.

Since the governances were not formally revised thereafter until President Lacy issued new ones in 1981 (except insofar as the 1978 collective-bargaining agreement contained terms and conditions of employment in effect superseding related governance provisions), Dean Tan's unilateral governance amendments continued in effect to 1981.

According to Professor Knapp, whose testimony in this regard was not contested, certain significant changes were made by Dean Tan in the 1964 governance. For one thing, the terms of office of the members of the newly constituted committees were to be for 1 year or until the governance was finally revised, whichever came first, whereas the earlier terms had been for 3 years. The admissions committee now had alumni representation, without vote, a change from before. The academic standards committee which had apparently added two students since 1964 did not specify whether they had a vote although in the preexisting governance they had none. The faculty members were now listed as representing disciplines, not departments. Student Activities, a joint committee, was now listed as containing among faculty one member from Engineering and one from either Art or Architecture, instead of one from Engineering and one from Art and Architecture. The Committee on Academic Freedom and Tenure, another joint com-

mittee previously comprising four members elected from Engineering and Art and Architecture by the joint faculties, now listed seven faculty members who had tenure and two adjunct members with at least three from the School of Art and Architecture and at least three from the School of Engineering and faculty of Liberal Arts and Sciences. The interim curriculum committee now listed the dean as chairman, and contained one representative from each of the degree programs in the School of Engineering; two from the faculty of LA&S, one of whom shall be in mathematics or science and the other in humanities and social science; two students elected by the School of Engineering student council; and two alumni. Whether students and alumni could vote was not disclosed. Neither were represented on the original 1964 committee, which comprised only heads of departments with the chairman presumably selected from among their number.

On August 22, 1975, President White individually wrote eight tenured professors, formally notifying them that as a result of the discontinuance of several of the institution's academic programs, their appointments on the faculty of Cooper Union were terminated effective August 31, 1976. Five of the professors made written request on October 28, 1975, for a hearing pursuant to the principles and procedures concerning academic freedom and tenure as set forth in appendix III of the faculty policy manual. It appears that the request was made directly to the Committee on Academic Freedom and Tenure, which constitutes the hearing Committee once the AF&T committee makes a recommendation for formal proceedings approved by the president. By letter dated November 13, 1975, President White denied their requests for a hearing, stating that "it is our considered opinion that the action of the Board of Trustees to eliminate degree programs in Mathematics, Physics, and Distributed Science was exclusively within its area of responsibility," and that, accordingly, a hearing under these circumstances is neither appropriate nor required by the terms of the governance. The committee to which the request for hearing had been made did not respond, and, according to Professor Knapp, the matter was taken out of their hands by President White before they responded.

On denial of a hearing, the five professors brought suit in the Supreme Court, New York County, State of New York, against Cooper Union (*Baker v. Cooper Union of Science and Art*), alleging that they were entitled to an injunction against their terminations until they were granted a hearing pursuant to article III of the manual to determine whether their terminations were for adequate cause. Cooper Union moved for summary judgment dismissing the complaint on the ground there was no triable issue of fact and that it was entitled to judgment as a matter of law. President White submitted an affidavit in support of the motion.

In addition to asserting that the discontinuance of the programs was not a "change in academic program" within the definition of "adequate cause for dismissal" in appendix III, but, rather, involved the elimination of three entire academic degree-awarding programs, President White, in his affidavit, referred to two other proceedings in which the institution's unilateral authority to take this action was upheld. In one, the Acting Regional Director for Region 2 of the NLRB dismissed a charge filed by the CUFCT on February 5, 1979, claiming that Cooper Union was required to negotiate with it prior to making the decision to eliminate the programs. In this dismissal letter dated April 23, 1975, the Acting Regional Director stated, inter alia, "It appears that the decision by the Employer to restructure the College and discontinue certain educational programs was an entrepreneurial decision and therefore not one that required prior bargaining with your organization," citing *General Motors Corp.*, 191 NLRB 951 (1971). Other, unrelated allegations were also dismissed by the Acting Regional Director in the same letter. The General Counsel's Office of Appeals denied an appeal from the refusal to issue complaint. In the other proceeding, a justice of the same court dismissed an action brought by Cooper Union students in the eliminated programs and alumni seeking to enjoin the program eliminations until the affected students obtained their degrees, the court recognizing that the trustees' decision was a proper exercise of its powers.

In the *Baker* suit, Cooper Union's motion for summary judgment was granted. After concluding that the appendix III hearing procedures do not apply to plaintiffs' situation, the court noted that even assuming plaintiffs had a right to a hearing, it would result at most in an advisory, nonbinding recommendation to the trustees. The court also referred to Cooper Union's "Charter and Indenture" under which it is the trustee's function to determine whether, when, and what programs should be offered or eliminated and their exclusive right to determine how the objects and purposes for which Cooper Union was established are to be implemented. The court added that "in point of fact, the Trustees have often eliminated or implemented programs in the past without first consulting any other group at Cooper Union. In the past fifteen years many similar changes have been made exclusively by the Trustees."

Among the other tenured professors terminated by letter on the restructuring and program eliminations, Professor of Physical Education Stephen P. Baker was subsequently reemployed as the director of health and recreation. The faculty neither participated nor voted on the decision to terminate Baker or the others, nor did it vote on Baker's subsequent appointment.

By memorandum dated May 22, 1978, addressed to the full-time faculty, President White dealt with the continuing problem of the administrative structure and organizational location of the current faculty of Liberal Arts and Science. He referred to a December 1977 request from the academic deans, the provost, and himself to Professor Bowman to poll the faculty in the hope a generally acceptable administrative solution could be achieved. The president then described two resolutions adopted by the faculty at a special meeting held in April 1978. The first recommended incorporation of its members into the degree-granting schools in varying and seemingly contradictory numbers, and the second proposed establishing the LA&S faculty as a nondegree-granting faculty and appointing four members each to the Art and Architec-

ture faculties and nine members to the Engineering faculty.

The president went on to describe three other suggestions as to placement, participation, and structure made to him in the course of subsequent meetings be held with the several faculty groups. These groups comprised in all 35 members of the Cooper faculties, including 10 from Engineering, 5 each from the faculties of Art and Architecture, and 15 of the presently constituted faculty of LA&S. The president next summarized the weight of opinion of each group toward the five proposals, concluding that a commonly supported solution was impossible to achieve at this time. President White found this regrettable and even harmful to the prospects for collegiality and a common purpose search for solutions. He stated that in the absence of a coming together with the faculty on this matter, ultimately an administrative decision must be made. He tabled further consideration of the matter until the fall when he would reraise it with the hope that the differences between the several faculty groups could be resolved.

Associate Professor of Art and Union President Eugene Tulchin testified that pursuant to article XXV, "Meetings," of the collective-bargaining agreement, effective March 1978, he had been meeting regularly with Provost Kaplan. That article provided that the president of Cooper Union, or a designee, and the president of the CUFCT, or a designee, shall meet at least once each month to discuss and consult on matters affecting the terms and conditions of employment of bargaining unit members and on any other matters related to the agreement, unless both parties agree that no meeting should take place in any particular month.

Along with issuance of President White's report to the faculty in May 1978, on the continuing unresolved problems involving the LA&S faculty, union members among that faculty were complaining to Tulchin that they were disenfranchised and without a vote in the faculties and requested him to do something now that they had a union contract.

At one of their monthly meetings, Provost Kaplan told Tulchin that he really did not want to be the acting dean of the LA&S faculty and would love to be relieved. In the light of the president's memo, the union members' expressions of concern for their participatory exclusion, and the Provost's desire to be relieved of his responsibility, Tulchin now asked Kaplan if he was amenable to working with the Union in solving this problem. The Provost said he was.

Tulchin next obtained permission from the Union's executive board to pursue this matter. At his next meeting with the provost, they agreed to proceed to seek a solution together and to keep their discussions completely off the record. Tulchin asked Kaplan what absolute conditions he needed to have that were not negotiable, so that he would try and work out a solution incorporating that. The provost said one condition would be that the humanities group be an identifiable entity, and a second condition was that the president would appoint a person to be in charge of that group. Beyond that, the provost said he was open to suggestions. Tulchin stated he did not believe Kaplan's absolute needs were unreasonable or impossible to comply with and he went on to offer several suggestions to the resolution of the problem.

Tulchin's ideas were discussed and, ultimately, agreement was reached on the following terms. The science faculty would return to the School of Engineering and be assigned to that faculty; the other faculty members would be assigned to the faculty of the School of Art, School of Architecture, and School of Engineering in numbers that would be reasonably equitable relative to the numbers of full-time faculty in each of those schools; and the person responsible for the humanities area would be a member of the bargaining unit. On this last item, the union position, as expressed by Tulchin, had been that if the person to head the humanities was from within the institution, and it was a full-time administrative position, the Union wanted an additional instructor hired to replace the successful candidate, but that if no replacement was to be hired, then the position would be bargaining unit work, and the occupant would be included in the unit. Kaplan replied at a subsequent meeting that Cooper Union did not wish to go outside and hire a full-time person, nor did it wish to hire a full-time faculty member to substitute, and then agreed that the person to head this area would be included in the unit.

Tulchin and Kaplan next came to a further understanding in principle that the occupant of the position would have a reduced teaching schedule and additional pay, without getting into the specifics. When each voiced the view that the new head had to be acceptable to his principal, the Union and the administration, respectively, agreed that they would find a person acceptable to both of them. They then reviewed candidates from among LA&S faculty members, and, after Tulchin had tentatively agreed on three names and felt out one but was advised by the Union's executive board that in doing so he had exceeded his authority, he later reported that either of two candidates would be acceptable to the Union, and the provost chose Professor Bowman from that list.

Finally, Tulchin and Kaplan discussed the mechanism for Professor Bowman's achieving appointment to the position. As Kaplan had insisted on the incumbent being appointed to the position, Tulchin suggested that the humanities group nominate candidates. The provost guranteed that if Professor Bowman's name was on the list of nominees, he would be the individual selected. They next discussed the appropriateness of the idea of the restructuring being given to the Senate. Tulchin said he would line up the union votes in the Senate. Kaplan said, "I have a few chips outstanding there, and I can call them on this issue of the restructuring." The two then reiterated their agreement and shook hands on the deal.

These discussions took place prior to the Senate meeting of January 19, 1979. Before that meeting, Tulchin had met with other Senate members of a subcommittee appointed by the Senate to recommend the restructuring of the faculty of LA&S. Tulchin and one other member of the subcommittee were union executive board members. The subcommittee also included two other faculty members, one of whom was not a member of the Union,

and two students. The Senate contained at least one other union executive board member.

At the meeting, Tulchin sat with Provost Kaplan (who attended along with Deans Tan and Sadek) at one side of a large square table. To Tulchin and Kaplan's surprise, in addition to the subcommittee's proposal, appendix A, the Senate was presented with another recommendation, appendix B, emanating from the LA&S faculty. One major difference between the two was that the faculty's proposal provided that the head of a reconstituted humanities group be a dean, a title expressly excluded from the certified bargaining unit, while the subcommittee's proposal listed the head as an elected coordinator. Tulchin testified that the provost expressed himself in strong language critical of the faculty members who had reneged on a promise to him to go along with the understanding. With certain changes, among them regarding nomenclature—Tulchin getting the provost's approval in a side bar conversation for giving the new humanities grouping the title of department and then speaking up in favor of such language—a third recommendation, appendix C, retaining most of the concepts of appendix A, was adopted.

It provided that the physics, chemistry, and mathematics faculty would become members of the faculty of the School of Engineering; humanities, social sciences, and art history faculty would constitute the faculty of humanities—with the understanding it would be a department with its own department head, elected for a 3-year term; members of the department would be assigned to the three schools in a manner, if possible, reflecting their preferences, with full voting rights in the school assigned and functioning under the governance; members of the three schools would participate in the department's curriculum committee; department members' recommendations would be sought on appointment, reappointment, promotion, and tenure as required by the Cooper Union-CUFCT agreement; the chairperson (or department head) would meet regularly with the three deans, be ex-officio member of the three schools and their administrative committees, and preside over departmental meetings, handle teaching assignments and scheduling, handle student matters, and recommend a draft departmental budget and monitor the budget approved; governance changes would reflect the foregoing and the humanities faculty would draft its internal rules or bylaws compatible with the collective-bargaining agreement.

About a week after the Senate meeting, Tulchin and Kaplan met again to discuss the terms and conditions under which Professor Bowman would hold the position. They agreed that the additional salary for the department head of humanities would be $5000 and that the reduction in workload would be slightly less than half the normal teaching load.

By memorandum dated February 21, 1979, President White addressed the Cooper Union faculties about the reorganization of the Liberal Arts and Science faculty. The reorganization follows in every respect the deal made between Tulchin and Kaplan as adopted by the Senate. The chemistry, mathematics, and physics academic staff will become members of the faculty of the School of Engineering, and the humanities and social sciences academic staff will become members of the three degree-granting faculties. Given the present level of staffing, four will become members of the Engineering faculty and two each will join the Architecture and Art faculties. These assignments will reflect balanced representation of the two disciplines and individual preferences. They will carry the full privileges of those faculties.

The humanities and social science group, for their own administrative and curriculum planning purposes, will be designated as the humanities department. A member is to be nominated by them to the president for appointment to a 3-year term as chairperson. The chairperson's responsibilities follow those specified in the Senate resolution. On curriculum matters, departmental faculty will serve on the other schools' committee, and representatives from those schools will participate in its curriculum considerations.

Certain governance changes were recommended relating to enlargement and cross-representation on school curriculum committees and the chairperson's inclusion on administrative committees. The president ended by expressing his gratitude to the student-faculty Senate for the diligent, evenhanded, and openminded assistance they provided in structuring this reorganization.

Provost Kaplan, as departing dean, next called a meeting of the humanities faculty pursuant to the president's request to receive nominations for the position of chairperson and preferences on assignments. Professor Richard S. Bowman was the only candidate nominated and received the faculty's unanimous vote for the position. Shortly afterward, President White appointed Bowman as chairman of the department.

Humanities Professor Gatza, CUFCT treasurer and member of its executive board, corroborated, in broad outline, Tulchin's testimony, in particular, as to his representing, reporting to, and receiving input from the Union's executive board on his negotiations with the provost regarding restructuring of the humanities grouping with a head recommended by them and to be included in the bargaining unit. Associate Professor of Architecture Wurmfeld, union executive board member and member of the Senate, also confirmed that the Senate in January 1979 implemented and formalized an administration-CUFCT agreement on humanities restructuring. As testified by Wurmfeld, through the fall of 1978 the Union's executive board had debated the best resolution of humanities structural requirements and kept abreast from Tulchin's reports of his meetings with Kaplan and ultimate commitment, including its submission to the Senate where the Union's board members on the Senate would vote as a group. The Union's executive board also later came to a consensus to support Professor Bowman as chairman and authorized Tulchin to propose Bowman in his meetings with the provost.

Provost Kaplan denied that Tulchin ever advised him that he was negotiating with him during the course of their frequent meetings held with respect to the 1979 humanities restructuring and the selection of a chairperson for the new department. Yet, Kaplan's testimony otherwise appears to corroborate various facets of Tulchin's

narrative regarding the nature of their discussions. Thus, Kaplan recalled seeing Tulchin fairly often during that period. He also confirmed Tulchin's claim of influence in the Senate's consideration of selection of a chairperson and their narrowing consideration between the two of them to Professor Bowman and one other professor. At one point, Kaplan testified that without explicitly setting it forth, "I think he [Tulchin] understood that I understood that there were a number of members of the executive board of the Union on the Senate, and he was on the Senate too, so that he had some influence with those people." It is also clear that Kaplan did not specifically deny holding discussions with Tulchin at or before the January 1979 Senate meeting with reference to the form the restructuring should take. Neither did Kaplan explain why it was Tulchin, in particular, with whom he was meeting alone on a frequent basis or why the subjects of their discussions related to the choice of a humanities department head and the restructuring of the humanities grouping. I am compelled to conclude on the record before me that Tulchin's testimony is basically accurate and that Kaplan was well aware that Tulchin was representing the CUFCT and he was representing the administration in their off-the-record discussions, that they included reaching agreement on the form of the restructuring of the faculty of LA&S, including unit inclusion of its new head, and the manner in which the faculty input into these decisions would be expressed and approved.

F. *Adoption of the 1978 Governances*

In 1975, at President White's direction, his assistant and secretary to the board of trustees, Callcote Kindler, compiled a single document bringing up to date the 1964 governances by inserting on typed pages all amendments made between 1964 and 1975 to the governances. She did this by reviewing the minutes of the faculty meetings containing amendments they adopted and trustees' minutes approving the various amendments. She also crossed out those words and sections in the original which had been changed or modified, and referred to the appropriate amendment appearing on the following page. These handwritten crossings out and some notations were made by Kindler, and others were made by the president and represented his interpretation of application of the governances to the new structural change in 1975 when the three schools and faculty of LA&S were created. The president consulted with the provost on these interpretations.

The governance documents with the insertions, amendments, and interpretations remained solely in the possession of the administration for its use, and were not made available to the faculty, although, as earlier indicated, from time to time President White requested the faculties to address major revisions of the governances in light of the restructurings, particularly those in 1975.

According to Union President Tulchin, corroborated by Provost Kaplan, after the 1978 collective-bargaining agreement was executed in March of that year, the two of them got together pursuant to its terms to make changes in the governances to bring them into conformity with article XXIII of the agreement and to make minor changes to bring them into conformity with the existing structural organization of the institution. Article XXIII provided: "The application of the Governances shall not affect subject matters covered under this Agreement. In other matters (i.e., matters which do not fall within the definition of 'Terms and Conditions of Employment'), the Governances of each faculty (i.e., Art, Architecture, Engineering) as they currently exist or, in the case of the Arts and Sciences Faculty, as established in the future, shall remain in full force and effect pursuant to the terms of each Governance, respectively." In meeting with the provost, Tulchin was acting under authorization by the Union's executive board to conduct negotiations, including those relating to the governances.

For the first time, a member of the faculty, Tulchin, saw a compilation of all of the governances, as amended since 1964, in one document. Together, he and Kaplan reviewed the amended and revised compilation for the purpose of seeking agreement on those portions which affected terms and conditions of employment dealt with in the union contract, removing them from the governances, and to arrive at an agreed-upon version of the governances. Both Tulchin and Kaplan made markings on the document as they went along, reflecting their agreements on deletions and modifications in language of the governances.

According to Tulchin, he and the provost worked from the original compilation of 1964 governances with changes and typed revisions contained in a loseleaf bound folder and bearing the title "Faculty Governance and Interpretation June 1975." Provost Kaplan believed the working document he and Tulchin reviewed was a Xerox copy of the looseleaf bound volume. I conclude that Tulchin rather than Provost Kaplan is correct here, and that, indeed, the two of them were working from and worked up the original compilation of materials.

During their discussions, at least one difference arose between them, regarding the continued inclusion of the administrative committee in the governances. The Union wanted the committe abolished and the Provost countered that if the administrative committee was removed then the curriculum committee should also be out. Tulchin objected to this latter proposal. As a result of their continued negotiations over the matter, a compromise was reached whereby the administrative committee was retained in all school governances but certain preexisting language providing that "the activities of the members of the committee shall reflect the interests of the Faculty [and] . . . shall seek to interpret these interests to the President through the Dean or through representative on the Senate" was deleted.

The end result was that Tulchin and Kaplan reached agreement on all changes and modifications, a clear copy of the revised governances was prepared, it was checked over, and a covering letter to accompany issuance of the new governances was prepared, dated September 12, 1978, signed by Tulchin, as president of the CUFCT, and White, as president of the institution, and was attached to the front page of the new governances. The letter noted, inter alia, that the governances were in conformance with article XXIII of the agreement, and that changes were made to bring them into conformity with

article XXIII and with the existing structural organization of the Cooper Union.

Among other changes which appear in the 1978 school governances are the following: In article I three members of the adjunct teaching staff, elected by all part-time teachers for terms of 1, 2, or 3 years, are included as members of the faculty; ex-officio members, including the president, all deans other than of the school itself, and adjuncts, are specifically denied the vote; officers of the particular faculty now include a parliamentarian; students shall be represented at faculty meetings by three student members of standing committees elected by such students and they shall have a vote each; one alumnus as representative from the Alumni Association shall attend faculty meetings, without vote; deleted are paragraphs describing the faculty members' advisory responsibility in recommending appointments and promotions of department members (covered in the collective agreement) and department heads (eliminated in the early 1970s); deleted in article V are references to the committees on calendar and schedules (covered in part in an academic calendar, article IV, of the collective-bargaining agreement) and Academic Freedom and Tenure (covered in an "Academic Freedom and Responsibility," provision, article II, which tracks to a considerable extent the substance of the academic freedom described in appendix III to the 1964 faculty policy manual and in other articles dealing with dismissal of tenured faculty, article XIX, discipline, article XX, and grievance and arbitration procedures, article XXII, which permit grievances and, if unresolved after two preliminary steps, arbitration of all unresolved disputes concerning the application, the interpretation, or the reasonableness thereof or other claimed violation of any term or condition of the agreement, not excluding disputes concerning dismissal or discipline for conduct claimed protected under article II); committees now include as ex-officio members alumni representatives and student representatives; the Senate includes two faculty members elected by each school's faculty, including the faculty of LA&S (still in existence at this time in 1978), two elected student undergraduates from each school, the ex-officio members, the president and school deans shall be nonvoting members, and the term of faculty members is to be 3 years except at the first election one member from each faculty to be elected for 2 years and the term for student members shall be 1 year; each committee, in addition to including the school's dean, the dean of admissions and records, and alumnus, as ex-officio novoting members, also includes two full-time faculty, one part-time faculty, and one student, except that the dean chairs the administrative committee and votes and on all committees except administrative, and the chairperson shall be a full-time faculty member.

G. *Current Complement of all Employees and Students by School*

In July 1980, at the time of Cooper Union's withdrawal of recognition from the CUFCT, the School of Engineering had a complement of between 30 and 35 full-time faculty, including a handful of humanities faculty assigned to the school, the School of Architecture had approximately 9 full-time faculty, including 2 humanities members assigned, and the School of Art had approximately 8 full-time members of the Art faculty, including 2 humanities faculty assigned. In the 1981–1982 academic year, the student body, institutionwide, comprised approximately 1000 undergraduate students, including 175 in the School of Architecture, 420 in the School of Art, and the balance, 405, in the School of Engineering.

In addition to full-time faculty, there were adjunct faculty hired in each school from time to time to teach individual courses and relieve full-time faculty on leave of absence or sabbatical leave for a semester or academic year. At any one time, adjuncts probably equaled or exceeded the number of full-time faculty. Professor Wurmfeld estimated that in the School of Architecture alone, anywhere between 20 and 50 adjunct faculty had been hired in the 10 years since he became a full-time member of the Architecture faculty in 1972.

Besides full-time and adjunct faculty, the institution also employed shop and laboratory assistants or technicians, four to five shop assistants and a shop supervisor in the School of Art alone, a small complement of professional and clerical library employees, administrative assistants and clerical support employees for the deans and other administrators, and a maintenance staff.

H. *Administration of the Library System After 1976*

1. Cooper Union's entry into the library consortium

Until 1977, Cooper Union maintained its own indepenent library services. A working collection for Art, Architecture, and Engineering was (and is presently) located on the first floor of the Foundation Building. Library services were under the direction of a head librarian, who was assisted by a number of assistant librarians, a few clerks, and a complement of student part-time workers.

By memorandum dated March 14, 1977, President White, in an attempt to dispel rumors of the elimination of library services at Cooper Union, disclosed to the Cooper Union community for the first time that there had been discussions among Cooper Union, New York University, and The New School for Social Research (including Parsons Institute of Design) in order to explore the possibility of entering into some sort of cooperative library arrangement.

In a letter to President White dated April 20, 1977, responding to his invitation made at a meeting with students and faculty on March 24 to express their views on the matter, the faculty of the School of Art transmitted a resolution adopted unanimously at its regular, semiannual meeting held on April 19, including, inter alia, the conclusion that in order to preserve the viability of their educational programs, the jurisdiction over the Cooper Union library should remain exclusively with Cooper Union and no part thereof is to be delegated outside this school.

At the meeting with faculty, President White gave a capsule history of the discussions underway among the three institutions to enter a cooperative venture and to computerize their collections, including the solicitation of grant money to finance the venture. He assured the

faculty that they would have adequate opportunity to give advice before the arrangement was completed, but that the final decision would be made by himself and the board of trustees. It was in this context that the Art faculty adopted their resolution.

In response to that resolution, White assured the faculty by letter of April 25 that under any plan Cooper Union would retain full jurisdiction over it own library, and the other concerns expressed in the resolution would be satisfied. But White now advised, "As soon as an agreed upon proposal is reached . . . the faculty and students *will be informed* and your suggestions . . . given serious consideration." (Emphasis added.)

In a formal 7-page document transmitted to the Cooper Union community under date of May 5, 1977, White set forth the basic plan for possible cooperative delivery of library services among the three institutions, and welcomed all suggestions and recommendations which would be seriously considered by the administration and trustees. A deadline of June 1 was set for receipt of all comments. At the heart of the agreement was NYU's undertaking the purchase and cataloging of all new materials, installing an automated, on-live circulation system, and including the Cooper Union and New School libraries in its own computer output microfilm catalog program. These services were to be provided for a fee to be paid by Cooper Union and New School. All libraries of the three schools except certain NYU professional school libraries were to open to normal access by all students and faculties at the three institutions. The agreement delegated administrative responsibility and authority for all library operations at Cooper Union and New School to the dean of libraries at NYU, on behalf of and subject to the approval of each school president—thus, the Art faculty's concern over loss of jurisdiction by Cooper Union over its library. The agreement was to terminate after 3 years on August 31, 1980. It was later extended in 1979 to August 31, 1983.

At a special meeting on May 17, 1977, the faculty of the School of Architecture unanimously adopted a resolution critical of the minor consideration given to the educational aspects in the president's report. In its letter to the president informing him of the resolution, the faculty also advised of a resolution unanimously adopted on April 28, requesting the formation of an elected library committee. The faculty now requested that the president's report of the agreement not be implemented until the formation of this committee and its study of the proposal. At this time, and since 1976, an ad hoc library committee had been serving, appointed by the president. It was not until 1980 that the administration approved a Senate plan for a new faculty-student selected library committee.

In a letter to the trustees dated May 24, 1977, Professors Richard Bowman, the chairman of the library committee, and Thaddeus Gatza of the humanities faculty urged that no decision be made on the cooperative library services proposal until all the faculties had adequate time to study it and respond with suggestions and recommendations. The letter agreed that the June 1 deadline for comments was impossibly abrupt and precipitous, given the limited time in May for last classes, final exams, senior grades, and end of month holiday. The letter further claimed that the administration had achieved the May 9 proposal while rejecting the involvement of its own professional librarians, faculty library committee, and faculty and student body in general. It (the administration) had done so with the argument that there was nothing to discuss until a foundation responded with an award to the application for a grant. The letter went on to raise a number of questions, among them ones regarding the ultimate disposition of the 48,715 volumes in the humanities, social sciences, general science, and mathematics categories, and whether an adequate working collection would be retained on site. Two other members of the four-member library advisory committee, as well as other influential faculty members, joined the protest by separate memos and letters in the period of late May to June 1.

Union President Tulchin also requested an opportunity of Provost Kaplan to discuss the library venture as having a significant impact on terms and conditions of employment and on March 11 urgently requested a meeting to discuss the matter. There is no evidence that the Union had any separate opporunity to contribute comments other than that provided to the faculty generally as described.

2. Continuing faculty-administration conflict over the consortium

In spite of this overwhelming faculty sentiment opposing entry into the consortium without adequate faculty deliberation and consideration, the agreement, without change, was executed by President White on June 16, and by the other two presidents on June 16 and 17, 1977, and shortly thereafter at its July meeting was approved by the Cooper Union board of trustees.

Faculty opposition to the consortium continued unabated. There were faculty expressions of concern and disapproval when the head librarian *informed* the members of the library committee in May 1978 of the standing orders of books dropped and the over 100 periodical subscriptions not renewed for 1978. In November 1979, the faculty members of the president's library advisory committee presented to the administration a draft recommendation for changes in and discontinuance of certain procedures under the library agreement. These included the return to Cooper Union of the placement and processing of all purchase orders for new materials, the reviewing and cataloging of new materials by Cooper Union library personnel, no transfer of any materials to the NYU Bobst library, the return of the administration and authority over Cooper Union's library to Cooper Union, and the renegotiation of the annual payments of more than $40,000 to NYU as Cooper Union's share in the library consortium.

The draft recommendations had earlier been presented to the NYU library dean. In an August 1979 memorandum that dean castigated the committee for proposing "the reversion to a completely localized library operation at Cooper Union while retaining full access and privileges at NYU Bobst Library for Cooper Union's faculty and students" and he suggested such an approach was

contrary to the basic purpose and objective of the consortium. He hoped that dialogue with the committee would turn to matters of substance in implementing the objectives of the agreement.

Both the faculties of the Schools of Art and Engineering advised the NYU library dean that they had unanimously adopted resolutions at their fall 1979 meetings supporting in general the draft recommendations of May 1979 of the library advisory committee. As noted earlier, in 1979 the agreement was extended without change in substance, for an additional 3-year period, to August 31, 1983.

Earlier, in June 1978, President White informed the library committee that the position of head librarian had been eliminated, effective July 1. The notice also advised that the administration was advertising for a librarian specializing in engineering and science to replace a retiring assistant, and, further, that a librarian would be selected shortly to perform onsite administrative and coordinating duties under the NYU dean's supervision. A week prior to this written announcement to the committee, its then faculty chairman, Professor Ralph Knapp, had been summoned to the president's office and told of the decision to eliminate the head librarian position and retire the incumbent. Knapp asked if financial provisions had been made for the head's last year and White said he would receive his full salary for that year. Professon Knapp testified to his discomfort and difficulty it caused him with the committee arising from what he perceived as a mischaracterization as to his participation in these matters when, at the foot of his memo to the committee, the president stated, "Your chairman was consulted on this matter in advance." Knapp testified he believed the president took advantage of him in that statement when he had only been informed of decisions already made.

At the hearing the parties entered into a stipulation: (1) that Cooper Union decided to institute a new position of coordinator of library services and established the job duties of the position; (2) the institution negotiated with the Union the salary for that position, with the understanding that a portion of that salary would be that which the person had earned in her position as librarian, and in addition an added sum for performing administrative duties of the position; (3) the institution furnished to the Union at its request a description setting forth the duties of the new position; (4) Union President Tulchin sought to have a search made for a coordinator to avoid the possibility of a sex discrimination charge in discussions with the provost; (5) a search was made, and a Mrs. Vajda, an assistant librarian, was selected for the new position.

In January 1980, the new president, Bill Lacy, approved in writing to the chairman of the student-faculty Senate the Senate's motion to establish an ad hoc library committee, and to include the appointment of the present faculty members of the president's library advisory committee. Lacy noted that while these members were appointed by the president, they were elected by their respective faculty constituencies. He approved the change immediately. The Senate committee which had been approved at its October 30, 1979 meeting had heard Professor Hans Haacke, the then library advisory committee chairperson, severely criticize the administration for its failure to fulfill the mandate of the committee to advise on the establishment of policies and procedures to provide a more excellent, efficient, and economic library service by its and the NYU dean's withholding relevant information from it and by excluding it from specified important policy discussions, in particular the 3-year extension of the consortium agreement while the committee was drafting recommendations for what it assumed to be the eventual negotiation of the agreement. The decision to establish the ad hoc committee was viewed during the debate as enhancing the faculties' role and potential influence on the library consortium policies. The record contains no evidence that faculty influence increased or was felt after the establishment of the ad hoc committee.

3. The work of the library staff and their relations to faculty and students in work study programs

The certified unit includes librarians and assistant librarians.

Assistant librarian Irene Perry testified that she was hired by Vajda in July 1980. Her specialty is in engineering. There are two other assistant librarians, each having a different subject specialty. The staff also includes 3 full-time clerks, 2 part-time clerks, and 15 student part-time workers.

Perry spends 3 hours a day providing reference assistance and research assistance in engineering and general reference areas. The other 4 hours of her workday are divided among her other responsibilities. These include collection development in engineering, stock maintenance, maintenance of the card catalog, processing of new acquisitions, serials (periodicals), and documents, handling of student workers, and advising and assisting the library coordinator in the preparation of reports and project planning in her capacity as liaison with NYU library and technical liaison with its engineering school.

The three full-time clerks have a number of different duties: one works at the circulation desk, charging and receiving books and entering data into the circulation computer; another is secretary for the library, physically processing books and the periodical collection, and performing other miscellaneous clerical duties; and the third acts as assistant to the coordinator, placing book orders, handling petty cash, and doing some accounting.

One of the two part-time clerks assists in the slide library, typing headings and mounting slides, and the other is the evening circulation attendant. The library opens at 8:45 a.m., Monday through Friday, and closes at 10 p.m. on Monday, 8 p.m. on Tuesday and Thursday, and 6 p.m. on Wednesday and Friday.

All of the clerks report to Vajda. The coordinator hires them, gives them time off from work, keeps their time records, schedules their work hours and days, and disciplines them when deemed necessary. Perry does not prepare any work evaluation of the clerks, and has never recommended a clerk's promotion or removal. Once a week, on Monday evenings from 5 to 10 p.m., Perry is in charge of the library in the absence of Vajda. During

Vadja's summer and other vacation time, the three assistant librarians rotate as librarian in charge.

At the direction of Vajda, Perry, along with the other assistants, has helped train the part-time clerks. It appears that the jobs of both the full- and part-time clerks are quite routine in nature. A very small percentage of Perry's time—less than 10 percent—is spent instructing clerks in particular work tasks. On one occasion, in the spring of 1981, her recommendation to terminate a full-time clerk for an unreported absence of several days was not followed. Instead, the individual was warned and docked pay for the absence. Perry, as most senior assistant librarian, neither hired nor recommended hire of the other two assistant librarians. In the case of one of them, with whose hiring she was familiar, no faculty participated in interviewing or recommending hire. Perry does not sit on any governance committee of the institution, Dean Tan having denied a request made by the library coordinator, Vajda, that she sit on the School of Engineering curriculum committee.

The parties stipulated that the three assistant librarians receive substantially equivalent salaries and the library coordinator earns a substantially higher salary.

Of the approximately 15 part-time students, half at the time of the hearing were in a work study program, with 80 percent of their salaries paid by the institution's financial aid office and 20 percent paid out of the library budget. Their work applications are screened by the aid office which applies a need criterion to them.

Approximately 25 students apply for these positions each semester. Perry interviewed each of the candidates for the fall 1981 semester, questioned them about their work background and the hours they were available for work, and then recommended for hire to Vajda the 15 students who were ultimately employed.

There is relatively high turnover among the students, 5 of the 10 initially hired in the fall of 1981 having been replaced before or at the completion of their work term. Perry's recommendation not to continue two students in the second semester of the 1981–1982 school year was followed by the coordinator. While employed they check identification of library users and see that books are not removed without authorization. They also act as pages placing books back in their proper places on the library shelves. The students are not assigned to work for a particular assistant librarian.

Perry trains the students, providing them with a manual describing the two different functions and regularly checking to see they are doing their job correctly. Vajda also participates in the day-to-day training of the students. Perry and Vajda together review work performance to determine whether students who wish to return are retained for the second semester in a school year. Perry also maintains time and attendance records on the students except for the student assistant in the slide library, who reports to another assistant librarian in art, and, when students are late or absent from work without excuse three times, has, with the concurrence of Vajda, terminated them in accordance with the disciplinary regulation set forth in a written instruction sheet provided the students on their commencement of employment. Perry updated and thoroughly rewrote the instruction sheet which, with the approval of Vajda, was thereafter posted. The updating clarified the penalty for unexcused lateness or absence from work.

Perry spends approximately 5 percent of her time evaluating, interviewing, monitoring, and working with the student assistants. The students are paid an hourly stipend of either $3.50 or $3.65. Further, unlike the librarians, who receive an annual salary paid monthly, at a substantially higher rate of pay, they receive no fringe benefits and only 2 of the 15 student workers continue working during the summer recess. The assistant librarians receive a paid vacation, sick leave, and medical insurance, among other fringe benefits.

None of the librarians employed by Cooper Union are members of the faculty nor do they participate in governance committees. Neither the librarians nor the faculty supervise or evaluate the work of the other nor does either have anything to do with determining the vacation schedule, salaries, fringe benefits, overtime hours, or any other terms or conditions of employment of the other. They, of course, do come into professional contact and work relationship from time to time in terms of faculty recommendations on additions to the collections in their subject fields and in faculty arrangements to use or borrow texts or books in the collections.

I. *Faculty Participation in Academic Matters*

1. Administrative matters

a. *Appointment of presidents, deans, and other administrators*

In 1968, the minutes of a joint faculty meeting held that September report that the then chairman of the board of trustees addressed the members present, informing them that following the sudden death of President Humphreys, Dean Teller had been appointed administrative head of Cooper Union and had agreed to serve up to 90 days in that capacity while the trustees continued their search for a new president. Dean Teller then made further remarks, including an announcement of the formation of an advisory committee to the board of trustees for the selection of a president, composed of division heads, heads of departments, and three faculty members, one elected from each academic division. President White was ultimately selected as the new president by the trustees sometime thereafter. It is clear that the division heads referred to administrators of the divisions (schools) of the institution, holding broad managerial responsibilities.

When President White submitted his resignation in 1979, the trustees retained an executive search firm to assist in the preliminary screening process. The Senate minutes of March 13, 1979, include reference and discussion of a report by Provost Kaplan of the institution's executive search. The "weeding out" process being conducted by the search firm was then underway, 80 applications having been received in response to an ad appearing in the New York Times. Kaplan indicated in response to an inquiry that the Senate would have input in the selection process. The input of the faculty-student Senate ultimately took the form of conducting interviews

of the two final candidates and endorsing the selection of the candidate who was chosen as the president to succeed White, Bill Lacy. The July 16, 1979 letter to the chairman of the board of trustees endorsing Lacy's selection shows that due to the fact that the meeting with the two candidates took place during the summer, 12 faculty members, not all of whom were duly elected Senators, participated.

The 1978 governance provides that when faced with the task of filling the office of president, a committee shall be formed consisting of the heads of educational divisons and the vice president of business affairs. This committee shall submit a list of qualified candidates to the trustees for their consideration. Thus, faculty were excluded from the process, except for the limited role the Senate was permitted to play, and except for some reference in the minutes of the engineering administrative committee meeting of February 12, 1979, to the Dean's solicitation of Engineering faculty input in the selection process and a reference to the fact that names of candidates could be directly submitted to the trustees, dean, and the administrative committee.

According to Professor Hans Haacke, whose testimony in this regard went largely unrebutted, there were a number of instances when the faculty was not consulted concerning the appointment of administrators. The position of provost was created and filled in 1970 or 1971 without input of the faculty. The position of dean of the School of Architecture was created and filled in 1975 without faculty input. The position of associate dean for health, recreation, and safety was created and filled in the late 1970s without faculty consultation. The position of dean of admissions and registrar was created and filled in the early 1970s without faculty input. When Dean Sadek left his position as dean of the School of Art during the 1980–1981 academic year the faculty was not consulted. Testimony supported the conclusion that Sadek resigned under fire after a private consultation with the president following his meeting with a delegation of students demanding Sadek's resignation. Sadek subsequently returned to full time teaching and, effective in the fall of 1981, was appointed director of the design center of Cooper Union, a unit of the institution established in approximately 1979 to perform typesetting and typographic work for in-house publications as well as for nonprofit outside clients. The faculty had no role in establishing the design center, the creation of which had been initiated by Sadek when he was still Art School dean. Neither was the faculty consulted on Sadek's appointment following his resignation as dean.

Following Dean Sadek's resignation, in accordance with the 1978 governance, Professor Corwin, as senior member of the Art School faculty, became acting dean. As senior member Corwin also served as chairperson of the three-member governance committee which made a search for a new dean and presented one candidate, Lee Ann Miller, who was in fact appointed dean of the Art School.

In 1972, at a time when the School of Engineering had been restructured as a division, the faculty participated in a division meeting held on October 25, which, inter alia, voted to recommend to the administration a successor head of the division to succeed then Dean Vopat. The minutes disclose that the faculty first voted unanimously to define the word "majority" in the rules previously adopted for the election of a slate for division head to mean a majority of the faculty members of the division. Next, as a result of a split first ballot, the two candidates receiving the least votes were eliminated. A second ballot yielded seven votes for Tan, nine for Wallace, and lesser votes, five and six, for the two other remaining candidates. The members then unanimously approved Tan and Wallace as the slate for head of the division. Although receiving two fewer votes, Tan was selected by the administration as division head.

The manner of faculty participation in the selection of Professor Bowman as departmental chairman of humanities, on the 1979 restructuring has been reviewed supra. During the 1980–1981 academic year, President Lacy asked Bowman to step down as chairman and Bowman readily acceded to the request, resigning his position as head of the department effective with the end of the year. Bowman's successor was chosen under the following circumstances. As explained by Professor Gatza, the full-time members of the department constituted a search committee, there was a chairman of that committee, and applications for the position were solicited by advertisement. The committee reviewed the applications and, based on professional judgments as to their qualifications, interviewed some of the applicants. Subsequently, at a meeting held with President Lacy, the committee members rejected all applicants. Finally, during the summer of 1981, the search committee agreed to the professional qualifications of a Professor Michael Sundell, not then a member of the faculty. Each member of the committee wrote President Lacy, with a consensus in favor of Sundell, and Sundell was appointed.

b. *The administrative committees*

The charge of this committee has been described supra and did not change in substance in 1978. Prior to 1978, the committe in each school (or division) consisted of the dean, as chairperson, and the heads of department. Following the issuance of the 1978 governances, the School of Engineering committee now comprised the dean, as chairperson, and, as revised unilaterally by the Dean on an interim basis, one elected member from each Engineering discipline. The School of Art and Architecture committees were changed to include, in addition to the dean chairperson, two full-time faculty, one part-time faculty, one student, and one graduate, with only the representative for the Alumni Association not having a vote.

At the April 12, 1977 meeting of the Architecture School committee, it received nominations for adjunct faculty representatives to the curriculum and academic standards committees to be voted on at the April faculty meeting. Dean Hejduk also presented the March minutes of the curriculum committee in which various curriculum changes were approved by the sole vote of the full-time faculty members in attendance, the chairman only voting in case of a tie. The Dean then moved that the actions of the curriculum committee be endorsed and

presented to the School of Architecture faculty. The motion passed. Also discussed were requests that the committee support the school's funding of materials for student construction of drafting area enclosures and that a committee be established to determine future Cooper Union exhibitions and publications.

Thereafter, no meeting was held of the Architecture School administrative committee until April 9, 1981, 4 years having elapsed without a meeting. As explained by Professor Wurmfeld, the chairman of the Architecture School curriculum committee during the same 4-year period and a member of the administrative committee from 1978 to 1981, it was the dean's prerogative to call the meeting. It was also the dean who prepared and controlled the agenda of items to be considered at the meeting. The dean failed to call any meeting. On one occasion, in 1979, Wurmfeld, as chairman of the curriculum committee, had forwarded to the dean and administrative committee members minutes of a curriculum meeting at which curriculum changes had been approved. No administrative committee meeting was held; instead, the dean took these changes directly to the faculty with his recommendation for approval; they were approved by the faculty and then implemented by the administration. Among the changes approved were ones dropping social science and philosophy from the first year and adding them to the third year; expanding the credits for the introductory first year architecture courses from 4 to 5 each semester; reducing general studies electives from 6 to 3 credits each semester in the third year; reducing the fifth year thesis course credits from 10 to 9 each semester and adding for the fifth year a requirement for a 2 credit advanced course each semester dealing with the relationship between architectural space and some other discipline in the humanities; and a restructuring of the elective history of architecture program by announcing an attempt to coordinate these courses into a sequence of offerings on a biannual cyclical basis.

Finally, an April 9, 1981 meeting was called not by the dean but by Professor Richard Henderson, a faculty member who assumed administrative duties while Dean Hejduk was on sabbatical leave at the dean's request. The agenda for that meeting was to create a slate of nominees to fill vacancies for the following semester on the various standing committees for positions which had opened because of the expiration of the 3-year terms of the incumbents.

Minutes of School of Art and Architecture administrative committee meetings in 1974 and 1975, before the 4-year hiatus in meeting of the Architecture School committee, show that they dealt with such matters as receipt of nominations from the Alumni Association for alumni membership on the standing committees, conditions and terms for exhibition of student work in the institution's gallery, discussion of and agreement to seek to expand library hours in discussions with the provost, and the approval of renewed 3-year teaching contracts for part-time faculty.

There was some question whether the administrative committee of the School of Art and Architecture prior to its separation into separate schools in the 1975 reorganization dealt with budgetary matters. Professor Wurmfeld testified credibly that when he became a member of the administrative committee in 1978, Professor Robert Slutzky of the committee informed him that he had never seen a budget document setting forth categories of projected income and expenditures in his years on the committee. In his role as a member of the committee, Wurmfeld never reviewed or was consulted on any budget for the School of Art and Architecture breaking down operating expenses by salaries and other costs and expenses subdivided for each of the two operating entities or showing separately any overall shared costs for the two schools. Thus, he could not explain a statement in the minutes of the administrative committee for February 28, 1974, under the heading "Budget Report" in which the chairman, Dean George Sadek, reported "he has had budget hearings." There is no record evidence showing any budget hearings involving faculty. The hearing to which the dean referred probably was one involving administrators only at which the deans presented and discussed proposed budgets with the provost and president.

Representative minutes of administrative committee meetings for the School of Art following its establishment as a separate school for academic year 1975–1976 show that it reviewed the budgetary request of the School of Art and recommended funds be requested for equipment purchase, maintenance, and repair; reviewed upcoming adjunct faculty contracts and recommended reappointments to a 3-year adjunct contract, at the same time cautioning the dean to consider contract renewals separately from promotion in rank recommendations; recommended nonrenewal of certain adjunct teacher contracts; based on teacher evaluations, discontinued courses, low enrollment among other reaons; obtained the dean's agreement to a procedure for followup evaluation of first year students, including teacher access to entrance portfolios and mandatory teacher meetings to compare notes and discuss individual students before grading; approved and forwarded to the faculty curriculum committee curriculum changes, including a final version of the foundation program of study as well as a list of prerequisite courses in painting and graphic design; unanimously approved a new first year curriculum, as well as an additional requirement and suggestions for presentation to the faculty for its approval, including a direction that the chairman of the curriculum committee initiate hearings within the specific major areas of study in order to present a system of prerequisite courses to the administrative committee and, in turn, to the faculty; approved adjunct teacher promotions; agreed on a plan to improve job counseling for senior students; discussed moving video program facilities to the School of Engineering because of available space and technical staff assistance; discussed increasing the length of certain visiting professorships; discussed possible solutions to varying class sizes and excessive waiting lists of applicants at registration; and persuaded the dean not to combine separate techniques and workshop courses in the video program for at least 1 year.

The minutes of the administrative committee of the School of Engineering for the period 1974 to 1980 like-

wise show a broad range of concerns, as it debated and recommended under the dean's chairmanship solutions to a wide range of educational problems and sifted, evaluated, and passed on to the faculty for its determination the recommendations of the various standing committees. It took up policies on evaluating transcripts of transfer student applicants; discussed methods of determining teaching hour credits and what constitutes a normal workload; approved a policy prohibiting receipt by employees of remuneration, other than in the form of an honorarium by a recognized nonprofit professional or scholarly society, for use of Cooper Union facilities for work performed for another agency or institution; recommended to the administration limiting use of the school's facilities to current faculty, staff, and students; sought solutions to problems involving shop technicians to increase efficiency and make technical support more responsive to teacher needs; recommended that students satisfying both physics and math curricular requirements receive credit for two majors; endorsed notification of a student's faculty counselor on placement or continued retention on probation; arrived at a consensus on continuing a freshman counselor program after retirement of the incumbent; received reports of budget preparations by the dean and division heads; clarified the rule permitting students dropping required courses prior to midsemester; made nominations for membership on standing committees; made provision for student membership, by student election of a representative, not provided in the 1978 governance, to be excluded when the committee went into executive session (to deal with personnel matters involving individual faculty members) and agreed to hold special meetings for student matters; prior to the 1979 Liberal Arts and Science reorganization, in 1978, agreed to liberal arts and science representation on the engineering curriculum committee, one from liberal arts and one from science, but without a vote; discussed formation and staffing of ad hoc committees; persuaded the dean that faculty all meet a 12-member, predominantly alumini, advisory council formed by the administration to advise the school on matters pertaining to its educational programs, after its first meeting with the trustees and registrar; in 1979, strongly advised the dean to seek an associate dean, received and reviewed the dean's listing of an associate dean's responsibilities, and unanimously recommended the dean pursue the appointment to the post of adjunct electrical engineering faculty member Larry Hollander (who was ultimately appointed to the newly created position); in 1979 unanimously agreed that deciding on appointment of new faculty shall be the responsibility of the committee and then recommended and obtained the dean's approval to recruit two new full-time faculty members, at the assistant professor level, one in the area of electronics and computer engineering and the other in structural engineering; in 1979 recommended a new composition of the Senate for consideration by the joint faculty, and discussed at length over a number of meetings a new makeup of the committee in light of the reassignment to the Engineering School of a majority of the liberal arts and science faculty, and the Dean's proposal adding to the committee's convernance responsibilities advising and assisting the dean on administrative matters dealing with the everyday and longer term needs of students and faculty related to academic programs.

c. *Establishment of the graphics design center*

According to the unrebutted testimony of Professor of Art Hans Haacke, some time in the late 1970s George Sadek, then dean of the School of Art, and Rudolph de Harak, professor of graphic design, drew up a petition among the graphics area part-time teaching staff to establish a design center within the Art School. Professor de Harak was then the only full-time member in the graphics area. The petitioners bypassed both the faculty and Senate and presented it directly to the president. The faculty did not vote on the establishment of the center. The center was approved by the administration and continues in existence to date. It is known formally as the Center for Design and Typography under the direction of Professor Sadek following his resignation as dean, and performs the services described in section I,1,a, paragraph 4, supra.

With respect to the in-house publications, including catalogues, produced by the design center, none of the faculty either in the Art School or otherwise have any say about the allocation of institutional funds for this purpose.

d. *Discontinuance of degree-granting programs*

The manner in which the mathematics, physics, and distributed science degree-granting programs were eliminated by the administration in 1975 without apparent faculty participation in the decision making process and, indeed, over widespread faculty opposition once the changes were announced has been described above.

e. *Institution of the SHAPE program*

In 1975, Professor LeMee of the Engineering faculty applied to the Mellon Foundation for a grant to study and apply an integrative approach to professional education in engineering. The minutes of the meeting of the Engineering faculty of September 25, 1975, note this proposal submitted by a member of the faculty. At the next meeting, held October 14, 1975, the chairman, Dean Tan, reported that the Mellon Foundation had awarded a grant of $100,000 to the school for the study and that a study group would be formed shortly. Professor Ralph Knapp of the engineering faculty testified that he had not been invited to join any such committee or recomend its composition, and that the faculty did not participate in its selection. Membership on the committee was by appointment.

At the March 2, 1976 continuation of the regular meeting of the faculty, Professor LeMee gave a report on the Mellon study group. The project had been named SHAPE, an acronym for the "Synthesis of a Holistic Approach to Professional Education." Its main objective was to design a curriculum in Engineering for a small group of students based on an integrative approach to professional education. The theoretical base of the integrative approach was contained in several papers published by LeMee, copies of which were available from him. LeMee said the project team was meeting Monday

afternoons, minutes of its meetings were available to peruse at the dean's office, and faculty members and students were invited to the project planning center to view the displays or to attend the Monday meetings as observers. The minutes of the meeting also note that a recently appointed visiting professor, Dr. Lee Harrisberger, whose appointment was funded by the Carnegie Corporation, after his introduction, spoke about his involvement with project SHAPE and urged the entire faculty to help the project team make it a success. Faculty did not vote to recommend candidates for visiting professorships.

At the faculty meeting of October 4, 1977, Dean Tan announced the appointment of Professor Huckaba as director of engineering program development. He would be seeking funds to implement programs developed by SHAPE. The prior year, Huckaba, like Harrisberger, had been an Andrew Carnegie visiting professor. By the 1977–1978 academic year, Huckaba had become a member of the regular full-time faculty.

According to Professor Knapp, for a considerable period of time after the formation of the SHAPE committee it was shrouded in mystery. By this he meant faculty generally were not encouraged to learn what it was doing. For a period of time the committee did not make a detailed report of its studies and faculty not involved with project were not kept informed through the governance mechanisms of how it was fulfilling its objective. It was Professor Knapp's judgment that when they did learn more about it a considerable number of the Engineering faculty, at least more than half, were opposed to the project as a program that would dilute the intellectual content of the curricula being offered by the school and would make the education of its students weaker than it was with the regular program at Cooper Union. In Professor Knapp's views, SHAPE dealt with teaching techniques as opposed to intellectual content—something a competent professor should fit into any course content without the necessity of having a special program to enforce it. Knapp testified that he did not become involved with the SHAPE program because he was never specifically asked to do so. He was waiting for that invitation because his own technique of teaching was very much related to what SHAPE was supposed to do. He had been teaching competencies for the 22 years he had been in the school and was not approached to be on the SHAPE committee, nor was he ever approached to teach in the SHAPE fashion.

At some point after its introduction as an experimental teaching program, the SHAPE program received a National Science Foundation grant and it continues to date under such renewed funding, now known as the D.I.S.E. Program.

The objections of certain engineering faculty to the continued operation of the program without broader faculty input took concrete form. Physics Professor Samuel Gelfman was called down by the dean in the summer of 1979 and told that the school had received a grant for experimental teaching programs. The dean said new methods of teaching were going to be employed which stressed the competencies of communication, problem solving, and value judgment. This was the first time that Gelfman became aware of the program. The dean said a set of courses had been selected for a 2-year experimental program under an NSF grant which originally included a chemistry course but after receipt of the grant he had been informed it was not practical to include chemistry so it was decided to replace that course with a physics course. The dean asked Gelfman if he was interested in teaching one section of the freshman physics course 12 in the SHAPE mode, Gelfman said he wanted to learn more about it, and the dean told him to see Professor LeMee. After talking with LeMee, Gelfman became convinced the experimental course was not a good medium for teaching physics 12, especially a freshman course, and told this to the dean. The dean responded that he would find someone else to teach it, he would not give up the grant. When the dean approached Physics Professor Yalow to teach the course, he also rejected it as inappropriate. All physics faculty turned it down. As a consequence, the dean selected Physics Professor Emeritus Milton Stecher to teach the course. Stecher was then an adjunct member of the faculty after his mandatory retirement from full-time tenured faculty status at the end of the 1977–1978 academic year.

While still a full-time member of the faculty, in the period 1975 to 1977, Stecher had participated in the experimental program. He testified that participants received as a special benefit for their participation release from teaching a regular course. The only benefit he received as an adjunct was payment of the adjunct's salary.

Subsequently, during the 1980 spring term, Gelfman now approached Dean Tan about participating in the experimental program, this time as the second man teaching physics 91, a required laboratory engineering course in the SHAPE mode. Gelfman had taught this course regularly every spring semester.

At the time Dean Tan was enthusiastic about Gelfman's participation; however, Stecher, in passing, later told the dean that Gelfman would be unacceptable to him for the course and the dean then told Gelfman that it looked like he would not be teaching it because of Stecher's objection. Dean Tan said Stecher believed Gelfman might sabotage the course. Gelfman was nonplussed and denied the insinuation. Yalow also asked to teach the experimental section and was similarly turned down. The dean then called a meeting for July 1 to clear the air. Present were Dean Tan, Professors LeMee, Gelfman, Yalow, and Rakow, and Adjunct Professor Stecher.

At the meeting, Gelfman and Yalow objected to the procedure for selecting a teacher for the course, this being the first time someone other than the dean was making the decision. They also sought information about the course content. When they learned that the list of experiments was less than the usual number they also objected about this. The dean maintained that if Stecher was uncomfortable with the full-time staff, he was free to select whom he would teach with. The course content was also not modified to meet their objection.

As a result of this dispute, the regular physics faculty took the following action, with the results indicated. By letter dated August 18, 1980, Gelfman and Yalow wrote

the dean recording their disagreement with a number of actions taken in connection with the physics courses included in the NSF-sponsored program at Cooper Union. They protested that no member of the physics faculty had any role either in the determination that physics would be in the NSF curriculum or which specific physics courses might be appropriate. They next deplored the dean's decision that no member of the physics faculty would be permitted to teach the NSF section of physics 91 laboratory in association with Stecher, notwithstanding their volunteering to do so and their own assurances to follow the modus operandi in teaching it. They noted they did seek and find an adjunct faculty, whom they named, for the section. Finally, they protested that the technical content of the course was inadequate and explained why. In a later, December 15, 1980 letter to the curriculum committee, Yalow, Walton Ellison, and Gelfman, the full physics faculty, provided it with information about the manner in which the NSF-funded physics 91 and 12 courses were included in the curriculum without their knowledge or participation and over their objections (as to physics 12). It ended with a statement that in order to provide a professional evaluation of physics 12 they would require written evidence which describes how the course is appropriate for this program.

On the same date, December 15, 1980, the Engineering School curriculum committee held a lengthy discussion about the ongoing NSF program and, in particular, the failure to have submitted physics 91 and 12 to the committee to determine whether its action was required. A resolution was then adopted by a vote of seven to none requiring that descriptions of modifications to existing courses be submitted in writing to the committee chairman, who will determine whether they warrant committee consideration.

f. *Joint degree program with New York University*

In May 1977, the faculty of the School of Engineering approved the curricula of a NYU-Cooper Union joint degree program effective for introduction in the 1978–1979 academic year. As explained by Professor Knapp, Dean Tan had appointed full-time faculty to a joint committee also including NYU faculty to study the possibility of establishing such a program. As contemplated, the program would permit NYU science students, by adding a year of undergraduate study at Cooper Union, to receive joint degrees in science from NYU and engineering from Cooper Union.

At a May 3, 1977 special engineering faculty meeting the curricula agreed upon by the joint committee was proposed for approval. Certain amendments to the motion for approval were offered, debated, and either withdrawn, defeated, or passed. One amendment adopted required the total number of NYU students enrolled in the program not to exceed 20 percent of the total enrollment of the School of Engineering. Another provided that the program would have to be approved by an affirmative vote of both the Cooper Union and NYU faculties to continue beyond the 1982–1983 academic year. Other faculty voiced certain fears and objections they had received from members of the then faculty of Liberal Arts and Science about the program and distributed and commented on a resolution passed by that faculty requesting the science faculty to table or refuse to vote on the approval motion. After a motion, passed by a vote of seven to none, approving a series of meetings with the LA&S faculty concerning the program to be held through December 1977 before reconsidering the program.

At the next regular Engineering faculty meeting held on May 23, 1977, a motion passed taking from the table the resolution relating to the joint degree program. When Professor Knapp then raised the question whether the adoption of the program that day would supersede his motion to hold joint discussions between the Engineering and LA&S faculties, the chairman, Dean Tan, replied that there was a degree of urgency in the matter because NYU had already approved the program and had requested Cooper Union to act soon so it could start in September 1977. The trustees also planned to consider the matter on June 8. Extended debate followed on the implications of the program, in particular, with respect to the faculty of Art and Science. During the period from 1975 to 1979 that faculty had been excluded from the governance and participation in deliberative processes—in this instance, consideration of the joint NYU-Cooper Union degree program—as noted above.

Professor Knapp offered a new amendment to the pending motion on adoption of the program that the regular full-time students originally admitted as Cooper Union students *not* be permitted to take at NYU any course requirements where the courses are currently offered at Cooper Union by the faculty of LA&S. The motion was passed unanimously. Another amendment was also adopted, by a vote of four for, three against, two abstentions, which called for the joint degree program to be governed by the 1964 governance of the faculty of the School of Engineering and all published amendments thereto. Then the original motion as amended was adopted approving the program by a vote of 10 for, 1 against, with 1 abstention. Four other faculty listed as present did not vote but were included among the abstentions. A final motion was proposed and adopted by a vote of nine to none registering the sense of the faculty that the administration keep all faculties of the institution fully and candidly informed about any developments and information concerning implementation of the program.

The trustees approved the program at its June meeting, and the program was implemented at least through the 1982–1983 year.

g. *The integrated master's program in engineering*

An integrated master's program in engineering was voted on and approved in principal by the faculty of the School of Engineering and the board of trustees during the mid-1970s. According to Professor Knapp, some time in 1974, then Engineering Division Head Tan, before his elevation to dean on the 1975 reorganization creating the School of Engineering, had proposed a master's program for Cooper Union students permitting them to achieve both a bachelor's and master's degree in engineering by earning a specified number of minimum credits in particular subject areas over an additional year of study.

One of the ideas embodied in the concept for the program was that its introduction would not cost the school more money than was was presently being spent in Engineering School programs. Knapp publicly voiced reservations about this underlying assumption in view of his understanding of the startup costs involved. Division Head Tan called Knapp in and had Knapp explain his objections in a private meeting. Tan sought Knapp's support for the program and voiced disagreement with his objections. The program was ultimately adopted by a large majority vote of the faculty, with two abstentions, one being Knapp's.

The agenda for the regular Engineering School faculty meeting held February 22, 1977, includes a motion to be submitted by the curriculum committee for approval of a proposed curriculum for the program to be implemented as capabilities and resources are developed. The proposal takes up 13 closely typed pages listing credit requirements overall and minimum credits in various engineering disciplines. The document is consistent with Professor Knapp's testimony that the master's program required all students to design their own program in an engineering discipline—chemical, civil, electrical, or mechanical engineering—consisting of a minimum of 45 credits in analysis, systems, design, and engineering laboratory so as to provide an integrated educational experience in the designated discipline of study, with at least 18 of these credits to be at the graduate level and at least 12 credits forming a coherent concentration in the major area of study. A thesis or project in the major or minor area of study, equivalent to a maximum of six credits, was also required.

The integrated master's program in engineering was approved by the Engineering School faculty and then by the board of trustees in the 1978–1979 academic year.

Since most of the courses offered in the master's program are electives rather than required, the courses are approved on an annual basis through the curriculum committee to the office of the dean. As explained by Professor Knapp, the courses approved for a particular year are then posted, the students in the program register for them, and the dean then decides based on the levels of enrollments, which courses will actually be given. Knapp recalled a statement made by the dean, apparently at an Engineering faculty meeting in 1979 in response to a question as to which courses would be offered, that since the faculty had voted for and approved the curriculum, all of the courses for offering in the program were legitimate courses and he would decide which ones were to be offered among them on any occasion in connection with staffing requirements and other administrative matters.

At a February 6, 1979 engineering faculty meeting, Dean Tan announced the trustees' approval of the program and commitment to a fund-raising campaign for it, and that four new faculty would be added to the present 18 full-time faculty to support the master's program—they would be added over the next 3 years. At a December 5, 1978 administrative committee meeting, in response to a question, the dean commented that he was "pretty confident" that if 25–30 students applied, the program would go as it was essential to the survival of Cooper Union's reputation. The program was ultimately and is still in force.

h. *Accreditation visit and report—1978*

Cooper Union, as a member of the Middle States Association of Colleges and Schools, has periodically prepared a self-study and has been evaluated by that body which certifies schools and colleges as meeting formal or minimum requirements relating to their academic programs, academic standards, facilities, financial soundness, and faculty. The last such study had been conducted by the Association some 10 years prior to the current study.

In the spring of 1976 an institutional self-study was initiated in anticipation of the visit of an accredidation team from the Association to evaluate Cooper Union during the 1977–1978 academic year. As the preface and table of contents to the self-study make clear, the document is broken up into sections, each prepared by the administrative head of the area covered. Cooper Union as an institution was drafted by President White, with an addendum by Provost Kaplan, the finances section was written by Vice President for Business Affairs Cahill, and sections on each school were written by each Dean, with a section on the faculty of LA&S prepared by Provost and Acting Dean Kaplan. Additional sections on affiliated activities were prepared by the dean of admissions and records, Liebeskind, the dean of continuing education, Alter, the head librarian, Graves, and the dean of students, Gore. The drafts of the sectional reports, at least those by the academic deans before their final preparation, were made available for review and suggestions to the full-time faculty, as well as adjuncts and students who serve as representatives on the degree-granting faculties. The entire report was distributed to these elements of the Cooper Union community and copies placed in the library.

A visiting evaluation team, consisting of six professors and administrators in academic and business areas from middle Atlantic colleges and two presidents of art schools representing the National Association of Schools of Art, visited Cooper Union on 3 days in April 1978. Shortly therafter the team issued a confidential report to the Cooper Union community representing its views as interpreted by the chairman, Clarence C. Mondale, professor of American civilization, George Washington University.

In the report, the team commended certain aspects of the institution and also reviewed its serious problems. It commended the competence and completeness with which the trustees, the president, and the administration have managed accounting and financing, the condition of the physical plant, the quality of teaching and of the students, and the quality of the academic programs. It also noted favorably the unusual loyalty to the institution among all segments of the Cooper Union community, the fact that the administration and Union had settled on a contract, and the quality of the library.

The serious problems the team discussed had to do with (1) faculty morale; (2) faculty governance, with special emphasis on the governance of the faculty of the Liberal Arts and Sciences, and student governance; (3)

long-range planning; and (4) the library consortium. Less serious was the need for review as to policy as it relates to adjunct faculty and the self-study document itself.

With respect to faculty morale, the team comments, all parties agree that the many changes in academic organization have been "rather drastic," and notes the administration argues its right to have taken actions "in the absence of advice from the faculty and senate, or contrary to such advice." The team then writes, "No doubt the right exists, but to the degree it is exercised, confidence in faculty governance is subverted, and faculty morale declines. The extreme case is morale among the Faculty of Liberal Arts and Sciences." The team further comments: (a) the many changes in faculty organization and affairs over the past few years have been attended by an overall decline in faculty numbers and influence; and (b) communications between the administration and faculty and within the faculty need to be revivified and regularized.

As to faculty governance, the team writes, it is in extreme disrepair, with the status of the faculty of LA&S especially irregular and unstable. The team's impression is that the deans of the professional schools are unusually strong and the faculty unusually weak, a fact which it attributes to such causes as the struggle over unionization, the abolition of departments, a seeming drift toward increased autonomy in each of the schools, and some indifference among some of the faculty to the often boring details of management. The team faculty members they talked to argued that they had not been fully participant in their own affairs, and there seemed to be no present provision for faculty review of institutionwide academic policies and priorities. As to the faculty of LA&S, in particular, the team writes, "Reduced by approximately fifty percent in numbers over the past five years, this faculty is also disenfranchised and dislocated. . . . It does not participate in the determination of curriculum in the professional schools, nor does it oversee development of a common liberal arts curriculum." And the team notes its fear of the cooperative agreements with NYU, further decline in its numbers, and the deep split between the scientists and mathematicians on the one hand and humanists and social scientists on the other.

After reviewing its concerns for the lack of attention in the self-study to student governance, the lack of long-range planning (in which it asserts the faculty must be a major contributor), and its doubts about whether the library consortium will in fact provide improved library service to the institution, the team criticized the lack of a general policy statement on the appointment and status of adjunct faculty. (It had earlier noted that the faculty consisted of 48 full-time and 76 adjunct members, with adjuncts in the Schools of Art and Architecture teaching approximately 60 percent of the total credits offered in these curricula.)

Finally, the evaluation team expressed its disappointment in the process followed in the development of the self-study and in the document itself. As to the process, the team was disappointed that so little was done to assure active and full participation from all segments of the community—many faculty and students feeling that the document did not accurately represent their interests and perceptions. The team was also disappointed by the "top down" procedure followed. The process of an administrator's giving his version of affairs under his charge and then asking, in effect, if there were any objections did not make for a candid exchange on the issues. As to the document itself, the team wrote they generally found themselves handicapped by the scantiness of the data in and incident to the self-study.

President White, in his May 22, 1978 written response to the Middle College Association on receipt of the report, took issue with what he characterized as an appearingly simplistic comprehension of the institution's problems and an inadequate understanding of the demands placed on Cooper Union by the altered circumstances of the past decade.

2. Curriculum

The charge of the committee and procedures for adoption of curricula, as set forth in the 1964 governances and as continued basically unchanged in the 1978 published governances, appear supra.

With respect to the operations of the committee in the Schools of Art and Architecture, the circumstances under which Professor Wurmfeld assumed its chairmanship in 1973, are described supra. Wurmfeld continued as chairman until 1981, after 1975 as chairman of the separate committee for the School of Architecture. As explained by Wurmfeld, the actual working of the committee generally followed the procedures outlined in the governance. In Wurmfeld's own words: "I have created the list of required courses. The Curriculum Committee controls the list of required courses." Wurmfeld, e.g., acknowledged under cross-examination that he played a forceful role in making a sequence of history of architecture courses a part of the required professional curriculum for architecture students and in expanding the number of such courses offered. Another example of the committee's successful proposal of changes in required curricula in 1979 appears supra, an occasion when, however, the changes were submitted by the dean directly to the faculty without submission through the administrative committee. Yet another example occurred early in 1974 when the curriculum committee of the School of Art and Architecture wrestled with revising curricula for the "BFA and B. Arch." degrees under the impetus of President White's expression of concern for the place of general education in the professional curriculum and as its role was clarified by Dean Sadek. Ultimately, after the administrative committee, as well as President White, had made suggestions for certain increases in required humanities, social science, and art history courses above those proposed by the curriculum committee, the faculty of the combined school in the spring of 1974 approved a revised curricula, increasing by two credits, from 12 to 14, the minimum number of credits required in these areas, or other approved courses in disciplines other than the student's own academic fielding of concentration, including engineering and science, by a vote of 18 for, 7 against, with 1 abstention. The various minutes of the governance committees concerned, as well as the faculty of the combined schools, and the correspondence be-

tween the president and dean show a genuine debate among the faculty as to the proper proportion of general education and professional courses, with the president, in particular, providing guidance and support in a cooperative manner. In a letter to the dean dated April 23, 1974, President White gave his approval of the proposed modification recently voted by the faculty, noted that there still might be minor revisions within these curricula, and expressed his dependence on the good judgment of the dean and his faculty in determining final solutions. Guidance was also provided by Dean of Admissions and Registrar Liebeskind, who reported to the committee on state minimum requirements in the liberal arts and sciences for the BFA and BA degrees in architecture.

In connection with general education requirement deliberations, President White also was brought into a dispute which arose between the dean and Wurmfeld when the dean accused Wurmfeld of making comments accusing him of using Wurmfeld and the curriculum committee as a bludgeon to do a hatchet job on the humanities department. At a meeting in the president's office, which Wurmfeld attended reluctantly, believing it his academic privilege to refrain from participating, the president affirmed the faculty member's academic right not to have to respond to the dean's accusation and the matter was immediately dropped.

While its members attended the Art and Architecture faculty meetings which considered and determined the general education requirements in 1974, Professor Brown and other members of the humanities faculty expressed their feelings that the A&A faculty had voted in a curriculum which directly affected their subject areas without their input. This was during the lengthy period of their exclusion from full governance participation.

Wurmfeld differentiated between minor changes, such as name changes or recommended elective courses or even the change in subject matter of existing required courses, which are implemented without formal vote of the committee and submission through the administrative committee to the faculty, and major changes, such as formal credit changes which changed the distribution of courses for the degree requirement which are formally voted on and brought before the full faculty. The kinds of major curricula issues dealt with by the committee include: (1) the balance of credits between each area of subject matter appropriate to the training in the profession and between professional training and general studies; (2) the range of exposure within each professional subject area; and (3) the proper sequence of technical courses in the professional areas.

Apart from the occasions when the administration unilaterally eliminated curricula as a consequence of the elimination of degree-granting programs in certain subject areas and the committee was bypassed on the establishment of experimental sections of existing required courses in the Engineering School, a number of the Charging Party's witnesses testified to their more limited role in the decisions regarding the offering of certain elective courses.

In one instance, in 1975, Dean Sadek of the then School of Art and Architecture unilaterally terminated Professor William Creston, then teaching and advising students full time in an advanced film and video program offered as an elective in the art curriculum. Creston had received a 1-year appointment and was not tenured. A petition signed by over 100 students was presented to the curriculum committee to save Creston's job and the program. The matter was debated at the committee's April 1, 1975 meeting and a resolution was unanimously adopted and referred to the administrative committee reaffirming the film and video programs as now constituted from a curriculum standpoint both as part of the core program in the visual arts and as a general resource in the school. Although the dean finally determined not to farm out portions of the program to another institution, as he had initially contemplated, Creston was terminated, adjuncts were thereafter employed to teach beginning and advanced film and video courses, which were continued in the catalogue as electives, and the special situation which the faculty sought to retain of having a full-time resource person for students in the advanced film and video area was discontinued.

In another instance, where the curriculum committee of the School of Architecture in 1980 had voted approval of an addition of a 2-hour freehand drawing course in the second year, the matter was never placed on the agenda for consideration by the faculty. In a discussion with Dean Hejduk, Wurmfeld was informed that the dean was not going to present the proposed course to the faculty, the dean and the faculty having an elective drawing course the previous year.

A third instance involved an administration decision denying six and limiting to three credits a new course which Art Professor Haacke and Social Science Professor Arato formulated and taught jointly for one semester in academic year 1976–1977 entitled "Art Theory and Art Practice." Neither the teachers nor the provost nor the dean, who ultimately limited the credit value for the course, submitted the proposal to the curriculum committee. As a consequence of this decision, Professor Arato's plan to have students write term papers could not be fulfilled and the professors did not offer the course again. Still another instance related to a written proposal for an elective course in electronic music from Professors Gatza and Knapp in October 1980 to the humanities department chairman, Bowman, to which the professors never received an administration response. Again, the proposal was not submitted to the curriculum committee of the School of Engineering, to which Gatza is assigned, and where both he and Knapp are faculty members.

It also appears to be the case that, from time to time, proposals for individual elective courses, to be taught by visiting professors appointed for the particular purpose of teaching the courses, were implemented directly by the administration without consideration by the appropriate curriculum committees.

As to the curriculum committee of the School of Art, after its establishment in 1975, it met periodically as a separate body and dealt with such significant matters as a successful revision of the first year required program in 1976, an evaluation of its new foundation year curriculum on its first year of implementation in the spring of

1977, and major revisions of the video and film programs and photography curriculum in the spring of 1978, which were implemented after review by the administrative committee and adoption by the faculty and the administration. The revised video and film program sought to solve such problems as the lack of availability of video equipment as a tool in the fulfillment of student projects in the three schools and the lack of educational focus as to film oriented to visual design students and diffusion of staff into the disciplines of video and photography inhibiting educational clarity and efficiency. These appear to have been problems in these subject areas which had continued unabated after the termination of a full-time faculty resource person in 1975. Thereafter, from the 1978–1979 academic year until 1981, no meetings of the committee were held, as neither the committee members nor the dean nor any faculty members brought any proposals for curricula changes before it.

A review of the minutes of the curriculum committee of the Engineering School show that between 1975 and 1979 it considered and approved both major and minor curriculum changes. The major changes included replacement of required courses taken in the first semester of the senior year, the dropping of certain required courses for students majoring in particular engineering disciplines, increasing the credit allotment for certain courses, and approving in principle the concept of new courses in a particular engineering discipline. Minor changes included approving the introduction of new elective courses.

3. Admissions

The revised 1978 governances changed the composition of the admissions committee in the Schools of Art and Architecture. Previously they included the director of Admissions and three members elected by the faculty. Now they consisted of the dean of the school, the dean of admissions and records, two full-time and one part-time faculty, one student, and one graduate. The chairperson was to be a full-time faculty member elected by the committee to a 1-year term. The dean, dean of admissions, and alumni were ex officio without a vote. Whenever pertinent, the committee was to invite representatives of any school or faculty or discipline within the school of which it formed a part to participate in the discussion of admission policies of that school, faculty, or discipline. The committee in engineering now included one student in addition to three members elected by the faculty. The charge and responsibilities of the committee in all three schools remained the same.

Admission requirements for each of the three degree-granting schools appear in the annual catalogue which is published by the institution. With respect to these requirements for art and architecture majors, according to Dean of Admissions and Registrar Liebeskind (who testified about admission policy and its implementation at great length without any contrary testimony being offered by the longstanding faculty chairman of the three committees) they were established a number of years ago by the faculty through the admissions committee. Since Liebeskind assumed the title of dean of admissions and records in 1974 (from 1970 to 1974) he served as director of the same areas), the requirements in architecture were changed at least once by the faculty. That change, which originated in the admissions committee in the mid-1970s, resulted in the dropping of the requirement of a 1-year course in high school physics for applicants for the architecture program upon approval by the president and trustees. Since 1970, the high school requirements for admission to the Engineering School have not changed. However, some time in 1979–1980, the Engineering School admission committee did successfully request that the first part of the application form for undergraduate admission used by the three schools, after a large number of the forms had been printed, delete that portion relating to the selection of a major by the applicant. As a consequence, the form in use for engineering applicants has the majors blocked out in ink.

Taking the procedures on admission in each school in turn, as fully described by Liebeskind, the longstanding policy in the Art School has been to admit those candidates whom the faculty have felt are most talented among those who apply. Liebeskind has implemented this policy.

In 1973 or 1974, the A&A (Art & Architecture) committee prepared the second part of the application forms (described as a questionaire) which, with certain changes in problems made thereafter by the committee, is still in use in 1982. Until 1973, the completed questionnaire was followed by an art test given in the Great Hall in the original Cooper Union structure, the Foundation Building. In that year, the committee decided to abandon that test and require a home test instead. The test and a covering letter forwarding the materials to the applicant were and are prepared by the committee. That form letter, basically unchanged to date, begins, "The Admissions Committee of the Cooper Union School of Art attempts to find the best qualified students who will benefit from the programs of the school." In the third paragraph the letter notes that "the potential in Humanities and Social Sciences and Mathematics will be judged on the basis of high school records and SAT scores. We want to emphasize, however, that the high school record and SAT scores, combined, count for only 25 percent of the total admission scores." Actually, since 1970, the committee has instructed the director, later dean of admissions, that artwork counts 85 percent, academics 15 percent.

When the completed tests are returned by a deadline date stamped on the test, files including the application, test solution of art problems posed, high school transcript, and SAT score, if then available, are made up and provided for the committee for its review. At a room set aside for its use in the Hewett Building, teams of three faculty members, including at least one full-time member (only since 1981 have some adjuncts been involved), a procedure established at the suggestion of the committee chairman in 1978, review batches of the files, each member of the team placing his numerical rating or evaluation on a scale of 1 to 10 on a card placed in a separate sealed envelope since 1980 to minimize influencing the ratings of other team members, and all ratings being placed in the applicant's file folder. On the completion of

this preliminary review, Liebeskind is informed by the chairman and he then personally arranges the files in alphabetical order, records the total scores, and averages scores. Liebeskind also uses a correction factor to avoid the possibility of errors in the team gradings which he devised after having been requested to do so by the chairman in 1978. Also, at the request of the chairman, in stacking the files by final grades, Liebeskind separately groups files with low grades but, where one evaluator has given a grade of 6 or more, for further review. Other stacks include those applicants rejected with no scores above 5 and those of minority applicants which are looked at again by the faculty in a final review.

Since 1978, the chairman then calls the committee to make this final review in which many faculty beyond committee membership participate and in which general discussion of the home projects takes place. Then the chairman gives Liebeskind a list of students to be admitted and, since 1974, those applicants to be placed on a waiting list. Liebeskind's office then checks for compliance with the generally applicable admission requirements, the high school requirements, SAT test scores, and the like. When particularly low high school grades or SAT test scores are discovered, Liebeskind raises the issue of admission of the applicant with the chairman, who either agrees or not, or asks for further opportunity to discuss the case with other members of the committee. Liebeskind has never overruled the final decisions submitted to him by the faculty chairman of the committee.

As an example of the nature of faculty participation in the admission process, the minutes of the regular meeting of the art faculty held on April 24, 1979, contain a report of the admissions committee chairman, Arthur Corwin, which reads, in part, "After unanimous participation of the Faculty in review of applicants for the Freshman class, 63 were admitted (25 Female, 38 Male)."

While the record shows that the faculty reviewers have the high school transcripts and some, if not most, scores available to them, and, in fact, some of the reviewers take these documents into account in making their evaluation, by and large, the Art applicants' evaluations are based primarily, if not exclusively, on the artwork submitted and results of the home test.

As to transfer applicants to the School of Art, the application process is similar to that for freshman applicants but in an abbreviated and modified form. In a covering letter prepared by the chairman, the applicant is informed that the admissions committee has initiated a number of stringent procedural requirements in order to raise the level and reduce the overall number of the applications. It goes on to advise that the committee is looking for exceptional students who have already demonstrated their commitment by hard work. The committee will also consider the total record of performance with special attention to the institution's portfolio requirements, the studio courses in the applicant's transcript, and teachers' recommendations. A home test (or project) with problems periodically updated is enclosed. A separate questionnaire specially prepared for transfer applicants by the committee and in use since approximately 1977 is also utilized. It is accompanied by a checklist of required credits prepared a number of years ago by the office of the dean so that the applicant can determine what course prerequisites he or she may be lacking. Also enclosed are three copies of a faculty evaluation form which was worked over by the committee.

After the application is received, the transfer applicant is requested to forward a portfolio of his or her work. The request is accompanied by a form in which the application certifies that the artwork submitted is the student's own. The committee added this certification around 1978 after some members expressed some concern about whether work being submitted was really that of the applicant. After the portfolios are received, the office of the dean of the admissions notifies the chairman that the folders have been sent to the evaluation room and the chairman arranges for the faculty review. The faculty then conducts its review, without the scoring and prescribed evaluation procedures used in the case of freshman applicants, and the chairman forwards the committee's recommendations to Liebeskind, who accepts them.

As explained by Liebeskind, since 1977 or 1978, the dean of Art has not taken an active role in the admission process. Prior to that time, he was more active in freshman application final evaluations.

As to acceptance of transfer credits in all three schools, it was Liebeskind's uncontroverted testimony that this was a matter for faculty evaluation and determination. Furthermore, the admissions committees establish policy with respect to whether a particular student applicant for admission should be deemed a freshman or transfer applicant with all the different requirements for admission and evaluation standards such categorizing involves. By letter dated January 21, 1981, to Liebeskind, the architecture admissions committee chairman, Scofidio, issued a clarification of committee policy in this regard. In the letter Scofidio set forth guidelines; the freshman application and home test to be reserved for students in the 17- to 19-year-old bracket, i.e., those fresh out of high school; and the transfer application, including problem set and portfolio requirements to be made available to (a) those currently enrolled in an architecture program in another institution and who would be admitted into an advanced design year at Cooper, (b) those currently enrolled in a creative art or design program in another institution and who feel they would be able to put together a substantial portfolio, and (c) applicants with advanced degrees in other fields who feel they could submit the required creative portfolio. In the letter two instances, the applicants would likely be placed in first year design. One of the stated underlying considerations for the policy is to protect the interests of recent high school graduates from competing for places in the freshman class with older, more experienced applicants.

The admission process in the School of Architecture is very similar to that in the School of Art. The initial application form is the same as that used in the Art School. After its receipt, the committee's specially prepared home test and questionnaire are sent out to the applicant from the committee along with a covering letter which has the identical first paragraph as in the covering letter sent to Art School applicants. In the second paragraph,

after noting that the ratio between applications and admissions the prior year was 10 to 1, the letter continues, "[T]he admissions committee tries its very best to choose fairly. It is quite obvious that a ten to one ratio forces us to reject many well qualified applicants." Although the letter also continues to note that the high school record and SAT scores count for only 40 percent in architecture of the total admission scores, Liebeskind related that this 60 percent artwork, 40 percent academics formula which it had established was abandoned by the committee before the mid-1970s. Nevertheless, the faculty place a number, up to a maximum of 40, on the home test when it is evaluated. This contrasts with the maximum grade of 30 which the Art test may receive on its evaluation by the three-member team.

After the material is received by Liebeskind's office, the Architecture committee receives the folders containing the home test, two-part application, transcript, SAT scores, and any letters of reference, and they are then reviewed by the members of the faculty along with a number of adjuncts. At least one full-time faculty member is among a particular small group of faculty selected by the chairman who review a segment of the applications, giving the closest attention to the artwork, solutions to the problems posed in the home test, and the completed questionnaire. On its completion of this review, the longtime chairman of the committee, Professor Richard Scofidio, who had served at least 7 years at the time of the hearing, on behalf of the committee, submits to Liebeskind a list of those students they would like to see admitted and those students to be placed on a waiting list, with the remainder to be denied admission.

Normally, lists submitted from past years were discarded after Liebeskind's office would type the current list in alphabetical order. Liebeskind did retain, Respondent offered, and I received in evidence, over the General Counsel's objection, two separate lists of names in Scofidio's handwriting he submitted to Liebeskind. One list containing the names of students, not in order, accepted for admission to the 1980–1981 academic year and those to be placed on a waiting list, in order, and a second list of transfer applicants to be admitted to the first, second, and third years of the 5-year program and those invited for interview. On its receipt by Liebeskind, his office checked and entered SAT scores on the list; Liebeskind himself noted "conditional acceptance" of two applicants who lacked certain high school math requirements, by prior understanding with Scofidio and a third applicant with respect to whom Scofidio, had written "want interview first, with him," later crossing out the name when Scofidio later informed Liebeskind, "Don't accept him."

Two other names of students to be accepted were later crossed through with the notation "reject" followed by Liebeskind's initials. When Liebeskind learned that neither had taken the SAT examination, he informed the chairman and Scofidio agreed to their removal. The list also shows, by circling of names of the first two appearing on the waiting list and an arrow, and the addition of two names to the waiting list, that the first two on the waiting list were added to the group of students accepted for admission and two applicants were added to that list to replace the two elevated. The numbers 19 and 23 in Scofidio's handwriting also appear, reflecting the chairman's way of keeping track of the total offers of admission and total number of names being forwarded to Liebeskind's office.

The second list represented the committee's final judgment as to transfer student placement after review of the home test with respect to the particular architecture design course in the 5-year sequence of design courses for which they would be required to enroll. Thus, a certain number of the applicants were listed as being required to take first year design, a course described as "Arch. 111" (Architectonics), even though they were being offered admission as transfer students from another institution. One notation, in particular, the word "accept," was written by the assistant registrar after Scofidio informed her of the committee's decision following an interview of one of the transfer applicants invited for interview.

These two lists, received by Liebeskind in May 1980, were typical of the procedures both the committee and Liebeskind followed in the admissions process during Scofidio's long tenure as committee chairman.

In the Engineering School, the current freshman application form and questionnaire were designed by the admissions committee some years ago. The first part of the application, it will be recalled, is common to all three schools, and was modified to remove the listing of a major choice for engineering applicants. The second part of the freshman application (or questionnaire) was redesigned some 5 years before the hearing when the committee invited Visiting Professor Harrisberger to attend discussions of what factors, other than academic scores, might be useful in making an admission decision or might be substituted for an oral interview. As a result of those discussions, the application was redesigned.

Just as in the case of candidates for art and architecture, Engineering applicants were required, up to 1972 or 1973, to take a battery of tests in the Great Hall consisting of achievement tests in physics, chemistry, mathematics, and spatial relations. In those years a qualifying score was computed, based on high school average and SAT scores, and applied as a cutoff to determine whether or not to invite students to take the test. Liebeskind decided in 1971 not to limit admittance to the achievement tests. Around 1973, Liebeskind proposed to the committee that the spatial relations test be dropped because the college board was no longer producing it; that, since many applicants had not taken both high school physics and chemistry by the time of the test, they be given the choice of either; and, further, that the Cooper Union administration of the test be discontinued but students take the test under college board auspices at their local high school. These changes were approved and the committee then designed the questionnaire (part II of the application) which has since continued in use, as later modified.

At the time the questionnaire was redesigned, the committee also determined to have borderline candidates interviewed, using Dean Liebeskind, an alumni representative on the committee, faculty committee members, Dean Tan, and Dean of Students Gore for this purpose.

The committee has applied a mathematical formula throughout Dean Liebeskind's tenure to make admission decisions. It has changed a number of times over the years as a result of periodic validity studies the committee requested Liebeskind's office to undertake to determine the correlation between students' performance (grade point average) at the end of the freshman year and each of the different factors, which were considered in the formula, such as high school average, the SAT math and verbal scores, and the achievement test scores in math, chemistry, or physics. As a result of these studies and the committee's approval of the results, different weights were assigned to the various factors which went into the mathematical formula and the new formula was then applied to a new class of applicants for first year admission.

The most recent formula in use at the time of the hearing appears in a memorandum dated January 28, 1982, from the committee chairman to the Engineering School faculty. Professor V. A. Guido, the chairman, sets forth the formula used for admission of students to the fall 1981 freshman class. It is a composite score, assigning varying weights to, and totaling, the various components previously described, and divided by 10. The memo then advises that on December 4, 1981, the committee approved a motion permitting each curriculum group to independently recommend an admission's formula to it, which the committee could then either approve or disapprove. The memo concluded with a request that any faculty recommendations for an admission formula, accompanied by justification, had to be submitted no later than February 5, 1982. Liebeskind testified that the motion had been adopted on December 4, 1981, over his objection and contrary vote. (Unlike the voting composition of the Art and Architecture admissions committees, the dean of admissions retains a vote on the engineering committee.)

As to transfer students into engineering, the applications and grade transcripts are received up to June 1, after which time they are forwarded to the office of the dean where a meeting is held at which there are faculty representatives from each of the engineering disciplines. The faculty present in the applicant's discipline review the files and make the admissions decision as well as noting in the applicant's folder the number and nature of transfer credits to be allowed. No waiting list of transfer applicants is maintained. If the reviewers find the applicant lacking the equivalent of the institution's first year engineering curriculum, the student will not be admitted. Liebeskind described the dean's participation as that of a mechanical engineering faculty reviewer in the absence of such representative, but never as an administrator.

With respect to the size of entering classes in each school, Dean Liebeskind credibly testified that the deans advised and set rough guidelines, or goals, for optimum numbers of students, but that the admissions committee pretty well admitted as many students as they felt should be admitted in any particular year. For example, in the Art School, which scheduled 4 sections of freshmen, the dean sought 16 as an optimum number for each section. Yet, in the past 10 years, while the figure of 66 has not been exceeded, the total has in particular, years gone as low as 50 or 54. In engineering, before the mid-1970s, the entering class had 5 sections of 25 each. When 1 of the majors was eliminated in 1975, the dean advised Liebeskind to raise the optimum figure to 30 for each of 4 sections. Thus, today, 120 is the target for the size of the freshman class.

Each admissions committee also works with Dean Liebeskind in drawing up an admissions calendar. The dean's office annually supplies various chronological dates to the faculty after Liebeskind discusses his proposal with the committees, setting deadlines on mailing tests to applicants, faculty reviews, and Liebeskind's own review, all based on and working back from a generally recognized May 1 deadline for notifying applicants of their admission or rejection by the school.

4. Academic standards

Although the printed 1978 governances of the Schools of Art and Architecture incorporating all amendments made prior thereto list the deans of admissions and students as exofficio and nonvoting members (along with the academic deans) and the dean's unilaterally revised governance in the School of Engineering merely includes these deans as exofficio members without specifically denying them the vote, both deans testified without contradiction that, in addition to fully participating in their deliberations, they also vote on these committees. However, in the Art and Architecture committees, which also include two full-time and one part-time faculty, one student, and one full-time LA&S faculty member, the full-time faculty alone outweigh them. In the Engineering School committee, which under Dean Tan's revision included one representative from each teaching discipline without student or any part-time faculty representation, full-time faculty outweigh the two voting deans by eight to two.

The charge of the committees is identical in each school and is, in substance, unchanged from that contained in the 1964 governances. Academic standards and regulations for each school appear in the annual catalogues. From time to time, committee deliberations result in changes in these standards. For example, the minutes of the Art School committee for June 7, 1976, show that it discussed both poor attendance and work in studio courses falling below the 2.0 minimum and unanimously voted for inclusion in the academic requirements of the School of Art, effective in the 1976–1977 year, the following statement:

> Students whose attendance record and/or performance in studio courses is unsatisfactory may, at the discretion of the Academic Standards Committee, be dropped from the rolls of the Cooper Union.

At that time, Deans Gore and Liebeskind, although present, did not vote, but the academic dean joined the three faculty members present in the committee's unanimous approval of the standard. The minutes further report that, at its direction, faculty members were to be polled by phone on their position regarding the statement, three members who had been reached by June 9 having given their approval.

As further evidence of the committee's adoption of the standards governing retention of student status and satisfactory completion of degree requirements, the Engineering School committee minutes of February 27, 1979, report, inter alia, that, "The Academic Standards previously adopted, and which will appear in the 1979–1981 school catalog, were reviewed. Several items were modified for clarification, and are listed in the memo, sent to Dean Liebeskind and distributed to the members on 3/1/79." The minutes of September 4, 1979, report that a motion was passed in which the committee recommended to the faculty that a 3.0 GPA [grade point average] in graduate courses taken at Cooper Union be required for graduation from the integrated master's degree program. This motion, as amended by Professor Yalow in certain particulars, clarifying that the minimum average applies only to 400 level courses and all courses taken beyond the requirements of the bachelor's degree, was passed by the faculty at the continuation of its regular October 23, 1979 meeting held on November 6, 1979. (Parenthetically, the admissions committee in March, 1979, had adopted a standard for undergraduate admission into the program, at the request of Dean Tan, which required a minimum 3.0 average, but which also permitted a waiver on recommendation of the faculty in the area of the student's major interest.)

The three governances provide uniform procedures for the committees' exercise of their responsibilities in defining the grading system, recommending standards and regulations for academic performance, reviewing petitions from students, and recommending candidates for degrees. Major changes proposed by any member of the faculty in the grading system or academic standards and regulations after consideration by the committee go to the faculty and then the president. Minor changes, such as in wording for clarification, may be acted on by the committee and reported to the faculty. On student petitions for reinstatement, the guidelines for consideration of which appear in section IV,D, supra, the governances provide that the committee's actions in this area shall be final.

According to Dean of Students Marilyn Gore, in dealing with student petitions, the faculty, particularly that in the smallest school, Architecture, pride themselves on their flexibility in resolving the problems presented. In one instance, in which it was clear by his academic record, primarily in the design area, that a particular student should be dropped, Professor Wurmfeld appeared before the committee and stated he would like to take on the student and see if he could work with him. The committee approved the student's retention, and the student ended up doing very well and was able to graduate. Dean Gore, who initially opposed such flexibility in some cases, over a period of time became appreciative of the kind of thoughtful consideration that the committee gave to the individual situations of the students. In further support of the independent, as well as compassionate, exercise of its discretion in these areas, the minutes of the committee meetings of the schools are replete with instances of the varied determinations which they made on the cases of students dropped, or placed on probation, or in considering petitions for change of grades (invariably left completely to the discretion of the faculty teacher, but on occasion modified to permit a timely withdrawal or incomplete grade only on approval of the dean and which must be completed expeditiously or result in a failing grade). The range of possible actions regarding students in serious academic difficulty appears by code in the engineering committee minutes of June 12, 1980. They include probation, readmitted and on probation, decision pending before September meeting, removed from probation, absolved of any unsavory status, special considerations (which are then annotated), continue on probation, and denied readmittance. As explained by Liebeskind, no student is dropped without the opportunity of appearing first before the committee. Students placed on probation are also under the continued guidance and counseling of their faculty advisor who periodically reports to the committee on the student's academic progress.

In an effort to show the limited control the faculty exercised in the area of academic standards, the General Counsel adduced evidence with respect to two students who received failing grades in the fourth year architectural design course yet, with the apparent aid of the dean, were able to complete the required course work, including the simultaneous completion of both the fourth and sequential fifth year design courses in the following year, and graduate with their class at the completion of the fifth year. This incident became a matter of some dispute and received considerable attention from both the General Counsel and Respondent at the hearing.

Professor Wurmfeld testified that the grades for each student in his classes are turned in to the dean, who countersigns the sheet containing them, and the grades are then issued. In this instance, in academic year 1976–1977, he gave a final grade of F for the spring semester to two students, R.S. and S.S. in "Arch. 141, Design IV," listed for six credits. The next year, 1977–1978, these students did not repeat the course, but instead were in the fifth year course, "Arch. 151, Thesis," listed for 10 credits. The inference Wurmfeld drew is that the students had been promoted over his issuance of the failing grades and were permitted to take the last in the sequence of design courses without having satisfactorily completed a required prerequisite. Wurmfeld is the full-time faculty member who is aided by four adjuncts in Arch. 141, while Dean Hejduk is team leader and one of two full-time faculty members who teach Arch. 151, assisted by three adjuncts. Arch. 151 is described as a synthesis of 4 years' educational experience with the choice of area of study left to the student. Problems are analyzed and studied with the aid of faculty from each discipline and by visiting critics. Arch. 141 involves the investigation of urban programs and sites requiring the integration of form, structure, space, and environmental technology through the solving of individual problems. Each course thus has an extensive studio component.

On June 9, 1977, Ysrael Seinuk, the faculty chairman of the academic standards committee in architecture, wrote Dean John Hejduk reporting that at the committee meeting of June 8 the two students had registered a complaint about their failing grades, claiming an appar-

ent personality problem with the head instructor who had announced they would fail regardless of work which quality warranted a passing grade. The dean forwarded the letter to Wurmfeld for his comments. Wurmfeld wrote Seinuk responding point by point to the students' complaints, in particular noting the ample notice they had received of the risk they were facing from their failure to attend studio and the poor quality of the uncriticized work, and listing the uniformly failing grades given to the students by each of the other adjunct instructors. There were no further communications.

Both students not only had academic difficulties, but S.S., in particular, had emotional problems as well which were disruptive in the academic environment. Professor Robert Slutsky, at the time a full-time member of the architecture faculty, discussed S.S.'s academic and behavioral problems with Dean Hejduk on a number of occasions, once recommending his suspension for a year. To the dean, who did not tesitfy, Slutsky attributed the response that he wanted to get S.S. through the school as quickly as possible without having S.S. cause additional trouble, to the extent of permitting him to retake the second semester of Arch. 141, which he had failed, simultaneously with Arch. 151.

In the fall of 1977, both the dean and Slutsky taught, with others, Arch. 151, and the dean was the head instructor as well in Arch. 141, Wurmfeld being on leave at the time. Slutsky acknowledged that S.S. attended his Arch. 151 classes but that by spending every day in the studio could have done repeat work in Arch 141, with some overlap of time. Both R.S. and S.S. had been placed on probation and, by academic rules would have been limited to 18 credits a semester, and in no case more than 20. Yet, the transcripts of R.S. show he received 23 credits in the fall 1977 semester and 21 in the spring semester. R.S. received a grade of A and S.S. a grade of D in Arch. 141 in the fall of 1977 under the head instruction of Dean Hejduk. Dean Liebeskind acknowledged that it was unusual for a student on probation who failed a design course to be permitted to take the next course in the sequence simultaneously with repeating the design course he failed, for a total of 16 credits only in design courses.

Dean of Students Gore recalled S.S. and problems with his conduct. She saw him at Dean Hejduk's request because of the disruptive nature of his behavior. She also participated in an academic standards committee meeting which considered the status of S.S., when he was in his fourth year, and at which a decision was reached to permit him to complete his studies. Student R.S., who she recalled having unsuccessfully attempted to convey unfair treatment by the faculty in design courses, was also permitted by the committee to continue his studies and to graduate.

With respect to student status, generally, Dean Liebeskind testified that, after the committee meets and votes, his office acts to implement the committee's decision after receiving a copy of its minutes. He explained that the committee operates substantially in the same fashion in each of the schools. With respect to granting of degrees, Dean Liebeskind's office maintains a credit audit for each student. At the conclusion of the final semester, his office will check to see that all graduation requirements have been met both with respect to total credits as well as distribution of credits in the different required areas. A list of all the students who meet graduation requirements is then prepared and in May is presented to the committees and then to the full faculty for their respective approvals.

Counsel entered a stipulation on the record that the academic standards committee in each of the three schools, and in the predecessor combined Art and Architecture School, has had the same responsibilities and authority in the period 1969–1970 to 1973–1974 that it has exercised since that time.

5. Student activities

It will be recalled this committee is a joint committee. Under the 1978 governance it now consists of one faculty member elected by Engineering, one member elected by Art or Architecture (alternating each year), the dean of students, and one student from Art, one from Architecture, and two from Engineering, who shall serve for 1 year. The students shall be elected in elections in which student participation shall be at least 50 percent in the school each represents. The committee's charge has remained the same. See section IV,D, supra.

Dean of Students Marilyn Gore testified that she is the chairperson. She believed the governance established this, but it is silent on who is chairperson and how that person is selected. According to Gore, the committee also includes a faculty representative from each school, and is not limited to two as provided in the governance. Furthermore, the committee in operation now includes three students from Engineering, two from Art, and one from Architecture, each elected by the respective student bodies.

A current concern of the committee is discussing and preparing a student judicial code. The purpose of such a code is to provide standards for the behavior of students, procedures and penalties for student breaches, and also to ensure that students get due process when accused. Gore prepared a first draft, which was then modified with committee input. In academic year 1981–1982, the committee had already met four times and a fifth meeting was planned for a few days after Gore's testimony. The first draft was begun in January 1977. After committee revision and approval, it was submitted to the faculty-student Senate which referred it back to the committee for further revision. Gore first attempted to meet senate objections; the committee then discussed it again, made its own revisions, and it was resubmitted to the Senate in November 1981. At the time of the hearing, Gore had not received any formal word on senate actions. Since all members appear to participate equally, this is one governance committee, probably the only one, on which the full-time faculty either does not have a member officiate as chairperson or constitute a voting majority among the membership as actually constituted.

Apart from the work of the Student Activities Committee, individual faculty members act as advisors to various student extracurricular activities clubs. For example, Professor of Humanities Thaddeus Gatza advises the

Cooper Pro Musica, a student musical organization. Besides performing with the group, Gatza advises the student president concerning its funding, and arranges rehearsals and musical programs, spending an average of 3 hours a week in this role. Gatza stressed, however, that the students manage their own activities and that annual funding is provided by a joint activities committee of students to which student leaders of the various extracurricular clubs apply. Gatza has nothing to do with either the obtaining or disbursing of these funds.

Professor Knapp advises another group of students who formed a production center which provides audio services for student organizations and runs the audio and lighting systems for productions in the Great Hall. This group is partially funded by the joint activities committee budget and partially by income received through sale of their services to individuals and organizations. According to Knapp, who testified without contradiction, the faculty has no input into the size of the budget or how its funds are allocated. While no tuition is charged Cooper Union students, there is a student fee, totaling $300 in academic year 1981–1982, which is the source of the funds for these activities. The faculty has not voted on the amount of the fee which was raised to its present level some time during the 1970s. Neither does the faculty have any say on the registration or approval of student clubs so that they may apply for and receive funding.

6. Calendar and schedules

Prior to the 1978–1980 collective-bargaining agreement, the annual calendar and schedules of instruction were prepared under the auspices of the governance committee on calendar and schedules as set forth in section IV,D, supra.

Up to 1975, the committees from each of the then two schools, Engineering and Art and Architecture, acted jointly in working out details of the calendar and in coordinating schedules of the two schools. Thereafter, committees from the three schools acted jointly in doing so. Dean Liebeskind, prior to his elevation to director of admissions in 1970, for most of the years since 1948, had been faculty chairman of the Engineering School committee which produced a calendar and class schedule each semester.

In 1970, the committee asked new Director of Admissions and Registrar Liebeskind to produce the schedule. Liebeskind forwarded forms for each engineering discipline to the office of the dean, who consulted the faculty members as to their availability and how a particular class was to be scheduled, e.g., whether on 3 consecutive hours or 1 hour on each of 3 separate days. Liebeskind would then prepare a schedule from the completed forms, and it was posted so that faculty members could review it and make suggested changes for implementation by Liebeskind.

In February 1970, the full engineering faculty adopted a statement of policies and guides relating to class and examination schedules in the School of Engineering and Science which it had received from the calendar and schedules committee. At least two changes were made in the statement after its receipt by the faculty. The standards and guide the statement embodies have recently been brought to the attention of the faculty by Dean Tan following termination of the bargaining agreement and the withdrawal of recognition. They relate to such matters as when in the day certain classes should be scheduled, reasonably balancing the workload for students and avoiding excessive staff member load on any one day, limiting classes between certain hours, and the prcedure, process, and location of review of the registrar's proposed schedule by faculty members. Dean Liebeskind followed these guidelines when he prepared the schedules.

The 1970 statement also contains a foundation for an effective examination schedule. Final exams are not given in the Art School and are rarely given in Architecture. They are given in Engineering, and the principles contained in the statement guide Liebeskind in preparing the proposed examination schedule which he submits to the dean's office for the faculty's review. Some faculty contact him directly to make changes and he complies with those requests.

For the 3 or 4 years up to the time of Liebeskind's testimony in February 1982, or roughly since the collective-bargaining agreement became effective and after withdrawal of recognition, the responsibility for completing a master class schedule, at least in the Engineering School, has been given to Associate Dean Hollander. The faculty have been invited to come into the room where the schedule is being worked on and to more or less schedule their courses in different time slots as they wish. Dean Liebeskind has observed Dean Hollander working on the schedule and faculty in the room, placing and moving class descriptions on a large, 3- by 5-foot mockup of the master schedule. Students have also made suggestions on time slotting of courses. Conflicts in time between courses are resolved between the faculty affected and Associate Dean Hollander. According to Liebeskind, under the current system there is greater faculty participation in the preparation than when he drew it up.

The academic calendar lists the dates of beginning and ending of classes each semester, recess dates, final examination dates, and graduation.

In previous years, after preparation of an academic calendar by each committee, if there were discrepancies between them the faculty-student Senate resolved then so that a common calendar for all divisions of the institution could be produced. Then, in negotiations for the collective-bargaining agreement, an understanding was reached that as dean of admissions and records, Liebeskind would prepare the calendar. By virtue of article XXIII of the agreement, see section IV,F, the committee on calendar and schedules was not continued in the 1978 governances. Instead, article IV of the agreement provided that the dean of admissions shall prepare the calendar and it shall remain substantially the same as at present. There shall be no change in the number of holidays and number of weeks in the academic year. And the faculty shall not be required to be in residence between June 15 and Labor Day of any academic year.

After the contract expired, the institution went back to the committee structure only now with three formal fac-

ulty committees reflecting the three schools. Liebeskind submits to them a list of significant dates during the academic year, including holidays and dates of religous observance, and a typical calendar. The committees meet and agree on a calendar for each school, resolving any discrepancies between them; the faculties then approve the calendars and, if any discrepancies still survive, they are resolved in the Senate.

7. Academic freedom and tenure

The charge of the committee and the principles and procedures concerning academic freedom and tenure appear in section IV,D, supra, and in appendix III to the 1964 faculty policy manual. The committee was a joint committee made up of four senior faculty members from each of the two schools, Engineering and Art and Architecture, elected by the joint faculties. In formulating a code to be followed in proceedings concerning the fitness of a member of the faculty, embodied in the procedures described in section IV,D, supra, the committee was guided by and followed closely the principles adopted jointly by the Association of American Colleges and the American Association of University Professors. After adoption by the faculty the procedures were approved by the trustees.

Professor Ralph Knapp, who served on the joint committee for a 3-year term in the early 1970s, alluded to what he and other members conceived to be a serious defect in its operation. This was a merger of the investigative and adjudicatory functions in the same body in that the committee both investigated and heard matters which in its view warranted formal proceedings. As Knapp explained, "It was not possible for the committee to do both functions and remain uninvolved in the issue . . . you were already prejudging the issue." This problem, although discussed a number of times by the committee in its private deliberations, was not resolved.

Professor Knapp described the three areas of activity allowed to the committee under the 1964 governance and appendix III as (1) alleged violations of academic freedom, (2) alleged violations of due process, and (3) alleged violations of adequate consideration. He later expanded that list to include consideration of dismissal of a tenured faculty member for alleged inadequate cause. In appendix III adequate cause was defined to mean professional incompetence due to either physical or mental disability; professional incompetence manifested by gross negligence of duty or grave and continued disregard of scholarly standards or professional responsibilites; conviction of an act constituting a violation of law and involving moral turpitude; or a change in academic program, approved by the faculty, administration, and trustees, or a demonstrably bona fide financial condition that necessitates the abolition of the position. It will be recalled that in this last area in 1975 the institution successfully opposed the request for a hearing of five tenured professors whose appointments were terminated due to the discontinuance of their academic programs, the president's denial of a hearing having been affirmed by way of a court dismissal of the professors' suit to enjoin their terminations pending a hearing.

In 1969, Professor of Physics Milton Stecher and then Humanities Professor Leo Kaplan had become co-chairmen of the joint committee. During the period 1969 to 1975 it dealt with seven cases raising all of the issues described by Professor Knapp. In 1969, three cases came before the committee. In one of them, the committee's recommendation that a letter from the Engineering School dean to the faculty requiring them to disavow a memorandum circulated to his colleagues, by a member of the mathematics department, criticizing the dean's action in removing the departmental chairman for failing to support the dean's candidacy for president, or have the memo placed in their permanent files, be declared ineffective as a violation of academic freedom was approved by the board of trustees. In another, Stecher testified that the committee's recommendation to censure the acting administrator of the math department for his failure to consult math faculty on the appointment of a new member of the department in violation of article IV of the governance was also approved by the trustees. Stecher, however, could not locate any letter of censure in the case file and counsel stipulated there was none. Furthermore, a group of outside consultants appointed in mid-1969 to review "a problem . . . related to the Department of Mathematics" and to make recommendations for its solution made a recommendation, inter alia, approved by the president and trustees in October, that gratitude be expressed to the acting math department administrator for undertaking an otherwise thankless task and he continue to serve until a new administrator be located and employed. By letter dated January 9, 1970, President White relieved the acting administrator of his duties, assumed the duties himself for the second semester, with the assistance of another member of the faculty until the search for a permanent head was concluded, and ended by expressing gratitude to the acting head for his leadership and patience. In the third matter referred to it that year, the committee's jurisdiction regarding a complaint of disenfranchisement by the humanities department was disputed by interim President Heald and, as a result, the committee only acted informally prior to new President White's decision later in the year to give them the vote on governance committees.

In 1970–1971, the committee, after hearing, successfully recommended reappointment for the next academic year without prejudice of a chemical engineering professor whose academic freedom had been violated. The following year, the committee, affirmed by the trustees, denied a hearing and dismissed the claim of the same professor on his nonrenewal, having satisfied itself that he had received academic due process.

In 1973–1974, the board of trustees approved a committee recommendation that another chemical engineering professor had not been denied renewal and tenure because of insufficient consideration, the committee concluding that all relevant documents and information respecting the professor's status and tenure application had been given due consideration. In his testimony about this case, Professor Knapp noted that it was beyond the committee's jurisdiction to involve itself in the substantive matter of the administration's denial of tenure to the pro-

fessor in spite of his having received a favorable departmental recommendation on a second vote of the senior faculty members in his department after an apparently inconclusive first vote had been taken. On the first vote, the departmental chairman had been in favor and the only other tenured member against. By the time a second vote had been taken at the professor's request, a third member of the department had received tenure and was thus now eligible to vote. He voted in favor, and the other two votes continued to remain split.

The last case considered by the committee arose in 1974. Professor of Art Thomas J. Gormley complained in 1974 that a decision of the president to deny him tenure was due to his union activities and therefore a violation of his academic freedom.

Gormley had been teaching full time in the combined Art and Architecture School since 1970. In 1971 he was appointed acting head of the department of graphic design, a post from which he later resigned and then reassumed. By academic year 1972–1973, Gormley was an assistant professor. Under the faculty policy manual, if tenure was to be denied him, the administration was obligated to notify him 12 months prior to the completion of his fifth year of service, thus by the end of the spring term of his fourth year, in 1974. That spring, the Division of Art tenure committee unanimously voted to recommend Gormley and a colleague, the Art Division head, and initially that Art and Architecture School dean, Sadek, recommended in writing Gormley's tenure, along with that of the other candidate, Professor Kadish. Then, unexpectedly, Dean Sadek a month later withdrew his previous apparently unqualified support for Gormley. In a second letter to President White, in which he referred to informal individual discussions with the committee members and division head, held as a result of a recent conversation with the president, characterizing their support for Gormley as lukewarm at best, Sadek concluded he would not give other than "pro forma" support to Gormley's candidacy. President White, who had not approved Dean Sadek's initial letter of recommendation for Gormley, wrote Gormley on June 14, 1974, officially informing him that on June 12 the board of trustees decided not to grant him tenure and that his appointment for 1974–1975 was a terminal one.

Gormley's complaint to the committee was grounded on a belief that Dean Sadek's change in position was related to his anger at Gormley's support, by his vote and remarks at the senate meeting for the Union, and to Gormley's alleged failure to clarify his position in a conversation the day following the senate vote. Gormley testified that Sadek had been hysterical in a later telephone conversation in which he referred to Gormley's vote, to Gormley's tenure candidacy, and to his view that Gormley's stand on the matter was not going to sit very well with the administration. Gormley also felt the procedure invoked by the dean in reevaluating his tenure recommendation had been improper in that he had learned from various of the committee members approached by Dean Sadek that they had not held any real "discussions" about his qualifications as claimed by the dean in his second letter.

The committee, under Professor Stecher's chairmanship, proceeded to investigate the matter, including interviewing various faculty and administration figures. Gormley submitted a lengthy recital urging a hearing on his complaints, as well as affidavits from two members of the committee. Gormley also sought and received a statement of reasons for denial of tenure from President White in which White relied on a policy adopted by the board of trustees in 1973 recognizing the unusually high proportion of faculty on tenure, the long-range educational and financial implications arising from this situation, and the urgent necessity to act firmly to correct it by limiting tenure to only those with the most outstanding credentials. (White referred to 10 other faculty members besides Gormley who were denied tenure in the past 2 years, most of whom also had the support of their colleagues.)

At the urging of Professor Robert Slutzky, a member of the committee and a strong supporter of Gromley's position, additional meetings on the case were held with the provost, dean, and others. At these meetings, two of the committee members who continued to participate in its deliberations were unavailable (of the original seven members, two withdrew from consideration because of then direct involvement on the Division of Art tenure committee in recommending Gormley's tenure and one could not participate because of a personal tragedy).

Ultimately, a committee majority, consisting of Stecher and two others, who attended interviews and participated in early deliberations and whose views were later polled, determined to take no further action in the complaint, and Slutzky dissented. The committee's decision was announced in a lengthy document issued in February 1975 and signed by the chairman, and Slutzky issued a one-page dissent. The majority concluded that while it considered Dean Sadek's second letter to the president as a tortuous, ambivalent document, it learned he wrote it after failing to secure from Gormley's colleagues the necessary overriding reasons to convince the president, and it had no effect on the president's disapproval of tenure. Nevertheless, the majority went on to deplore the absence of a statement concerning standards of performance, as well as criteria and procedures for evaluation of tenure candidates, which led to an evaluation in Gormley's case pervaded by ambivalence and ambiguity.

Slutzky's minority report stressed that only Stecher and he had heard the entire evidence, including meetings at which crucial evidence was presented. He also questioned whether a prehearing was necessary at all since the faculty policy manual does not clearly outline the procedures regarding termination of probationary appointments, suggesting that a formal proceeding may have been Gormley's procedural right.

Later, Stecher released an open letter to Slutzky in which he dealt in detail, point by point, with Slutzky's arguments. The Stecher-Slutzky debate mirrored a deep divisiveness within the overall faculty about the outcome of the Gormley complaint, an apparent majority of the full-time staff favoring a formal hearing so that the charges could be aired and put to rest once and for all in

the full light of an open on-the-record confrontation between Gormley and the tenure committee on the one hand and the administration representatives on the other. In part, further faculty involvement with the issue also probably reflected, to a certain extent faculty views favoring and rejecting collective bargaining as a means of dealing with issues which seemed to place administration and faculty in an adversary position. Stecher himself admitted strong antipathy to unionization, while Slutzky was a member of the Union's executive committee. Indeed, a conflict in testimony arose with respect to whether or not Slutzky told the provost in Stecher's presence that if things go easy with Gormley, things would go easy over the bargaining table, Stecher's asserting and Slutzky's denying the statement was made. I deem it unecessary to resolve this conflict since the question of fact presented is not germane to the legal issue presented by the Gormley complaint as to whether the faculty exercised managerial authority over matters involving claimed breaches of academic freedom and due process on tenure considerations.

Gormley remained unsatisfied with the result and continued to seek a formal hearing in unsuccessful direct correspondence with President White and by taking the matter to the Senate for its input as an advisory body to the president. The Senate voted to bring the matter before a joint meeting of the faculty on May 13, 1975. At this meeting, tensions ran high. What transpired next is pieced together from Gormley's and other witnesses' testimony and a review of the minutes in evidence and is not entirely clear. Yet, the major points are sufficiently comprehensible to describe them here.

At the meeting, both Stecher and Slutzky spoke to their respective reports. At some point a motion was introduced and carried calling for the resignation of the committee and the election of a new ad hoc committee, and a separate motion was also adopted by a vote of 43 to 16 that it immediately convene a hearing on Gormley's complaints. Gormley recalled that President White left the chair and the meeting before the votes. Apparently, the members of the committee present, including Stecher, resigned. Ultimately, six of the seven members stepped down. At the opening of a reconvened meeting on May 22, President White read a written statement informing the assemblage that "the administration will regard the election of the proposed committee as an illegal act under the governance." He went on to state the administration would not recognize it, provide it any financial support, participate in its activities, nor receive any communications from it. He then relinquished the chair. The meeting continued with the secretary, Professor Bowman, serving as chairman pro tem. It was ruled that a quorum was present. After a speaker was applauded for criticizing the administration for now emasculating the AF&T committee after continually whittling down the structure and strength of the governance, another professor moved to censure the president. The motion called for a vote of no confidence in the president in view of his continuing efforts to thwart the duly expressed wishes of the joint faculties and his continuing refusal to abide by the governance. The motion was seconded, almost immediately the question was called, and the debate concluded. At this point the deans and division heads stood up, announced they would vote against the motion, and walked out. This action prompted some faculty to leave, thereby destroying a quorum among faculty members, and no vote was taken. The meeting then adjourned to May 27. On May 27, a quorum could not be obtained and no meeting was held. No further meeting was scheduled that academic year and the effort to elect a new ad hoc AF&T committee to hear Gormley's complaints went no further.

Gormley had an unfair labor practice charge filed on his behalf with Region 2 toward the end of 1974 in Case 2–CA–13549 alleging his nonrenewal as violative of Section 8(a)(1) and (5) of the Act. The charge was dismissed, there were no further proceedings, and Gormley left the faculty at the end of the 1974–1975 academic year.

Following the Gormley cause celebre, the committee ceased to hear any further matters. According to Professor Stecher, he continued to remain a member after the abortive resignations failed to result in a successor committee, but the committee was no longer called on to do anything and it just petered out. According to Professor Knapp, the committee ceased to exist after the time of the Gormley episode. It will be recalled that in 1975 the administration successfully opposed the request for a hearing before the AF&T committee made by five tenured professors whose appointments were terminated due to the discontinuance of their academic programs, the president's position later having been affirmed by way of court dismissal of the professors' suit to enjoin their terminations pending a hearing. During the period 1975 to 1978 union contract demands included replacing the committee with grievance and arbitration provisions. All of these factors, including faculty disenchantment with the committee structure and concentration on another mechanism, probably contributed to its demise.

It will be recalled that the Senate, by voluntary decision of its membership, also ceased to function from shortly after its referral of the Gormley matter to the joint faculty until after execution of the collective-bargaining agreement. President White's rejection of the joint faculty's effort to reconstitute the AF&T committee reflected also on the Senate's referral of the matter to that body. In fact, it was at the same meeting at which the referral was approved that President White in addressing the Senate pointed out its purely advisory and limited role. The president's statement was made in the context of a discussion of the Union's role in certain decision-making matters and probably reflected some tension between administration and faculty arising from conflicts arising during the bargaining period. President White also never called another meeting of the joint faculty. Six years elapsed until its new meeting in the spring of 1981.

During the contract period, the AF&T committee was formally abolished and was replaced by various contract provisions pursuant to article XXIII of the agreement. Article II, "Academic Freedom and Responsibility," recited principles of academic freedom for the faculty, expanding on those contained in appendix III to the 1964

faculty policy manual. Articles VI, "Reappointment, Promotion, and Tenure," and VII, "Tenure," established final approval on these decisions by the president but required the dean to make every reasonable effort to secure written recommendations from faculty members who may be affected by such decisions, including, but not limited to, faculty members with higher rank or tenure, and which group could be expanded to include other faculty members at the request of the affected member. Procedural time limits for faculty notice and submission of additional names were set forth, the manner of initiation of candidacy by the administration, individual applicant, or other faculty was described, and provision for grieving a procedural defect was included. Tenure was to be determined for all faculty uniformly by the end of the member's third full year, with denial followed by a fourth year terminal appointment. Article XXII, "Grievance and Arbitration Procedures," provided for an informal attempt at resolving complaints followed by a three-step formal process for resolution of grievances and culminating in final and binding arbitration in accordance with the rules of the American Arbitration Association. A grievance was defined broadly as any dispute concerning the application, the interpretations, or the reasonableness thereof or other claimed violations of any term or condition of the agreement. In a separate clause, article XIX, dismissal of tenured faculty was limited to adequate cause and tracked the grounds establishing such cause in article III to the faculty policy manual, and in article XXI the administration committed itself to no layoffs of tenured faculty for the life of the agreement.

Professor Knapp testified to the amicable resolution of grievances during the contract's first year, 1978–1979, during which he was the Union's grievance officer. In one matter, the parties worked out a resolution of a probationary faculty member's claim of termination breaching an agreement to retain him, which included a financial settlement. In another, Professor Tulchin's grievance disputing a reprimand was resolved at the level of the dean by removal of the offending letter from Tulchin's personnel file. A third grievance, filed in 1980, claiming administration involvement in a plan of student evaluation of faculty violated the agreement, was resolved by a signed agreement in which the administration agreed to refrain from involvement with the student evaluation form, but in which the right of students to engage in such activity through their organization was affirmed.

Gatza testified that during the contract's second year, at which time he was the new grievance chairman, another grievance claiming a teaching overload was resolved at the level of the provost by payments made to the affected teachers above their regular salary.

After withdrawal of union recognition in mid-1980, at a joint meeting of the faculty in late 1980 or early 1981 called by President Lacy, the president asked the faculty to form a new AF&T committee. This new committee has a different composition from the old, including two elected representatives each from Engineering, Art, Architecture, and the humanities department, one librarian, and, when matters before it concern adjuncts, two adjunct faculty members. Deans and other administrators participated fully in nominating and voting for committee members. In March 1981, in a signed memorandum addressed to the president on the Union's letterhead, five bargaining unit members, and in a separate letter a sixth, all elected at a meeting of the joint faculty to serve on what they described as the unilaterally imposed AF&T committee, accepting their positions under protest and only to provide a voice, however weak, for the faculty, without waiving their contractual rights or rights to pursue the instant proceeding. A responsive letter to the individual letter writer from President Lacy placed the new committee under the governances and the 1964 principles and procedures concerning academic freedom and tenure.

J. Faculty Participation in Nonacademic Concerns

1. Building and property matters

The record makes clear that on matters relating to the use and renovation of institutional buildings and the purchase, sale, and lease of real estate, the faculty had either no input or no effective advisory role on the ultimate decisions reached. When the Foundation Building was renovated during the period 1973 to 1975 and other quarters were acquired for class and administrative use, the faculty was not consulted. In 1981, when Cooper Union sold the cooperative apartment it retained for its president and purchased a brownstone residence for his use at a cost exceeding $600,000 plus additional funds necessary for its restoration, the faculty learned of the transactions and allocation of funds after the fact from an institutional publication and a letter from the chairman of the board of trustees. The trustees had authorized the purchase in December 1980. The assignment of space in its academic buildings also appears to be a matter as to which the administration has uniformly operated independent of any real faculty advisory role. For example, the allocation of classrooms for use by the Art School in the Hewitt Buildings was determined unilaterally by the administration. No faculty or Senate meeting dealt with these matters. Similarly, an Architecture faculty vote in 1974 to create a faculty lounge in the Peter Cooper Suite in the Foundation Building, used for board of director meetings and other social foundations, when the suite was not being used for other purposes, was not followed by the administration. In the summer of 1977, the operational hours of all Cooper Union buildings were shortened by limiting their use to 4 days. The decision, made to conserve on energy costs, was announced to all faculty and staff in a memorandum from the office of the president. On the other hand, there have been instances of consultation with faculty on those occasions when students have requested of the dean that the normal open hours for the Foundation Building be extended. A permanent move of the faculty of Liberal Arts and Sciences in the summer of 1979 from the Foundation Building to the School of Engineering Building and its replacement in the Foundation Building by the Design Center was effectuated without faculty consultation. The establishment and location of an audio-visual resources center in the Engineering Building, including video studies, videotap-

ing, and editing facilities and a video playback center were also announced unilaterally by the provost in a letter to faculty, students, and staff on September 21, 1977. With respect to property owned by the institution off the Cooper Union academic sites but located in New York City, leases with tenants on these properties have been entered and renewed without any faculty advice or consultation.

Two other real estate decisions of consequence to the Cooper Union community were reached largely independent of any faculty input, and one of them was made contrary to an apparent faculty consensus.

On the renovation of the Foundation Building, the planning and design of space was never raised or brought before any faculty committee or body by the administration. Professor Wurmfeld testified that although the architectural plans were posted at the school and he offered preliminary suggestions regarding the location of the architectural studio, he was not aware that the institution ever solicited proposals or that there was any bidding procedure for architectural or contractor services. Dean Hejduk formed a private architectural firm to do the renovation and informed Wurmfeld that he wanted no objections from his faculty which created additional problems in the design of the space. Wurmfeld never saw competitive design plans or proposals, and the faculty did not negotiate the architect's fees or contracts, nor did it hire the building contractor or negotiate the contractor's fees or review the terms of any building contract. When Wurmfeld raised complaints about specific design solutions regarding the elevators and ramps and access for the disabled, ventilation, and lighting, he was either discouraged by Hejduk or the problems were never satisfactorily resolved.

The disposition of the developed portion of Green Camp, the institution's 1000-acre rural special educational, recreational, and athletic facility located in Ringwood, New Jersey, in 1978, was an issue which was debated at length over the years among faculty and administration, but very strong opposition to its sale by faculty, students, alumni, and others ultimately failed. As early as 1971, the trustees announced they were preparing to close the camp because of financial considerations. A number of proposals were made thereafter by outside consultants, and faculty, among other groups, in various forums voiced opposition to the closing and sale. In spite of these sentiments, in 1973 the trustees directed that the operation of the facility be discontinued, and it was ultimately sold. Even after its sale, faculty sentiment for utilizing the proceeds for continued recreational activities was thwarted. A proposal made by the Student Activities Committee to the trustees and president in late 1978 that the moneys received from the recent sale be used to construct a permanent gymnasium on Cooper Union premises was rejected, although it received serious consideration at a subsequent trustees meeting. In a letter responding to the committee's request, President White explained that he believed the moneys were insufficient for the purpose sought.

2. Gallery art shows and exhibitions

The record reveals that the faculty had no input into the choice of art or artifacts exhibited in the gallery maintained in the renovated Foundation Building. Even when Professor Wurmfeld was invited to exhibit architectural and other drawings there, Dean Hejduk sought to rearrange the location of drawings Wurmfeld selected for exhibition. No faculty participates in arranging, mounting, paying for catalog and posters, and selecting exhibitions. At one point, the administrative committee in the School of Art and Architecture made a request of the dean to report on policies on exhibitions and to refrain from arranging any further exhibitions until the policy could be evaluated. There is no record evidence that the dean reported, and shows continued to be held in the gallery. There was, in fact, an unwritten policy prohibiting use of the gallery by full-time faculty, which Dean Hejduk suspended when he offered Professor Wurmfeld the gallery space for exhibition of his work.

3. Budgets

The evidence discloses that the faculty has had no role in determining annual operating or capital budgets for the various divisions of the institution. The parties stipulated that the Schools of Architecture, Art, and Engineering, the department of humanities, the library, and Cooper Union as a whole, each has an annual fiscal year budget running from July 1 to June 30. Many of the items included are components based on an annual academic year which begins on September 1 and ends on August 30 of the succeeding year. Faculty members from each of these institutional divisions testified uniformly that they had no input in the preparation of the budgets or the allocation of moneys to various categories within the budgets. Nor does the faculty have any input in the allocation of funds to other administrative subdivisions of the institution, such as student activities and the office of admissions and records. Neither has the faculty been consulted on how endowment funds are invested or managed.

As an example of faculty exclusion from the budgetary process, the minutes of the administrative committee meeting of the School of Art and Architecture for February 23, 1974, include a report by the chairman, Dean Sadek, on the results of budget hearings. There is no indication that the faculty participated in the hearings. The dean's report related to the tightness of funds for the next year. Materials and supplies were to be maintained at last year's figures. The contingency budget was being carried over, which meant the school would be operating on what had been saved from excess funds. However, it was possible to equalize Art and Architecture adjunct salaries and correct some inequities in full-time salaries. The dean related that the committee would receive a report in the fall as to the amount of money available for lectures, materials, supplies, etc. and allocations recommended for the various disciplines. Professor Knapp testified that, in the School of Engineering, prior to the elimination of department heads they participated in the process to the extent of formulating a proposed budget for their department and attending closed hearings along

with the dean, president, and provost which fixed the budgets. Since departmental heads were abolished, Knapp has no knowledge as to how the school budget is prepared or allocated.

On one occasion, in academic year 1973–1974, President White reported to the Senate that the board of trustees had made a policy decision to change a formula used to project the percentage rates of return on net asset value used to cover operating expenses on the one hand and to reinvest capital on the other. By virtue of this change, the institution incurred a projected budget deficit for the succeeding fiscal year of $300,000. The faculty played no part in either considering or implementing this change in formula or in creating the budget deficit. In the same year, the trustees unilaterally moved to place in the operating budget as an expense item the $364,000-a-year mortgage amortization payment on the Engineering Building.

For a period of time starting in the early 1970s, faculty observers were permitted to attend board of trustees meetings. The observers were elected periodically by the Senate and included two faculty members and one or two students. Professor Knapp, who served as one of the faculty observers for a time, testified that as a result of what he learned at these meetings he reported to the Senate periodically on overall figures he had heard discussed by trustees relating to projected expenditures for completion of the renovation of the Foundation Building and expenditures for a 2-month interval. According to Knapp, these figures appeared to be common knowledge among fellow faculty members at the time. In general, the documents containing some information of a financial nature which observers were permitted to review at the meetings presented broad categories of expenditures for the previous quarter or month. None of the observers was permitted to take any documents from the trustees' meetings and they were uniformly excluded from executive sessions where personnel and major policy decisions of a confidential nature were made. Neither were they allowed to participate in its deliberations during the public portions of its meetings, acting as observers only. According to Professor Tulchin, who was an observer for a period of time, he could not remove from the board room any documents or information, even to convey it to the Senate, and he could not conceivably take notes fast enough of what was transpiring in his presence as the subjects whizzed by. Knapp corroborated this testimony.

Shortly after the union election held in October 1974, the board of trustees decided to no longer permit faculty or student observers to attend its meetings. According to Provost Kaplan, the Union had been certified, collective bargaining was about to take place, and the trustees considered it would not be appropriate under the circumstances to have them present. The provost added that there had been some sentiment, at least informally expressed, on the part of faculty observers that it was a waste of their time.

Professor Wurmfeld testified to his limited knowledge of financial affairs of the institution, for example, the various sources of its funds, not from any financial information received from Cooper Union, but from its tax returns made available to the Union by the Federal Government under the Freedom of Information Act by virtue of its status as a not-for-profit institution.

Faculty in the various schools have from time to time made requests for acquisition of equipment for use in the academic programs. Humanities Professor Gatza testified that requests he has made for purchase of audio and visual materials or records for his music courses have been honored or not depending on what the chairman's administrative assistant tells him is available in the budget for such purchases. In the Engineering School Dean Tan informs the faculty whether funds are available for purchases of equipment and other supplies. The faculty members then tailor their requests in order to come within the cost range which the dean has indicated is acceptable. Even so, of the actual requests made, normally by memorandum, in the experience of Professor Knapp, only 60 to 75 percent, perhaps as much as 80 percent, have actually been approved. Professor Knapp recalled once being denied a supply of writing pads for up to a year although local stationers were well stocked with them. For the 18 months to 2 years preceding the hearing, the office supply cabinets maintained in the dean's office have been locked, necessitating a request by a professor to a secretary, or even a work study student, to gain access.

4. Terms and conditions of employment

Prior to the collective-bargaining agreement, faculty played no part in the setting of their salaries. They were told what it would be on a take it or leave it basis. This applied to the fixing of fringe benefits as well. Furthermore, the dean of the particular division also determined the length of the contract for probationary faculty members. No committee under the 1964 or 1978 governances dealt expressly with salaries or fringe benefits.

In the early 1970s there existed a "Committee Z," a committee of the American Association of University Professors, made up of faculty members, which undertook to improve faculty salaries and fringe benefits. In academic year 1972–1973, it reported to the faculty on three meetings it held with Provost Kaplan and one held with President White and a trustee to discuss faculty salaries for 1973–1974. The committee reported administration rejection of a proposal for annual cost-of-living increases plus additional amounts to be negotiated for merit and general productivity increases. The administration made clear the average increase would be about one-half of the COL for 1972, and this was not negotiable, although its distribution among faculty was negotiable. Neither would the administration negotiate fringes or sabbatical leaves. The committee recommended no further meetings be held in the future if the most important matters were nonnegotiable. It was at this point that Professor Tulchin first sought the aid of the New York State United Teachers in organizing a union among the faculty.

During the collective-bargaining period, salaries and other benefits were set by a process of negotiation in which Professor Wurmfeld, among other faculty, participated. In the agreement, article IX covers compensation;

article X deals with welfare and fringe benefits; article XI covers sabbatical leave; article XII, leaves of absence; article XIII, maternity leave; and article XVI, workload. The compensation article provides retroactive increases as well as minimum salaries for each faculty rank.

After the institution withdrew union recognition, on August 26, 1980, President Lacy announced to all full-time faculty and librarians changes in compensation for the academic year beginning September 1, 1980. Included were a percentage increase in salary, an additional promotional increment, and an increase in Cooper Union's annual contribution to each employee's retirement plan and the elimination of all compulsory employee contributions to these plans. Faculty had no input in determining the figures announced.

The governances have always provided for faculty advisory responsibility on appointments and promotions of the teaching staff. In practice this has involved the dean or division head consulting senior faculty members in the applicant's discipline on the applicant's academic qualifications and standing. However, before President White's term, this procedure was breached apparently at least as often as it was honored. For example, in one of the matters brought before the AF&T committee in 1969, the committee's recommendation to censure an administrator for failing to consult faculty on a new appointment was not followed in spite of Stecher's recollection to the contrary. At least four of the faculty witnesses who testified to the circumstances of their appointments were not interviewed or otherwise evaluated by faculty peers prior to their hiring by their respective dean. This held true for both their hirings as adjuncts and later when offered full-time tenure track positions. After President White assumed office in 1970, at least in the Engineering School, consultation uniformly took place, although often on a catch-as-catch-can basis with whoever faculty member or members were available in the applicant's discipline being asked to interview and report to the dean.

On their promotions over time to higher faculty rank, particularly to ranks above assistant professor, senior faculty at the rank or higher for which they were being considered were consulted. More often than not it was the dean who initiated the process by requesting letters from cohorts of the faculty member being considered. This is consistent with the language at page 10 of the faculty policy manual which reads, "Whenever the criteria for advancement are deemed by the administration to be satisfactorily met, a member of the teaching staff may be promoted to a higher rank, irrespective of his years of service in his present rank." Consideration for promotion (or tenure) may also be triggered by the applicant or by other faculty making the recommendation.

On reappointment of nontenured faculty, prior to the contract period, faculty input seems to have been minimal with respect to both contract renewal as well as the terms of the renewed contract. Professor Haacke could not recall any faculty participation sought by the dean of the Art School in recommending such reappointment, although half a dozen names of reappointed faculty were mentioned by him in his testimony. According to Professor Knapp, there were no nontenured faculty who came up for contract renewal in the 1970s prior to the union contract.

With respect to the grant of tenure, the faculty policy manual describes at page 43 the circumstances under which tenure is acquired:

> The Administration should grant tenure to the faculty member as soon as he has demonstrated his competence and a satisfactory development of his teaching and scholarship. The services of each faculty member in a probationary appointment should be evaluated periodically by the Administration in order to determine whether he should be continued on a probationary appointment or be granted tenure.

Over the decade of the 1970s and into the 1980s the administration weighed recommendations of tenured faculty in making this determination. Early in the decade, recommendations were sought from tenured faculty in the same discipline or, at least, the same division. Faculty recommendations were sought in writing but were also orally communicated. By the mid-1970s, the senior faculty in each discipline in a school or division were asked to meet formally to consider tenure applications and to submit written recommendations. See, e.g., the Gormley tenure procedure in section IV,I,7, supra.

During the contract period, 1978 to 1980, the procedures were formalized, broadened, and permitted greater input by those "affected by such decisions" and by the applicant for reappointment, promotion, and tenure and the probationary period was made a uniform 3 years. See section IV, I,7, supra. Even on initial appointment, appropriate senior faculty members and professional librarians, as appropriate, were to be invited to interview prospective candidates and were to be consulted prior to the making of the final decision. These procedures appear to have been continued unilaterally by the administration since 1980.

Whether faculty advice has been consistently effective in these personnel areas is another question indeed. The conclusion drawn from the evidence is that it has not. The administration unilaterally established and modified policy designed to restrict tenure and even promotion in light of other, conflicting considerations relating to such matters as economics, ratio of tenured to nontenured faculty, and age and anticipated dates of retirement of tenured faculty. See, e.g., President White's statement of reasons to Gormley on his denial of tenure in section IV,I,7, supra. Apart from the period of the early 1970s when tenure grants were severely restricted, many tenure and promotion applications have been denied adverse to majority faculty sentiment throughout the 1970s and into the 1980–1981 academic year. Provost Kaplan's initial testimony bears this out, as do the record documents showing the provost's detailed memoranda submitted to President White regarding promotion and tenure considerations in the spring of 1976 and records from 1974–1975 and 1976–1977 showing the box scores of distribution of votes from faculty through department chairman, division head, and dean to board of trustee decision on promotions and tenure for those years. Conversely,

tenure has rarely, if ever, been granted over significant senior faculty objection. In one instance, however, in 1978, when faculty peers split on a tenure application, with two of three responses in the file showing they were opposed, the professor was tenured on the strong support of the dean, provost, and president and five outside figures with professional reputation in the applicant's field. Even after the contract became effective, when a dean announced a full-time opening for a faculty position in the School of Art for September 1978, and a group of four members of the faculty interviewed a slate of candidates at his request and unanimously and enthusiastically selected one for appointment, no one was hired and no real explanation was provided for this change in decision regarding the opening. The administration's unilateral termination of probationary video and film instructor Creston, over strong faculty and student objection, has been previously described supra. Dean Sadek's appointment as a professor in the graphics area, as well as his appointment as director of the design center, was made without faculty input. I also credit Professor Wurmfeld's testimony that after the count of ballots in the representation election on October 16, 1974, Dean Hejduk informed Wurmfeld, "Now you have done it. You are through. You'll never get tenure." While Wurmfeld ultimately was tenured, and, in fact, ultimately declined an offer of acting dean in 1980, Dean Hejduk's comments illustrate the degree to which administrators believed they controlled the process of decision making on tenure, even to the extent of claiming to weigh irrelevant and discriminatory factors in the process. The same may be said for Dean Sadek's like comments to Professor Gormely during the same year.

The employment of visiting professors calls for separate comment. The faculty policy manual does not refer to this title. Nonetheless, as the earlier discussion of the SHAPE program illustrates, see, e.g., section IV,I,1,e, supra, individuals were appointed to visiting professorships during the 1970s without faculty input. Aside from Dr. Lee Harrisberger, appointed in 1976 under a Carnegie grant, the record reveals that when Art Professor Hans Haacke was appointed visiting professor by the dean in 1970 after serving as a part-time instructor since 1967, there was no faculty interview or screening process to his knowledge. Professor Knapp confirmed that the faculty did not vote to recommend candidates for visiting professorships. At least four persons, including Harrisberger, received such appointments in the Engineering School during the 1970s. One of them, Professor Ivan Grabel, while on sabbatical leave from a separate university teaching post and desirous of being in the New York area, received his appointment after being recommended to the administration by one of Professor Knapp's colleagues on the faculty.

Visiting professors were specifically excluded from the certified bargaining unit. However, during the period of the collective-bargaining agreement in 1979–1980, Union President Tulchin raised objection to the announcement of the appointment of a then visiting professor to the full-time faculty without administration compliance with the consultation with appropriate senior faculty as required by the contract. After some argument on the matter, Provost Kaplan acceded to Tulchin's request, and, after notifying the Art School dean, Tulchin was contacted to interview the professor in his capacity as the member of the Art faculty within the bargaining unit whose field was most closely aligned to that of the visiting professor. Under the agreement (art. XVIII), appointments of visiting professorships were limited to 1 year for each individual and the considerable number of adjuncts holding visiting professor titles in the Art School were to have their titles changed to adjunct if rehired.

Adjunct faculty are defined in the faculty policy manual as members of the staff not employed on a full-time basis whose position does not carry tenure nor membership in faculty. There is no governance procedure on their hire, their rehire, or their transfer to full-time status. The record establishes minimal faculty role in their hire. From time to time, full-time faculty members in the fields in which adjunct faculty were to be employed were asked to review qualfications of persons referred to them by the dean and report their conclusions. The faculty members normally did not recruit, nor did they fix adjunct salaries, rank, or hours, select adjunct replacement while on sabbatical leave, or participate in the employment process as a body or in any defined way and a number were hired over time without any faculty involvement whatsoever and, on occasion, over faculty objection. The deans select them and negotiate directly their salaries and other terms of employment.

According to at least one faculty witness, the collective-bargaining agreement required faculty consultation on their hire. Although a close review of the terms of the agreement does not bear this out, nevertheless, Provost Kaplan in notes made of a meeting of the deans and the president held on September 12, 1978, reported that he had an understanding with the Union that in the appointment of adjuncts the administration would consult relevant senior full-time faculty before making the appointment, whenever possible, and faculty consultation in the hiring process in the humanities area, at least, may have increased somewhat during the contract period. This agreed-upon role ceased at the termination of the bargaining relationship. To the extent that adjuncts were brought in to teach a new course the faculty has become intimately involved through their role in helping to determine curriculum under the governance committees. Furthermore, the administrative committee has had a continuing role in recommending on the renewal of teaching contracts to be offered adjunct personnel.

Although adjuncts were excluded from the certified bargaining unit, article XVIII of the agreement limited them to 9 contact hours of teaching or three classes, whichever was less. After the termination of the bargaining relationship, the faculty became concerned with the lack of any uniform personnel policy as to adjuncts, primarily at the urging of adjuncts. At the April 9, 1981 meeting of the School of Architecture administrative committee, the circumstances surrounding its conveneing after a lapse of some 4 years having been described, supra, upon expressions of concern by three adjuncts present, the agenda was unanimously revised to deal,

inter alia, with policy regarding adjunct hiring and renewal, promotions, hours, and fringe benefits. Motions were unanimously adopted (1) that the dean report to the committee his policy concerning hiring, renewal, and nonrenewal of adjuncts and make no additional acts before this policy is reviewed by the committee; (2) that the committee, after consultation with adjunct faculty, recommend a uniform and equitable procedure for evaluation of adjuncts to become the basis for hiring, renewal, nonrenewal, promotion, and the awarding of 1-year versus 3-year contracts; (3) that information be made available to faculty and students concerning contract hours of adjuncts with a view to correcting any disparities or misunderstandings that may exist between contract hours and scheduled hours; and (4) that the dean request the vice president for business affairs to study and propose ways, at the next committee meetings, in which it might be possible for adjuncts to participate in retirement benefits, health benefits, and life insurance. At the time of testimony on these matters in January 1982, the dean, who was on sabbatical leave in the spring of 1981, had not yet dealt with the concerns voiced in these resolutions although he said he would deal with them in the future.

With respect to termination of faculty, when tenured faculty are let go, if their separation is related to curricula or program elimination as was the case in the mid-1970s, the administration has been able to successfully withstand faculty attempts to participate in the process under the goverance hearing provisions. As for individual tenured faculty, so long as there has been adequate, consideration by the administration of one or more of the causes for dismissal previously described supra, the faculty has no real role in reviewing the matter on complaint of the dismissed member. As regards probationary faculty members denied tenure, they may seek procedural review by the AF&T committee, but only when a majority of the committee is convinced that academic freedom or due process has been violated or there has not been adequate consideration of relevant factors and/or cause for dismissal does the possibility exist of a formal hearing. It appears that probationary faculty prior to the third year have no recourse even to the preliminary procedures of the AF&T committee absent a claim of breach of academic freedom. If a probatioanry teacher is dismissed prior to the expiration of the probationary appointment, the AF&T committee may investigate the claim of breach of contract, but it has no jurisdiction to become involved in the merit of the nonrenewal. Aside from the procedural safeguards of due process and adequate consideration and absent a violation of academic freedom, the administration has a relatively free hand in determining whether to renew nontenured faculty, but is limited by the definition of adequate cause spelled out in the faculty policy manual with respect to tenured faculty.

Aside from the matter of calendar and course schedules previously discussed, the related matters of course assignements, class sizes, teaching load, and staffing were of concern to the faculty. The record evidence supports a mixed, generally more limited role for faculty participation in decisions in these areas. Even as to course schedules, faculty witnesses disputed Dean of Admissions Liebeskind's conclusion of greater faculty participation in determining them.

According to Professor Knapp, there are two aspects to course schedules. One relates to the courses that one is assigned to teach. The other concerns the times the courses are held. As to the first aspect, he is generally called by the dean to discuss the courses he will teach and, if there is disagreement between them, the dean's will prevails. As to the second aspect, he has nothing to do with the time schedule. It is assigned to him and he is left in the position of attempting to make changes if it is not suitable to him. This latter testimony conflicts with Liebeskind's description of the most recent process of give and take between Engineering faculty and Assoicate Dean Hollander in drawing up the schedule described supra. In view of the more complete and detailed narrative relating to this matter offered by the administration, I am prepared to credit the administration over Knapp's more limited denial, at least with respect to the Engineering School. I also have weighed in making this finding the testimony of administration accommodation generally to faculty requests to limit their teaching assignments to particular days in order to avoid conflicts with private consulting work, other projects, and the like. I credit Architecutre Profesor Wurmfeld's description of being denied requests to change time slots of courses assigned to him without his input, which he claimed were inconvenient in both 1978–1979 and 1979–1980. He was informed that it was impossible for the registrar to change the times for students in the fourth year who were taking the set of required courses.

As to rescheduling of classes already scheduled for specific slotted times, no changes may be made by the Engineering faculty member without consulting the dean or associate dean.

As to course assignments and class size there is more reason to credit Knapp. In a memo to Dean Tan dated November 30, 1978, he notes, inter alia, that "it has generally been known since September that I would be teaching two courses each semester this year. It was not until November, however, that any consideration of which courses I would teach was made known to me." In another memo of December 1, 1978, addressed to Dean Tan, Knapp expresses disappointment over the dean's decision refusing to schedule an advanced electromagnetics course because the seven students who signed up for it were deemed inadequate. Professor Gatza testified that as to required courses, he is assigned to teach them by the department chairman. What elective courses he offers is based on his suggestions and requests, which, as previously noted, are not always honored. Knapp described the process of introducing a new elective course. The faculty member will devise a course offering and submit a catalogue description to the dean's office prior to student registration. Ordinarily the course is also brought to the attention of the curriculum committee and, presuming its approval, the course is posted for student signup. It is only taught when a sufficient number of students, in the discretion of the dean, elect to take it.

Professor Knapp has been successful at times in objecting to an excessively large number of students in his courses and some adjustment has been made. On the other hand, on at least one occasion in 1978 when Knapp and other faculty objected to four student laboratory squads in a required project course as producing chaos and degrading the educational experience, his recommendation to schedule and staff another section of the course was rejected by the dean on the ground that there was no possibility of hiring anyone to teach another section.

As to teaching loads, the faculty policy manual provided that full-time members were required to teach approximately 10 to 14 contract hours per week on the average, a portion of which may be in the evening session. Under the collective-bargaining agrement, article XVI, "Work Load," defined a full-time teaching load as consisting of not more than 21 teacher-credit hours per academic year (2 semesters) with lecture course hours receiving a factor of 1 and laboratory studio course hours receiving a factor of three-fourths per each class-contact hour per week per semester. The contract article also limited course preparations to three during a semester and permitted reductions in teaching load for those faculty assigned unusually heavy nonteaching duties. It is unclear whether the practice since 1980 has reverted to that in the faculty policy manual, but it is likely this has occurred.

When the physics degree program was discontinued effective 1976–1977, and some freshmen students transferred into electrical engineering, Dean Tan proposed reducing the teaching load of the four electrical engineering faculty to accommodate for the resulting larger classes. The faculty members instead recommended the hiring of two additional faculty under 1-year terminal appointments. A copy of their memorandum was sent to President White. Dean Tan rejected this recommendation on the ground of lack of funds, but also said he was disposed adversely to it because the memo had been sent to the president. At a March 2, 1976 Engineering faculty meeting, Dean Tan cast the deciding negative vote, breaking a two to two tie on a motion requesting the board of trustees to consider an increase of faculty personnel in proportion to increased enrollment based on greater enrollment, the new 5-year masters program, and the influx of science degree transfer students.

In January 1980, Professor Knapp's written recommendation to assign an experienced faculty member to assist a new professor in the first electronics project course was not followed, in spite of significant student dissatisfaction with the manner in which the course was being taught.

On leaves of absence, there are no standards to guide faculty, there is no review by the faculty, and no faculty committee has authority to recommend their approval. Each request is considered on its individual merits by the administration. In 1977, Professor Wurmfeld's formal written request to his dean for a leave for the fall semester 1977–1978 to collaborate on a book based on his history (of architecture) course was granted by the board of trustees after both the dean and the administration had recommended it. In the same letter Wurmfeld was also notified of his promotion to associate professor. Art Professor Haacke was granted a leave one semester when he received a Guggenheim grant. He also was permitted short leaves up to a week in length for the installation of gallery shows of his art upon approval of the dean where in one instance he stated he would make up the classes missed and in the other he had procured a qualified substitute teacher at no cost to Cooper Union. The procedure is the same in the Engineering School. The president or provost recommends approval to the trustees on application made to the dean.

In one instance, a professor whose original sabbatical leave had been extended 1 year by a leave of absence, was denied a further 1-year extension of the leave of absence to teach at the Sorbonne. This last request came up in 1978 during the collective-bargaining agreement and was discussed by Union President Tulchin and Provost Kaplan. Professor Tulchin's testimony is credited that the provost refused to negotiate the further extension of the unpaid leave, stated that it was his managerial right to determine how long or how many leaves of absence the professor could take, and further stated that the professor had reached his limit and, if he did not wish to return to Cooper Union for the following semester, he would be deemed to have resigned. In fact, the professor was informed of the administration's decision in correspondence which spelled out the institution's concern for his return and the relevant educational factors which had entered into its decision, and, as a consequence of the professor's failure to return, he was removed from the faculty. The article negotiated by the parties (art. XII) provided that a leave of absence without salary may be granted for good cause provided the employee expects to return afterward. The leave may be up to two semesters and may be extended by the president. If the leave is recognized as one for an academic purpose, the employee shall receive all salary increases granted in the employee's absence. A major difference with the provision contained in the 1964 faculty policy manual is that the manual adds as a condition that satisfactory arrangements be made to carry the applicant's teaching assignments. It is presumed the manual governs present and further grants of such leave.

As to sabbatical leaves, the faculty policy manual provides for faculty eligibility after each consecutive 7 years of service at Cooper Union, at least 4 of which shall have been performed with a rank of at least associate professor. The grant of such leave is at the discretion of the president and trustees. Such leave is compensated at full salary for one semester and at half salary for a full year. It is expected the member on such leave will not accept remuneration other than his faculty salary and such prizes or academic awards given him. The disposition of the courses or administrative work of the person on leave is decided by the department head concerned in consultation with the dean.

The contract clause (art. XI) continued the definition of such leave and salary arrangement depending on length of the leave and the authority and discretion to grant such leave continued to reside with the president and trustees. A time limit for filing an application was set, and the administration agreed to grant at least one

full-year and one half-year sabbaticals subject to its review of all applications, taking into account the applicant's reason for the leave, the number of previous leaves, their allocation among the various schools and disciplines, the benefits to the institution's educational program, and Cooper Union's need for the services of the applicant during the time for which leave is requested. At no time has the faculty participated in the decision to grant or deny sabbatical leave, and since withdrawal of union recognition the administration's discretion is unfettered by the language which established a minimum number subject to the guidelines described.

During the contract period, more than the contract minimum number of sabbaticals were granted in some, if not all, semesters. Professors Wurmfeld in Architecture, Haacke in Art, and Knapp in Engineering were each granted sabbatical leaves during the contract period. In Wurmfeld's case, he expressed an intention to pursue educational goals related to his teaching responsibilities as well as his professional practice, and his request was enthusiastically supported by his dean, who noted, inter alia, Wurmfeld's "forceful role in the formation of the history program." In each of the two other instances, written requests made to their respective deans were also honored upon ultimate approval by the board of trustees.

Prior to the period of the contract, there were instances in which professors were denied sabbaticals although otherwise eligible.

Regarding welfare and fringe benefits, the contract (art. X) provided for the maintenance of such preexisting benefits as Blue Cross-Blue Shield, major medical, group life insurance, pension, and disability. Presumably these benefits have been unilaterally continued to date after contract termination.

As to faculty grievances, this subject matter has been exhaustively treated particularly as it relates to tenure, termination, or lesser discipline, and covering the contract period and subsequently, in an earlier section of this decision.

One last item relating to terms and conditions of employment is the fact that during the contract period only faculty evaluations were instituted on a once-a-year basis. In the Engineering School, the dean circulated a questionnaire for faculty to complete relating to their teaching and professional activities. An interview followed and a memorandum was then prepared by the dean and placed in the faculty member's file and a copy provided the member. In the Architecture School, the dean held individual discussions with the faculty and followed up with letters for the personnel files summing up the views he had expressed about the member's activities, contributions to the school, and their value. As noted, these evaluations ceased after the summer 1980. Faculty never prepared work evaluations of their colleagues although they did evaluate their colleagues to the extent they participated in tenure and promotion considerations.

K. *Alleged Faculty Supervisory Authority*

Professor Wurmfeld testified credibly that no employees report directly to him in the School of Architecture. He has no role in directing or supervising the dean's administrative assistants, in evaluating or hiring them, or in recommending their terms or conditions of employment. He shares office space with other faculty and any official or institutional typing is done either by a dean's assistant or a secretary employed in his private architectural firm. The very limited role of faculty in the hire of adjuncts and the nonexisting role in appointments of visiting professors has been described. As also described, faculty had no role in setting adjunct contract terms or length of hire or renewal of hire.

In regard to faculty relations to shop assistants and laboratory technicians, these employees are supervised by shop and laboratory supervisors and/or the deans, who determine their number and their hire, and terms and conditions of employment are determined in contracts prepared and offered to them by the respective deans. While they assist faculty members by maintaining equipment and the shop or lab, instructing and supervising students in their safe use, aiding in the practical execution of student projects, and helping to resolve technical problems, faculty do not evaluate their performance, and the assistants and technicians do not report to the faculty members they assist but rather report to their supervisor, who, in turn, reports to the dean who employs them. There is no requirement that technicians who assist in engineering lab courses respond to requests or even directives of faculty and, in fact, on the refusal of a technician to perform a task the faculty reports the matter to the dean for his followup and correction or possible discipline. Faculty also have no role in advising or determining which, if any, shop or lab assistants become adjunct teachers from time to time. Faculty do not train technicians; give them work orders or assignments; grant time off, sick leave, or vacation time; keep track of their worktime; evaluate their performance; or warn them or recommend disciplinary action. Their work contact is minimal. One Engineering faculty member's complaint in 1977 to the provost about the splitting of a physics technician's time between physics and chemistry was never corrected. In another instance, after receiving a written letter of warning from the dean, issued on the complaint of the supervisor, another technician in the Engineering School was dismissed by the dean a year later. Faculty members who were asked their recommendation before the dismissal refused to give one since they had not been consulted on the technician's earlier transfer into their discipline from another one. However, at the urging of one faculty member, the dean's determination to provide 2 month's salary severance pay was increased to 6 months. At the directive of the dean to look for a replacement, the faculty in the discipline in which he had been partially employed placed a newspaper ad, interviewed certain of the respondents, and recommended the dean's consideration of two, from which group the dean selected and appointed one. Although the faculty involved asked that the new hire be assigned fully to their discipline, his duties have encompassed work in another department. The dean also informed the faculty member who had placed the ad that he had exceeded his authority by having done so without prior permission.

Although certain faculty, such as the photography professor (Union President Tulchin), may have had

closer working relationships with the technician supervisor than with the technicians by virtue of the nature of the equipment and needs of the students, they appear to have no input into the supervisor's hire or other terms and conditions of his employment and in no sense direct their work or become directly involved in their supervision or discipline of the technicians under them.

The strictly professional relationship of full-time faculty and librarians has been described supra.

L. *Other Aspects of Collective Bargaining Including the Management-Rights Clause Incorporated in the Agreement*

In the series of meetings principally between Wurmfeld and White in the fall of 1977 which led to final agreement on terms of the labor contract, at one point Wurmfeld asked White to indicate those things he really felt he had to have and the areas he felt he had flexibility in, and Wurmfeld would do the same. One area in which White expressed having little flexibility was management rights. At a subsequent meeting White reiterated that he needed a strong clause. Wurmfeld then agreed to the initial Cooper Union demand in this area made back in 1975 and that clause was finally incorporated in the contract. Prior to President White's involvement in negotiations, during earlier negotiations the union team held with the provost, at one meeting at which the institution's management-rights clause was being discussed, Provost Kaplan made a comment that "you can't tell General Motors when to build a Vega." The Union's initial proposal was to the effect that anything not covered in the contract, without limitation, was reserved for management. The clause finally agreed to reads as follows:

> ARTICLE XXXIII
>
> *MANAGEMENT RIGHTS*
>
> Except as otherwise provided in this Agreement, Cooper Union retains the exclusive right to hire, direct, and schedule the Faculty and Librarian work force; to plan, direct, and control operations and the use of facilities; to modify, discontinue, eliminate, institute, reorganize or combine any department, curriculum, academic program or operation; to lay off employees; to promulgate reasonable rules and regulations; to introduce new or improved techniques, methods, or facilities, regardless of whether the new and improved techniques, methods, or facilities cause a reduction in the Faculty or Librarian working force; and, in all aspects, to carry out the ordinary and customary functions of management, provided that the same are not inconsistent with the express provisions of this Agreement.

In another article entitled "Matters Not Covered" (art. XXXVII) the parties agreed that with respect to matters not expressly covered by the agreement, Cooper Union agrees that it will consult and negotiate with the Federation prior to making any changes in terms and conditions of employment which are mandatory subjects of collective bargaining as defined under the terms of the National Labor Relations Act.

Over the period of time from certification to execution of the agreement, the Union filed various unfair labor practice charges, most of which were withdrawn but three of which were found by Region 2 to have merit. In one, after dismissing portions of a charge filed in 1975, a complaint was authorized and was unilaterally informally settled by Respondent which agreed not to bypass the Union and deal directly with its employees concerning terms and conditions of employment. In 1977, a consolidated complaint was issued in which the General Counsel alleged Respondent had failed to bargain over loss of bargaining unit work caused by its employment of nonunit employees (adjuncts) in such work and over the subject matter of the school year calendar; unilaterally increased teaching hours of full-time faculty in the Division of Liberal Arts and Sciences; and allowed the School of Engineering faculty, including nonunit employees and administrators, to consider and recommend on such mandatory bargaining subjects as teaching loads. In 1978, there was a settlement agreement entered into by all parties and the charge was later withdrawn and the complaint dismissed by order of the Regional Director.

M. *The Status of Governances After Termination of the Bargaining Relationship*

The governances which were revised in 1978 to remove these matters relating to terms and conditions of employment by agreement of the parties for inclusion in the collective-bargaining agreement remained in effect until 1980 when the agreement terminated and union recognition was withdrawn. Thereafter, Provost Kaplan set about revising the governances to include the material and subject matter removed in 1978. By identical covering letters date February 17, 1981, President Lacy had distributed to each faculty member respective revised governances for the Schools of Art, Architecture, and Engineering. The faculty played no role in preparing or issuing these revised documents. In the covering letter, Lacy noted some minor amendments were obviously necessary in order to bring the governances into conformity with the present structure of the school, taking into account the restructuring of the humanities department and the reassignment of its faculty members.

A review of these so-called Lacy governances show they conform to the earlier ones, incoporating all amendments made subsequent to the 1964 governances, as well as the subject matter removed in 1978. They also incorporate the actual changes in structure relating to the faculty of Liberal Arts and Sciences last adopted by the administration in 1979 after approval by the Senate following the understanding reached between Tulchin and Kaplan.

The manner in which the new Academic Freedom and Tenure Committee was organized, including the protest of six faculty members elected at a meeting of the joint faculty to the unilateral imposition of the committee, has been previously described supra.

Except for the period of time, 1978 to 1980, covered by the labor agreement, I agree with the testimony of Provost Kaplan that the various governance committees

functioned substantively in accordance with the way their functions were described in the 1964 governances and that most of the amendments adopted thereafter dealt essentially with the composition of the committees and not so much with their functions. Even during the contract period, the admissions, curriculum, and academic standards committees in the Art and Architecture Schools continued to function as they had prior thereto. In the Engineering School these committees functioned in accordance with the governance provisions adopted and promulgated by Dean Tan.

During academic year 1980–1981, shortly before the Lacy goverances went into effect, an incident arose in which the Senate's vote on a matter of alleged breach of academic freedom was not fully followed by the administration. An exhibition of graphics of the Mobil Corporation had been planned for the gallery located in the Foundation Building. A student constructed a free-standing conceptual work of art which was intended as a critical commentary on the use of oil by portraying the relationship between oil and militaristic helmets and weapons. It was displayed on the building's fourth floor until the evening of the opening of the gallery exhibit when it was moved to a location outside and immediately in front of the building where it would be seen by Mobil executives and other invited guests. At some point during the evening, it was alleged that the superintendent of maintenance for Cooper Union had summoned police and firemen. While police kept students away, firemen hosed the piece into the gutter and down the drain, destroying it. The student claimed it was up to the Senate to protect his academic freedom of expression and sought an investigation. Professor Wurmfeld, the Senate president, called an emergency meeting and requested that the administration produce Dean Sadek, who was present the evening in question, and the superintendent to respond to the student's claims. After the Senate took testimony from students the administration produced only Provost Kaplan and President Lacy, who explained what happened and expressed certain regrets. The Senate then recommended to the president that the maintenance superintendent be reprimanded for violating emergency procedures previously established in the late 1960's for the maintenance of public order in the Cooper Union campuses by a joint faculty ad hoc committee at the request of the president and required by state law, and, further, that the administration also issue an apology to the student and pay his expenses in the reconstruction of the piece. The administration did pay the student's expenses, but never produced the principals involved in the incident, nor did it issue any reprimand to those responsible. Although the president accepted Dean Sadek's resignation as Dean shortly afterward, there was never any public statement connecting his resignation in any way to the incident.

N. *The Deans' Council*

Provost Kaplan described the deans' council as an informal body within the institution which consisted of the dean and president and which met regularly for several years to discuss and develop a consensus on various matters of academic and administrative concern.

The record shows that those persons invited to attend the periodic meetings included the academic deans, the deans of students, records and admissions, and continuing education, the vice president of business affairs, the provost, the president, and Mrs. Callcote Kindler, the administrative assistant to the president and secretary to the board of trustees, who kept her own shorthand notes of the major items discussed. Kindler retired September 1, 1981.

The meetings were held monthly during the academic year between September 1975 and November 1979. After President White retired at the end of December 1979, President Lacy did not continue to hold them in the second semester of academic year 1979–1980 nor in academic year 1980–1981. However, biweekly meetings of the president, the three academic deans, and the chairperson of the department of humanities were held commencing in October 1981 at least through the close of the hearing in March 1982. No minutes or other written memoranda were kept of these meetings.

A review of the notes of these private meetings show that the subjects discussed generally fell into a recurrent pattern which by and large reaffirmed the positions in both academic and nonacademic matters which the administration was manifesting in its public dealings with the faculty and in its decision-making process. For example, building matters were a recurrent concern. Just as the exhibits and testimony already show the unilateral nature of the administration's determinations relating to maintenance, safety, security of buildings, permissible use, official hours, and establishment of mechanical and electrical support facilities (such as the audio-visual center) and location of divisions (such as the move of the LA&S department from the foundation building to the engineering building), the notes show the manner by which the unilateral decisions in these areas were reached. In contrast, however, when the discussions dealt with matters of curricula, or other matters subject to the committee system of governance, the role of the faculty was affirmed. For example, Dean Hejduk on April 4, 1977, reported on the very good change made in the sequence for math and physics courses and better placement of English and humanities courses. Although faculty are not referred to, these changes could only have been accomplished by them under the governances. On May 1, 1979, it was agreed that Hejduk call a meeting of the curriculum committee on the problem of teaching physics to architects.

In terms of academic standards, on January 13, 1977, President White stated that the schools (indubitably meaning the faculties) should reconsider what probation means in the institution in terms of who puts the status into effect, how long it should last, and what the conditions are for its establishment. When a matter of seeking to change existing institutional policy on prohibiting internal transfers was raised, while discussion ensued there is no evidence that the exising policy described in the catalog limiting graduates to only a higher level curriculum in another discipline was ever changed. On January 31, 1978, Dean Hejduk spoke of submitting a draft of a uniform definition of an incomplete grade in view of the

different standards for permitting and time limits for removing in place in each school. Again, there is no evidence of any change being made or implemented in the existing standards set by the academic standards committees although the dean's expressions of concern on these matters never came to the attention of the faculty governance bodies having jurisdiction over them.

As to the joint degree program with NYU, the four academic deans were advised to provide an opportunity to their faculties to elect a library advisory committee, without permitting them to interfere on personnel or other matters in the two institutions' areas. On January 13, 1977, the notes show, the joint degree program was ready to go to the Engineering faculty committee concerned for its approval. As to a problem of student cheating, it was the consensus this was a matter for individual faculty concern in terms of grade and not a matter for disciplinary hearing. On December 5, 1978, Dean Gore confirmed that a draft of a code of conduct for students was being prepared by the Student Activities Committees and the provost notes it should be presented to the Senate. With respect to another item relating to academic standards—change of grades—it was noted this should be taken up with the Senate as an issue of policy. At the last meeting, on November 6, 1979, it was reported that a full-time admissions counselor was being hired on the strong recommendation of the admissions committees primarily to recruit minority students for all three schools. On October 3, 1975, the president directed the engineering dean to send a memo to the faculty saying the requirements have been completed by math, physics, and distributive science students and they will be recommended for graduation unless there are substantial objections.

During the period from 1975 to 1978 that the faculty-student Senate voluntarily ceased to function, certain matters were determined by the deans' council "in lieu of the Senate," such as recommending the grant of emeritus titles at graduation and fixing the school year calendar.

Periodically, Provost Kaplan reported on his dealings with the Union, both during negotiations and contract administration, discussing as well the Union's filing of unfair labor practice charges, and noting in this regard on March 12, 1976, that in terms of the governances the committee structure is a prerogative of the administration, unrelated to working conditions.

On certain occasions, dissatisfaction was expressed as to the liberties faculty were taking in making too many unauthorized schedule changes and granting leave for student independent study in an unwarranted fashion. The deans were to issue policy statements but it is unclear whether they ever did so. On at least one occasion, Dean of Admissions Liebeskind notified a single professor on January 26, 1981, that unauthorized schedule changes which he continued to make each semester were creating difficulties for some classes and in locating students.

On certain matters of administration as to which the independent nature of the institution's decision-making process has already been established on this record, the notes again reaffirm this process. In the recurrent consideration of the accreditation study being undertaken by the Middle States Association (MSA), both the manner in which the self-study was prepared by the institution and the manner in which arrangements were made to meet with the study team and its chairman show no or ineffective input by faculty. When on September 12, 1978, during the contract period the Engineering dean disclosed plans for establishment of an advisory council of outside people and government officials—like a visiting committee—to visit the school once or twice a year, no faculty involvement in its establishment was acknowledged. In fact, on December 5, 1978, Dean Tan informed the Engineering School administrative committee that the advisory council would visit the school on December 12 and advise on its educational programs, but after faculty objection to its establishment the dean agreed to the faculty meeting the council after its preliminary meeting with the trustees. Two faculty members, at least one an outspoken opponent of the council, resigned a week later from the committee. Similarly, budgetary matters, such as an increase in student and graduation fees, were routinely decided without faculty involvement as the record has independently established.

V. ANALYSIS

The standard for determining the status of college faculty was set in the Supreme Court's decision in *NLRB v. Yeshiva University*, 444 U.S. 672 (1980). Managerial employees were defined as those employees who "formulate and effectuate management policies by expressing and making operative the decisions of their employer." Id. at 682, citing *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 288 (1974) (quoting *Palace Laundry Dry Cleaning Corp.*, 75 NLRB 320, 323 fn. 4 (1947)). An employee represents management interests "by taking or recommending discretionary actions that effectively control or implement employer policy." Id. at 683.

In determining that the faculty in *Yeshiva* were managerial, the Supreme Court found that the faculty effectively determined the curriculum, grading system, admission and matriculation standards, academic calendars, and course schedules. In addition, the faculty effectively determined faculty hiring, tenure, sabbaticals, termination, and promotion. Further, some faculties made final decisions regarding the admissions, expulsion, and graduation of individual students. Others decided questions involving teaching loads, student absence policies, tuition and enrollment levels, and location of the school. Id. at 676–677.

The Court summarized its views regarding the faculty's high degree of authority and participation in decision making in the following words (Id. at 686):

> The controlling consideration in this case is that the faculty of Yeshiva University exercise authority which in any other context unquestionably would be managerial. Their authority in academic matters is absolute. They decide what courses will be offered, when they will be scheduled, and to whom they will be taught. They debate and determine teaching methods, grading policies, and matriculation standards. They effectively decide which stu-

> dents will be admitted, retained, and graduated. On occasion their views have determined the size of the student body, the tuition to be charged, and the location of a school. When one considers the function of a university, it is difficult to imagine decisions more managerial than these. To the extent the industrial analogy applies, the faculty determines within each school the product to be produced, the terms upon which it will offered, and the customers who will be served.

The Court rejected the Board's distinction between managerial decisions and decisions requiring "independent professional judgment" as inconsistent with the goal of "ensur[ing] that employees who exercise discretionary authority on behalf of the employer will not divide their loyalty between employer and union." Id. at 687–688. The Court described "[t]he problem of divided loyalty [as] particularly acute for a university like Yeshiva, which depends on the professional judgment of its faculty to formulate and apply crucial policies constrained only by necessarily general institutional goals. The university requires faculty participation in governance because professional expertise is indispensable to the formulation and implementation of academic policy." Id. at 689.

The Court also limited the reach of its holding as follows (id. at 690–691 fn. 31):

> We recognize that this is a starting point only, and that other factors not present here may enter into the analysis in other contexts. It is plain, for example, that professors may not be excluded merely because they determine the content of their own courses, evaluate their own students, and supervise their own research. There thus may be institutions of higher learning unlike Yeshiva where the faculty are entirely or predominantly nonmanagerial. There also may be faculty members at Yeshiva and like universities who properly could be included in a bargaining unit. It may be that a rational line could be drawn between tenured and untenured faculty members, depending on how a faculty is structured and operates. But we express no opinion on these questions, for it is clear that the union approved by the Board was far too broad.

An examination will first be made of the faculty's input into academic matters in light of the *Yeshiva* standard.

The governances of the institution have consistently maintained a strong role for faculty responsibility for the educational programs of the respective schools. While the deans chair their respective school faculties, preside at their regular and special meetings, and are the initiators of a number of the items which are presented for faculty review and consideration, the collective faculties of each school have a significant, indeed indispensable, part in weighing and recommending changes and modifications in academic policy. Their most significant input is made through the operations of the various faculty elected governance committees, in almost all of which faculty predominate, and each of which has authority over a direct area of academic concern. Normally, no matter involving a new academic policy or raising an academic concern of institutional dimensions may be ultimately considered by the administration or board of trustees until it has first received faculty consideration through the governance committee structure.

The administrative committee, as the conduit for faculty curriculum proposals among other reports received by it from the standing committees, has a central role in faculty involvement not only in academic matters but in administrative matters having financial and personnel aspects. To the limited extent faculty play a part in budgetary matters, it is the administrative committee where faculty have input, e.g. in reviewing budgetary requests in various categories. The committee passes on adjunct promotions and reappointments in terms of contract renewals. The scope of its review of curriculum matters emanating from the curriculum committee is broad and fundamental, as evidenced by the list of its reviews in this area appearing in section IV,I,1,b, supra. Administrative approval of curriculum modifications which bear the committee's approval, in conjunction with that of the curriculum committee, appears by and large to have received prompt administration and trustee affirmance. On the occasions when a serious issue has arisen over curriculum, e.g., the fixing of required humanities credits in the professional curricula of the Architecture and other schools, the active dialogue with the chief administration officials which the faculty's proposed changes prompted established a positive collegial relationship in which managerial authority was shared but in which the faculty still had the final word.

The foregoing must be tempered by the knowledge that, as chairman, the dean has on occasion been able to break a tie vote by voting for or against proposals submitted to a vote of the membership. Further, by retaining the prerogative to call its meetings, the dean was able for a 4-year period to make the committee in the Architecture School inoperative. While the dean appears also to control the agenda, items have been added from time to time which reflect particular faculty interests and concerns. One such instance was the Engineering faculty's success in arranging an early meeting with the school's newly formed alumni adversary council. Many other instances abound in the subject areas catalogued, in section IV,I,1,b, supra.

The introduction of new teaching methods, such as the SHAPE program, is illustrative of an area of faculty input which shows both faculty initiative in academic policy as well as faculty divisiveness grounded on academic content leading to some faculty isolation from academic planning. The program was started by a full-time faculty member who obtained its funding. The study was announced and discussed at Engineering faculty meetings. Those faculty who were interested were free to become involved and absorb the literature. That it become a source of controversy, in which the dean finally backed an emeritus, now adjunct, professor against the involvement of the full-time physics faculty who sought belated participation, while regrettable, should not detract from the fact that it shows the faculty inspired and

spearheaded introduction of an innovative experimental teaching technique into the curriculum.

As to the curriculum committee, it did not become involved in the SHAPE controversy until faculty, belatedly, sought its involvement, illustrating, I believe, another fact which bears comment as a recurrent theme in faculty participation. That theme is an informality in the workings of the standing committees which sometimes has led faculty to avoid invoking the broad jurisdictional reach of the committees. This holds true for the limited number of elective courses initiated by faculty directly with the dean which might have received different consideration by the respective curriculum committee, if not the administration, if submitted directly to the committee under the governances. In any event, it is clear that faculty determine the required curriculum, and have continually wrestled with its adequacy and breadth, effectively modifying and amending it in each school as circumstances and inclination have warranted.

The incident involving the nonrenewal of a full-time probationary faculty member in film and video illustrates another recurrent theme which must be acknowledged. When economic considerations are deemed paramount by the administration, faculty concerns with curriculum and with student sentiment have a tendency to take a back seat. It is apparent that in this instance the faculty was ineffective in seeking to sustain an educational benefit derived from the retention of a full-time faculty resource person in the field. While the record contains other incidents of an even more significant nature showing administration overriding of faculty views on the retention of programs, such as the mid-1970s elimination of the three degree-granting programs and the termination of associated tenured faculty, it nonetheless remains true that on determinations of curricula, particularly required curricula but also regarding electives but to a somewhat lesser extent, in the institutions' three main professional training programs faculty make the effective decisions. The same holds true for the establishment of such new programs as the joint degree program with NYU and the integrated masters programs in Engineering.

The earlier extensive fact presentation establishes the predominant faculty role in the decisive decisions made under the auspices and authority of the admissions committee, academic standards committee, calendar and schedules committees acting jointly, and Student Activities Committee (but to a lesser extent because of minority faculty membership on this committee).

Administration participation in the deliberations of some of these committees, notably admissions, academic standards, and calendar and schedules, through the person of the dean of admissions and registrar is extensive. Yet, it is predominantly as a resource for quantitative data, statistical studies, correlations, legal requirements, and compliance with faculty imposed admission, credit, and graduation requirements that this dean contributes to the workings of these committees. The Charging Party points to the communications between the dean and long-term chairmen which result in final determinations of the committee, in particular on admission decisions, as showing a limited faculty role in these matters. I do not agree. The faculty select the chairmen and whether by active decision or default have permitted the chairmen to conduct the affairs of their committees in such fashion. As representatives of faculty participation in the workings of these governance committees, the chairmen are expressing the sentiment and consensuses of their brethren, whether articulated or not. The fact that neither the General Counsel nor the Charging Party saw fit, for whatever reason, to seek to rebut the testimony of Dean Liebeskind on the effective faculty determinations in the areas of these academic committees' concerns strengthens the conclusion that they exercise predominant and final authority in certain academic areas central to the institution's educational mission.

One matter involving academic standards bears closer scrutiny. The General Counsel argues that the graduation of RS and SS with their regular class after receiving failing grades in the fourth year architectural design courses shows administration disregard for the faculty grading system or matriculation standards. I do not agree. First, it is not clear that by issuing the failing grades the faculty involved meant to foreclose RS and SS from doubling up the fourth and fifth year design courses in their fifth year. Professor Wurmfeld never recommended against such action although there is no evidence he was ever asked his advice on the matter. Furthermore, Dean Gore testified without contradiction that the status of both RS and SS came before the academic standards committee where both were permitted to complete their studies in their fifth year. That committee also successfully dealt with RS's attempt to establish unfair treatment by the faculty in the fourth year design course. Thus, while Dean Hejduk as leading instructor in the design courses in fall 1977 permitted these students to double up in their design course work, it would appear that his discretion here was exercised within limits previously established by the faculty itself.

Faculty participation in matters of academic freedom and tenure require separate comment. For the total period covered by the records, except for the 2-year period 1978 to 1980, faculty allegations of breaches in the four areas of concern within the juridiction of the Academic Freedom and Tenure Committee received the attention and active investigative participation of this joint, faculty elected committee. In every instance but one, of the six cases described within its jurisdiction, its conclusions were affirmed by the administration and trustees. That one instance concerned the apparent failure of the administration to censure the acting administrator of the math department for failure to consult faculty on the appointment of a new faculty member. Nevertheless, the administrator was, in fact, shortly thereafter during midyear, abruptly relieved of his duties, which, in spite of the president's expressions of gratitude to the administrator, was probably based on faculty dissatisfaction with his tenure, manifested, at least in part, by the conclusions of the committee.

The committee's deliberations and conclusions with regard to Professor Gormley present a mixed pattern, one in which, however, a duly constituted governance committee investigated and deliberated at length before finally making a recommendation which was affirmed by

the administration. Neither the General Counsel nor the Charging Party argues that the committee acted without a quorum. Those two faculty members who were away, by choice, were polled after the last round of interviews and were present for the earlier investigation. That Professor Stecher and perhaps the others in the majority were opponents of union organization cannot be, should not be, and has not been raised as a basis for impunging the integrity of the work of the committee. While one may disagree with its conclusions, denying a hearing to Gormley, what is persuasive here is that the committee spent considerable time, even additional time and effort at the urging of its dissenting member, in investigating and deliberating to an effective governance committee decision. On the other hand, President White frustrated majority faculty sentiment when he refused to acknowledge the legitimacy of the procedures for selecting an ad hoc committee to hear the Gormley complaints. In this instance, the governance system was unable to achieve faculty compliance with the results of its workings. Faculty efforts, taken outside the governances, proved ineffective and faculty disillusion resulted. Given the context of union tensions in which the case arose, perhaps such a result was inevitable. The failure of the joint faculty attempt to censure the president resulted from faculty failure to maintain a quorum at the meeting involved, but, in any event, should not be viewed as determinative of lack of faculty effectiveness in matters of academic freedom and breaches of procedural safeguards on tenure and other personnel matters in light of the total history of the workings of the committee, the grievance experiences under the contract, and the reinstitution of the committee in its basic pre-1978 form, but with a slightly different faculty composition and now fully recognizing humanities faculty participation.

On matters outside the strictly academic, faculty influence has been somewhat weaker. One area, in which more recent history has shown strong faculty participation, in fact joint determination, relates to the structure, location, and leadership of the humanities faculty. The facts of the administration's determinations from 1969 to 1979 regarding the institution's structure and placement and governance participation of the humanities faculty with only limited overall faculty participation has been amply documented. The final report issued in 1978 of the accreditation team from the Middle States Association makes clear the adverse effect that the many unilateral changes in academic organization had, in particular, on the morale of the faculty of Liberal Arts and Sciences. Subsequent to the entry into the collective-bargaining relationship, the unit of full-time faculty achieved a form of parity in determining this subject matter. The off-the-record meetings and negotiations between the union president and the provost led to agreements in principle and in detail on the form of the 1979 restructuring of the humanities faculty and the status, identity, and benefits of the head of that restructured division.

Amicus, New York City Central Labor Council, AFL–CIO, argues eloquently in its posthearing brief that the Act should not permit employees in a unit to lose their status because of the success of the negotiations of their bargaining representative on nonmandatory subjects of bargaining. That brief was filed before the Board's decision issued in *College of Osteopathic Medicine*, 265 NLRB 295 (1982), which I find determinative on this issue. There, the Board rejected a union contention that a unit should not be able to "bargain itself out of the protections of the Act." It concluded that inasmuch as "[t]he *Yeshiva* decision does not expressly or impliedly distinguish situations in which managerial authority was gained through collective bargaining from situations in which such authority was granted, and we do not believe that such a distinction is required by the Act . . . we must look to the extent of managerial authority held by college faculties rather than the manner in which such authority was obtained." Id. at 298.

I conclude that with respect to the 1979 reorganization, the faculty, through its chief representative of the Union in the bargaining unit, jointly exercised managerial authority with the provost, even to the extent of cooperating on expediting its approval by the faculty-student Senate under the governances. As an independent, but related, conclusion, it is undisputed that since the 1979 reorganization, the humanities faculty, in whichever school they are situated, have had all governance rights and responsibilities fully restored to them. It is also apparent that the union-administration review of the governances undertaken in 1978 after execution of the collective-bargaining agreement, leading to agreement on certain changes and modifications including the exclusion of certain provisions covered as terms and conditions of employment in the agreement, involved the faculty members of the bargaining unit in an important aspect of managerial decision making.

The president's failure to call the joint faculty into session for a lengthy time following its attempt to censure him surely disminished the faculty's status during that period, although most other governance committees continued to function normally. That situation changed with the appointment of new President Lacy and has not recurred since 1980. The Senate's consideration of the incident involving administration responsibility for the destruction of a student's politically inspired artwork in 1980–1981 evidences an active Senate making an effective contribution to the governance system in which its recommendations were followed at least to the extent of the chief executive officers expressing regret over the incident and paying the student's expenses. The conclusion is also warranted that the very fact that the Senate took testimony and deliberated on the matter shows that faculty authority extended to a matter of student academic freedom not otherwise covered by the governances and probably acted as a deterrence to similar breaches of such freedom by the administration or its nonunit supervisory employees in the future.

The reason for the inactiveness of the AF&T committee following the Gormley affair is unclear but probably this committee would have continued to serve in protecting faculty procedural and academic freedom concerns had a faculty member claimed a breach of such rights during the period 1975 to 1978. There is no evidence that any faculty member did so.

The Senate's decision to discontinue meetings following the mid-1970s institutional reorganization, while understandable because of faculty frustration with its limited input into basic policy decisions which were governed by economic considerations, represented a voluntary self-limitation on the exercise of its advisory role in many areas of policymaking for a 3-year period, and caused the administration, noted at meetings of the dean's council, to determine certain matters otherwise normally within the Senate's authority under the governances.

With respect to building and real estate matters, fixing budgets and allocation of funds, and faculty compensation and benefits (except for the 1978–1980 contract period), the faculty has had either a nonexistent or extremely limited participation in decision making. As to the library consortium affecting delivery of library service at Cooper Union, unsuccessful faculty opposition to the plan is plain from the record. On hiring, reappointment, and tenure of full-time faculty, faculty consultation is required by the governances, is sought, and in practice is regularly weighed and considered, although its input has not been very effective even during periods of time when other administration policy considerations have not predominated. Faculty input on adjunct initial hiring has been even less effective, although its effective recommendations on reappointment and, by virtue of its monitoring of elective course offerings, its consistent input into the process of adjunct course assignments are borne out by the record. The faculty's advisory role in the appointment of administrators is also fairly limited.

The foregoing review of this voluminous record has not been exhaustive but has, I believe, pinpointed those areas of academic and nonacademic decision making where faculty participation has or has not risen to a level of effectiveness where its contributions could be said under the *Yeshiva* standard to constitute or not constitute an exercise of managerial authority.

Although the Board has had the opportunity since *Yeshiva* to interpret and apply the Supreme Court's standard to a number of college and university faculties, I can find no reported decision which presents a similar fact pattern to the one disclosed in this case. None of the reported decisions have shown such a limited faculty effectiveness in nonacademic areas even while exhibiting predominant faculty finality on decisions in a broad range of academic areas.

In *Lewis University*, 265 NLRB 1239 (1982), the faculty exercised little actual authority with respect to many academic areas, and its role was effectively limited by the terms of both a master contract and a faculty handbook. Here, the faculty exercise considerable academic authority which is reaffirmed in both the governance provisions and the collective-bargaining agreement while in effect. The management-rights clause in the 1978 contract is considerably narrower than that executed by the Lewis University faculty. In *Florida Memorial College*, 263 NLRB 1248 (1982), unlike in this case, no faculty were tenured, a layer of intermediate administrators was employed between faculty and higher administration, and there was no effective faculty input into the catalog, standards for retention of student status, or teaching loads.

In *College of Osteopathic Medicine*, supra, in which the Board found the faculty to be managerial, among other factors it weighed were the faculty's considerable influence on hiring of its members and effectively recommending their initial rank and subsequent promotions, and administration reliance on tenure committee recommendations—areas of important nonacademic matters where Cooper Union faculty have more limited input. In *Loretto Heights College*, 264 NLRB 1107 (1982), unlike the situation at Cooper Union, in no area was faculty authority absolute and there was an administrative staff of program directors and coordinators who acted as a buffer between faculty and higher administration. In *Puerto Rico Junior College*, 265 NLRB 72 (1982), unlike the governance committee structure at Cooper Union, the faculty were in the majority on only one committee in a hierarchy of governing committees.

In *Ithaca College*, 261 NLRB 577 (1982), the faculty enjoyed considerable authority in both academic and nonacademic areas, and in *Bradford College*, 261 NLRB 565 (1982), faculty recommendations in a broad range of academic areas were ignored. While the Board also specifically referred to and weighed an accreditation report in deciding that the faculty did not enjoy managerial authority, I do not deem the 1978 Middle States Association accreditation report discussed on this record to have similar weight, since it did not conclude that faculty lacked participation in academic decision making, which they had, but rather stressed that faculty participation in academic organization and, in particular, humanities faculty participation in faculty governance was lacking—both of which were changed so that by 1979 the Cooper Union faculty jointly participated in the last reorganization and humanities faculty have since enjoyed full governance status.

In *Thiel College*, 261 NLRB 580 (1982), where faculty enjoyed similar status under its constitution, at least as to academic affairs, as Cooper Union faculty enjoy under its governances, that faculty, unlike the Cooper Union faculty, also enjoyed considerable authority over budgetary matters, salary issues and their grievance adjustment, and in the areas of hiring, tenure, sabbaticals, terminations, and promotions. In *Duquesne University*, 261 NLRB 587 (1982), unlike the situation at Cooper Union, the faculty had veto power over any hiring decision made by the dean.

In spite of the foregoing factual distinctions in each of the Board decisions in this area, some common principles may be gleaned from them. In *Thiel College*, supra, the Board noted that lack of faculty involvement in certain nonacademic areas was not "vitally significant" in determining managerial status. These matters included tuition, enrollment levels, and the continuance and location of the program at the college's overseas Bregenz school. Furthermore, the Board minimized the importance of administration changes in faculty prepared budgets where the changes were made due to intermittent institutional financial problems. In *Duquesne University*, supra, the Board concluded that while several faculty members re-

ceived notices of termination in spite of faculty votes to the contrary and the dean was reinstated for a second 5-year term despite a negative faculty vote, the lack of authority in this area, less than that exercised by the Yeshiva faculty, was not determinative given the similar authority exercised in other areas previously outlined, including both academic and nonacademic. In *Duquesne*, the Board also took pains to comment favorably on the fact that the school's bylaws, just as does the faculty governances on this record, provide that faculty members shall enjoy full academic freedom in the classroom.

It is also significant that the Supreme Court in *Yeshiva* gave paramount importance to the faculty's role in academic matters, "effectively decid[ing] which students will be admitted, retained, and graduated," ahead of its role in certain nonacademic areas, in determining its managerial authority in conducting the central "business" of the university. I am also influenced by the limited number of administrators employed by Cooper Union, whose total number involved in faculty governance, 8, contrary to Charging Party's claim, is not large compared to the number of faculty, over 50, and this factor was deemed significant in at least three of the Board decisions reviewed above. It is also significant that only four administrators, the three deans and one chairperson, stand between the faculty and the president and provost in academic decision making under the governances.

While the issue is not entirely free from doubt, I conclude that based on the Cooper Union faculty's predominance and considerable authority in such academic areas as student admissions and class size, academic standards and retention, grading standards, requirements and system, curriculum, calendar, standards and fixing of class and examination schedules, and the protection of academic freedom in the classroom and in the school and due process in the determinations of tenure, promotion, and terminations relating to other than the elimination of entire academic programs, its authority in jointly determining and implementing the most recent academic reorganization placement of humanities faculty and identity and status of its chairperson, and its considerable consultative role in other nonacademic areas of faculty concern, such as tenure, promotion, and hiring of full-time faculty, among other areas, the full-time faculty employed by Cooper Union exercise managerial authority in sufficient areas deemed significant or "vital" by the Supreme Court and the Board so as to share the real responsibility for governance of the institution and to constitute managerial employees within the meaning of the Act. Accordingly, I conclude that the allegations of the complaint have not been sustained.

Having reached this decision, I deem it unnecessary to determine the supervisory status of the librarians or faculty, although if required to determine these issues I would find the assistant librarians to be nonsupervisory, since they supervise nonunit student employees for only a small fraction of their time, *Adelphi University*, 195 NLRB 639, 643–645 (1972), they do not supervise other library employees, and the record fails to establish that faculty members supervise laboratory technicians, shop assistants, or any other employees within the meaning of Section 2(12) of the Act. Furthermore, while the unit sought includes assistant librarians who do not exercise managerial authority, I also conclude that, just as in *Yeshiva*, it is far too broad to permit the three library employees included to constitute a separate unit appropriate for bargaining under the Act. For the same reason I also conclude now that the Charging Party, where membership is limited to Cooper Union staff, is not a labor organization within the meaning of Section 2(5) of the Act. The three library assistants constitute a group of statutory employees whose number is de minimus with respect to the overall unit.

[Recommended Order for dismissal omitted from publication.]

International Association of Bridge, Structural and Ornamental Iron Workers, Local Union No. 482, AFL–CIO *and* Norment Glass Company, a Division of Norment Industries, Inc. *and* Glaziers, Architectural Metal & Glass Workers Local Union No. 1778, AFL–CIO. Case 23–CD–442

6 February 1985

DECISION AND DETERMINATION OF DISPUTE

BY CHAIRMAN DOTSON AND MEMBERS HUNTER AND DENNIS

The charge in this Section 10(k) proceeding was filed 23 August 1984[1] by the Employer, alleging that the Respondent, International Association of Bridge, Structural and Ornamental Iron Workers, Local Union No. 482, AFL–CIO (the Iron Workers) violated Section 8(b)(4)(D) of the National Labor Relations Act by engaging in proscribed activity with an object of forcing the Employer to assign certain work to employees it represents rather than to employees represented by Glaziers, Architectural Metal & Glass Workers Local Union No. 1778, AFL–CIO (the Glaziers). The hearing was held 20 and 21 September before Hearing Officer Javier R. Gonzalez.

The National Labor Relations Board affirms the hearing officer's rulings, finding them free from prejudicial error. On the entire record, the Board makes the following findings.

I. JURISDICTION

The Employer, an Alabama corporation, is engaged in subcontracting for glazing, curtain wall, and window systems work. During the 12 months preceding the hearing the Employer purchased and shipped goods and materials to its Austin, Texas job valued in excess of $50,000 directly from outside the State of Texas. The Employer has gross revenues in excess of $500,000. The parties stipulate, and we find, that the Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the Act and the Iron Workers and the Glaziers are labor organizations within the meaning of Section 2(5) of the Act.

II. THE DISPUTE

A. *Background and Facts of Dispute*

On 25 March 1983 general contractor Warrior Constructors, Inc. (Warrior) subcontracted with the Employer for entrance and window work at William B. Travis State Office Building (Travis Building) in Austin, Texas. In September 1983 Iron Workers Business Manager D. A. Ragsdale telephoned an employer representative in Montgomery, Alabama, to request the assignment of metal installation work on this project to Iron Workers-represented employees.

In July, however, Norment assigned the work to employees represented by the Glaziers. The Iron Workers protested, and Iron Workers, Glaziers, Employer, and Warrior representatives held several meetings attempting to resolve the dispute. They did not reach agreement. During a 24 July meeting Ragsdale claimed the disputed work on behalf of employees represented by the Iron Workers and told the Employer's vice president and general manager Pat Johnson that the Glaziers would do the work "over his dead body." The Iron Workers began picketing at the jobsite's main gate on 21 August, carrying signs reading, "Norment Industries has no agreement with the Iron Workers No. 482." After about 3 days the picketers moved to the Employer's reserved gate. They picketed until 28 August. Numerous employees at the jobsite ceased work.

B. *Work in Dispute*

The parties stipulated and we find that the disputed work involves the installation of all aluminum entrances exceeding 125 square feet or 13 feet high or wide, metal work in storefront fixed show or display window units and entrance doors, installation of aluminum windows, bronze handrails, and metal supports for glass handrails, and caulking associated with this work, including all aluminum and steel support angles and clips, flashing and trim at the William B. Travis State Office Building in Austin, Texas.

C. *Contentions of the Parties*

The Employer contends here is reasonable cause to believe the Iron Workers violated Section 8(b)(4)(D) of the Act based on Ragsdale's 24 July claim and threat followed by the jobsite picketing and work cessation. It further asserts that the Board should award the disputed work to employees represented by the Glaziers based on its collective-bargaining agreement with the Glaziers, its preference and past practice, and economy and efficiency of operations. The Employer also asserts that no area or industry practice precludes an award to Glaziers-represented employees, and that they possess superior skills for performing the disputed work.

The Iron Workers contends the Board should award the work to employees it represents based on a 1961 interunion agreement with the Glaziers

[1] All dates are in 1984 unless otherwise indicated.

providing that this type of work be assigned to its members. The Iron Workers further asserts that the Employer's past practice, economy and efficiency of operations, and relative skills favor such an award.

D. *Applicability of the Statute*

The Iron Workers does not dispute that Ragsdale told the Employer's vice president and general manager Johnson that Glaziers-represented employees would do the disputed work "over his dead body," that the Iron Workers picketed at the jobsite from 21 August to 28 August, or that numerous employees at the jobsite refused to cross the picket line.

Under these circumstances we find reasonable cause to believe that a violation of Section 8(b)(4)(D) has occurred. No party contends that there is an agreed method for voluntary adjustment of the dispute within the meaning of Section 10(k) of the Act. Accordingly, we find that the dispute is properly before the Board for determination.

E. *Merits of the Dispute*

Section 10(k) requires the Board to make an affirmative award of disputed work after considering various factors. *NLRB v. Electrical Workers IBEW Local 1212 (Columbia Broadcasting)*, 364 U.S. 573 (1961). The Board has held that its determination in a jurisdictional dispute is an act of judgment based on common sense and experience, reached by balancing the factors involved in a particular case. *Machinists Lodge 1743 (J. A. Jones Construction)*, 135 NLRB 1402 (1962).

The following factors are relevant in making the determination of this dispute.

1. Certification and collective-bargaining agreements

No party contends that the Board has certified either of the Unions involved in this dispute as the collective-bargaining representative for a unit of the Employer's employees.

The Employer is a party to the Glaziers International's national agreement, and contends several of the agreement's provisions cover the disputed work. We disagree. Article II, section 2 of this agreement describes work comparable to the disputed work, but pertains only to the installation of equipment and protective devices at detention facilities.[2] Article II, section 3 covers installation of electronic equipment that is not comparable to the disputed work.[3]

The Employer has no collective-bargaining agreement with either Local involved in this dispute.

The Employer maintains a permanent crew of employees represented by Glaziers Local 432 at its home office in Montgomery, Alabama, and is party to a collective-bargaining agreement with that local. The Employer claims that, because all the permanent employees working on the Travis Building project are Local 432 members, the agreement requires it to assign the disputed work to Glaziers-represented employees. We find this unpersuasive, however, as Glaziers Local 1778, the only Glaziers local claiming the disputed work, is not a party to that agreement.

Accordingly, this factor does not support an assignment of work to employees represented by either Union.

2. Company preference and past practice

During the past 32 years the Employer has consistently assigned metal installation work similar to the disputed work to employees represented by various Glaziers locals. As noted, the Employer maintains a permanent crew of Glaziers Local 432 members in Montgomery, Alabama. Johnson testified that the Employer typically dispatches Local 432 members from Montgomery to its jobsites and supplements that crew with employees represented by the area Glaziers local. At the Travis Building, the Employer employs a core group of Glaziers

[2] It states as follows:
Section 2. Work covered by this Agreement shall include all work in the installation of detention equipment necessary to contain inmates or patients within a facility and the installation of necessary protective devices to make safe any facility from attempted penetration by force from without, including, but not necessarily limited thereto; such as, the installation of architectural metal, glass, exterior and interior panels, storefront metal and glass, curtain wall erection, ornamental and custom metals; such as doors, rails, enclosures, installation of ballistic frames, ballistic and security glass, ballistic steel panels, hollow metal security doors, security windows, security locks, hardware and devices, electrically operated consoles, security pass-thru devices, security grill work, fixtures and furniture in accordance with the installation specifications of the manufacturer, Architect, owner or builder including all incidental work required for the installation; such as, welding, electrical work, carpentry work and mechanical work, the unloading, stockpiling and distribution of all material, the operation, use and care of all tools and equipment required to perform the above described work.

[3] It states as follows:
Section 3. Work covered by this Agreement also includes all work in the installation and repair of electronic or pneumatic controlling, signaling, reporting, sound, communications and audio-visual/television in or on any type of facility or location; including but not limited to multi-plex systems, computers, facilities/energy management systems, control panels, access controls, perimeter/interior detection, fire alarm, intercommunications, sound, nurse call, television systems, audio-visual systems, electronic racks and cabinets, pneumatic tubing and controls, as well as installation of wire, cable and tubing in accordance with the installation specifications of the manufacturer, architect, owner or builder including all incidental work required for the installation; such as welding, electrical work, carpentry work and mechanical work; the unloading, stockpiling and distribution of all material; the operation, use and care of all tools and equipment required to perform the above described work.

Local 432 members, supplemented by a crew of employees represented by Glaziers Local 1778. The Employer has used employees represented by an Iron Workers local on only two occasions, in Midland, Texas, where there is no Glaziers local.

Johnson testified that the Employer prefers to use Glaziers-represented employees to perform the work in dispute.

We therefore find that the factor of company preference and past practice favors an award to employees represented by the Glaziers.

3. Area and industry practice

Employees represented by the Glaziers perform work similar to that in dispute in the Austin area and other locations throughout the country. Jim Reed, the Glaziers business representative, admitted, however, that employees represented by the Iron Workers also worked on similar projects at numerous locations in the Austin area. Reed further testified that "there is no real clear cut way of [work] assignment in Austin," because some companies assign work exclusively to employees represented by the Glaziers, while others assign it to employees represented by the Iron Workers or to composite crews of employees represented by both Unions. Ragsdale estimated that in the Austin area Glaziers-represented employees perform 30–70 percent of this work similar to the Travis Building project, while Reed testified to a figure of 75–80 percent. Thus, it appears there is no consistent area or industry practice for assignment of this type of work.

Accordingly, this factor does not favor an assignment of work to employees represented by either Union.

4. Relative skills

The Glaziers apprenticeship program provides instruction for the various metal fabrication and installation skills required to perform the disputed work[4] and, as noted, Glaziers-represented employees have performed similar work for this and other employers.

Employees represented by the Iron Workers have also performed metal installation work for various employers. Johnson testified that employees represented by both the Glaziers and the Iron Workers were "quality people" who did "quality work" on previous jobs.

[4] Reed is the training program's director. He testified that the curriculum covers "all phases of glazing" and includes training in erection and fabrication of all types of metal, welding, shop drawings, blueprints, caulking, sealants, tubular metals of all types, curtain walls, glass handling, fabrication, and installation.

We therefore find that this factor does not favor an award to employees represented by either Union.

5. Economy and efficiency of operations

The disputed work essentially involves installing metal frames on the Travis Building; Glaziers-represented employees insert glass into the metal frames. The Employer claims it is more efficient to employ only employees represented by the Glaziers to perform all of this work. Reed and Johnson testified that using the same people to install the frames and to insert the glass would eliminate the work problems such as delay, inefficiency, and conflicts created by having a composite crew. Reed cited an instance involving another glass company, in which Glaziers-represented employees had to redo faulty installation by the Iron Workers-represented employees and stated that such problems occur quite often. In rebuttal, however, Ragsdale testified that the problems noted by Reed would normally be brought to his attention and that he has received no such complaints on any project, including the project Reed referred to.

Johnson further testified that using a composite crew would require the Employer to use additional employees to train and supervise the Iron Workers-represented employees. Johnson admitted, however, that if the Employer had assigned the disputed work to a composite crew initially it would not have needed any additional employees.

The Employer claims that awarding the work solely to Glaziers-represented employees would save it money because the Glaziers-represented employees receive substantially lower wages than the Iron Workers-represented employees.

We do not regard differences in wage rates as a factor, however. *Cuyahoga Carpenters District Council (Midwest Exhibitors)*, 217 NLRB 190, 193 (1975).

We therefore find that this factor does not favor an award to employees represented by either Union.

6. Interunion agreement

On 22 February 1961 the Glaziers International entered into a national agreement with the Iron Workers International covering, inter alia, jurisdictional work assignments. It is undisputed that the national agreement, referred to by the parties as the "blue book," awarded work such as that in dispute to Iron Workers-represented employees. The Glaziers International, however, abrogated this agreement in 1974.

The Iron Workers argues that the abrogation was not effective in Texas because in March 1974

Iron Workers and Glaziers local representatives from Houston, Fort Worth, Dallas, and Austin reached an agreement with another Texas glass company to assign work in accordance with the "blue book" agreement. The Employer, however, was a not a party to this agreement. Additionally, Reed stated that Ragsdale was the first person to cite the "blue book" to him in 10 years. Reed testified that he had advised Ragsdale on a "number of occasions," including during discussions concerning the Travis Building project, that the Glaziers considered the 1961 agreement to be abrogated, and Johnson testified he understood the Employer may assign work to employees represented by either Union.

We therefore find this factor does not favor an award of work to employees represented by either Union.

Conclusions

After considering all the relevant factors, we conclude that Glaziers-represented employees are entitled to perform the work in dispute. We reach this conclusion relying on the factor of company preference and past practice. In making this determination, we are awarding the work to employees represented by the Glaziers, not to that Union or its members.

DETERMINATION OF DISPUTE

The National Labor Relations Board makes the following Determination of Dispute.

1. Employees of Norment Glass Company, A Division of Norment Industries, Inc., represented by Glaziers, Architectural Metal & Glass Workers Union No. 1778, AFL–CIO are entitled to perform the work of installing all aluminum entrances, exceeding 125 square feet or 13 feet high or wide, metal work in storefront fixed show or display window units and entrance doors, installation of aluminum windows, bronze handrails, and metal supports for glass handrails and caulking associated with this work, including all aluminum and steel support angles and clips, flashing and trim at the William B. Travis State Office Building jobsite in Austin, Texas.

2. International Association of Bridge, Structural and Ornamental Iron Workers, Local Union No. 482, AFL–CIO is not entitled by means proscribed by Section 8(b)(4)(D) of the Act to force Norment Glass Company to assign the disputed work to employees represented by it.

3. Within 10 days from this date, International Association of Bridge, Structural and Ornamental Iron Workers, Local Union No. 482, AFL-CIO shall notify the Regional Director for Region 23 in writing whether it will refrain from forcing the Employer, by means proscribed by Section 8(b)(4)(D), to assign the disputed work in a manner inconsistent with this determination.

T.L.B. Plastics Corporation *and* United Electrical, Radio and Machine Workers of America (UE). Cases 13–CA–22322 and 13–CA–22353

6 February 1985

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS HUNTER AND DENNIS

On 31 July 1984 Administrative Law Judge Richard L. Denison issued the attached decision. The General Counsel and the Charging Party filed exceptions and supporting briefs. The Respondent filed a brief in support of the judge's decision.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed, subject to the limitations provided for in the Order.

DECISION

STATEMENT OF THE CASE

RICHARD L. DENISON, Administrative Law Judge. This consolidated proceeding was heard in Chicago, Illinois, on January 19, 20, and 21, and April 12, 13, 14, 15, 1983, at which time a full record was completed.[1] The consolidated complaint, as amended, alleges that the Respondent violated Section 8(a)(1) and (3) of the Act by issuing two disciplinary warning notices to Charlie Jones, refusing to pay Jones holiday pay for Memorial Day 1982 and suspending him for 3 days, and discharging Jones on June 29, 1982. Also alleged as violations of Section 8(a)(1) and (3) are the discharges of seven other employees, who the General Counsel contends were terminated because of their union sympathies and activities, and who Respondent maintains were released for engaging in a work stoppage, or "wild cat" strike, in violation of plant rule 12 and the no-strike clause of its collective-bargaining agreement with Plastic Workers' Union Local No. 18, AFL–CIO. The Respondent's answer, as amended, denies the allegations of unfair labor practices alleged in the amended consolidated complaint. The answer also specifically asserts that these cases should be deferred to arbitration under the provisions of the collective-bargaining agreement then in effect.

Based on the entire record in the case,[2] including my consideration of the briefs filed June 20, 1983, I make the following

FINDINGS OF FACT

I. JURISDICTION

Based on the allegations of paragraphs II(a), II(b), and II(c) of the complaint, as amended, admitted in paragraph II of the Respondent's answer, as amended, I find that the Respondent is now, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION

Based on the allegations of paragraph III of the complaint, as amended, admitted in paragraph III of Respondent's answer, as amended, and other undisputed evidence in the record, I find that United Electrical, Radio and Machine Workers of America (UE), the Charging Party, and Plastic Workers Union Local 18, AFL–CIO are each labor organizations within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

The Respondent operates a custom injection plastic molding plant at Franklin Park, Illinois. As of early 1981, Respondent's production and janitorial employees had been represented for 17 years by Plastic Workers' Union Local 18, AFL–CIO with whom the Respondent had had a series of 3-year contracts. The most recent agreement, in evidence, expired in July 1982, pursuant to a memorandum of agreement between the Company and Local 18 extending the duration of the contract until the question concerning the Charging Party's representation status was resolved. The General Counsel does not attack the validity of that extension. Moreover, it is conceded that the contract with Local 18 was in full force and effect at the time of the incidents on which the allegations of the complaint, as amended, were based.

Approximately June 1981, through certain of Respondent's employees, the Charging Party began securing signed authorization cards from Respondent's workers as part of a drive to replace Local 18 as bargaining agent. An election petition was filed with the Board by the Charging Party on August 4, 1981, and, pursuant to a Stipulation for Certification Upon Consent Election, an election was held on October 2, 1981. The Charging Party won and, following the resolution of objections to the election, the UE was certified by the Board and the Respondent's contractual relationship with Local 18 ended. Initially, the Respondent sought to test the validi-

[1] During the course of the hearing Cases 13–CA–22571 and 13–CA–22632 were severed, settled, and withdrawn.

[2] (a) Certain errors in the transcript have been noted and corrected.

(b) Respondent's motion to strike portions of the General Counsel's brief to the judge, "Attachment B" [omitted from publication] to this decision, is granted. As requested in par. 3 of that motion, official notice is taken of the Board's decision in *T.L.B. Plastics Corp.*, 266 NLRB 331 (1983). Official notice is not taken of the record in the underlying representation proceeding. The General Counsel's response to Respondent's motion to strike is included as "Attachment C" for purposes of clarity.

(c) The joint stipulation and motion to strike filed by all parties on May 16, 1983, "Attachment D," [omitted from publication], is received into evidence, and the motion contained therein is granted.

ty of the certification by refusing to bargain with the Charging Party. A charge in Case 13–CA–22375 was filed as the result of this adopted course of action and processed through the Board's summary judgment procedure, wherein the General Counsel obtained a bargaining order which the Board issued in *T.L.B. Plastics Corp.*, 266 NLRB 331, on March 7, 1983, in the midst of a recess in this proceeding. Upon resumption of this hearing on April 12, 1983, the Respondent, through its counsel, gave notice on the record that it intended to comply with the Board's Order and, accordingly, would recognize and bargain with the Charging Party.[3] Thereafter negotiations took place, and the Respondent and the UE executed a collective-bargaining agreement on January 29, 1984, effective from January 30, 1984, until December 31, 1986.

Notwithstanding the sequence of events recited above, at the time of the closing of this record the Respondent adhered to its affirmative defense that the issues which comprise the instant proceeding should be deferred to arbitration. Thereafter, on January 19, 1984, the Board issued decisions in *United Technologies Corp.*, 268 NLRB 557 (1984), and *Olin Corp.*, 268 NLRB 573 (1984), reestablishing deferral to arbitration as official Board policy in appropriate cases, including those involving alleged violations of Section 8(a)(1) and (3) of the Act. In this respect *United Technologies*, wherein the Board overruled *General American Transportation Corp.*, 228 NLRB 808 (1977), and renewed the application of principles enunciated in *Collyer Insulated Wire*, 192 NLRB 837 (1971), to 8(a)(3) and (1) cases, is particularly relevant. Accordingly, the judge issued an order for the parties to show cause whether or not the instant proceeding should be deferred to arbitration. Responses, which were received from all parties, have been carefully considered.

In its response the Respondent adheres to its position in its answer, which it has consistently maintained throughout this proceeding, that this matter is appropriate for deferral. The Respondent shows that at the time of the events in question the affected employees were covered by a collective-bargaining agreement with the P.W.U., which contains, as article VIII, a grievance procedure culminating in final and binding arbitration. Timely grievances were filed by each of the alleged discriminatees in the instant proceeding with respect to the same issues which are the subject of this proceeding.[4] There is no issue of a defense of the timeliness limitations of the agreement, since both the Respondent and the P.W.U. have agreed to arbitrate the merits of this dispute based on the full record in the instant Board proceeding. Consideration of the unfair labor practices alleged in the complaint is thus assured. The arbitrator has been designated in accordance with the governing contractual provision. The P.W.U. has again reaffirmed its willingness to honor its residual commitment under its former contract with Respondent.[5]

[3] At which time the charge in Case 13–CA–22632, another 8(a)(5) charge, was withdrawn.

[4] Attachment E [omitted from publication].

[5] Attachment F [omitted from publication].

The General Counsel concedes that the issues raised in the unfair labor practice proceeding fall within the scope of the expired collective-bargaining agreement. However, the General Counsel argues that arbitration of this matter under the terms of that agreement under these circumstances would operate in derogation of the Charging Party's representative status, undermining that status and operating in derogation of the current agreement between the Charging Party and the Respondent. The General Counsel also argues that the Charging Party is not bound by the terms of the P.W.U. contract, and has replaced the P.W.U. as majority representative and, in addition, that the competition between the Charging Party and the P.W.U. during the election campaign created opposing interests which render this dispute unsuited to resolution by the arbitral process. Finally, it is contended that submission to arbitration would result in delay. The Charging Party's position, vigorously expressed in its brief, closely parallels that of the General Counsel.

In disagreement with the General Counsel and the Charging Party, in my view, the concerns they express do not preclude deferral to arbitration in the somewhat unusual circumstances of this particular case. As noted by the Respondent the issues raised by the consolidated complaint in a statutory context are also contractual issues under the no-strike, management rights, and holiday pay provisions of the P.W.U. contract then in effect. The facts which must be considered are also the same. Likewise, the issue of discrimination because of union activity, based on these same facts, will be passed upon by the arbitrator by virtue of the prohibition against union discrimination specified in article VII of that agreement. Thus, the requirement that the contractual issues and the unfair labor practice issues be factually parallel, is met. Secondly, the General Counsel's and Charging Party's objections that the Charging Party's interests would not be protected, and that due process and a fair hearing would be denied ignores the realities of the existing circumstances. It would appear that the employees involved continued to have a substantial amount of faith in the fairness of the grievance-arbitration machinery of the existing contract between Respondent and P.W.U., despite their support of the Charging Party in the representation case, otherwise they would not have pursued that avenue of relief, a course of action which they have never abandoned. Furthermore, there is undisputed evidence in the record showing that P.W.U. Union Steward Flora Rambo, on whose testimony the General Counsel relies, made considerable efforts to perform her contractual duties with respect to representing the alleged discriminatees, including extensive efforts seeking to persuade the employees who left their work stations to return to work for fear that they might lose their jobs for violating the no-strike clause of the P.W.U. contract. Such evidence, coupled with P.W.U.'s reaffirmation of its commitment to arbitrate these cases, tends to refute any contention that the alleged discriminatees would not receive fair representation before the arbitrator. Likewise, the Charging Party's interests have been protected since the basis for the arbitration of these issues will be the full record

in the instant proceeding in which the Charging Party freely participated and filed a brief. The fact that the Charging Party chose to represent itself at the hearing through the services of the field organizer responsible for the Charging Party's organizational drive rather than an attorney (the only appearance entered for the Charging Party in this case) is no impediment, since representation by a lay person is a common occurrence in Board proceedings. Finally, contrary to the expressed concern of the General Counsel and the Charging Party, arbitration of this matter is more likely to avoid rather then increase any further delay in resolving the issues specified in the consolidated complaint.

In sum, the true situation presented here is simply this. There remains one final item of unfinished business remaining under Respondent's contract with P.W.U.—the disposition of the final grievances filed under that contract by the affected employees who decided to use that avenue in seeking relief. Because of this case, these grievances have been held in abeyance at the arbitration stage. In my view, excluding tradition, emotion, and tactical considerations, invalid reasons for not processing these matters in an arbitral forum, there is really no logical reason why these issues cannot be determined by an arbitrator. The interests of the Charging Party have been sufficiently safeguarded, as described above. Furthermore, as the Board stated in *United Technologies*, supra at 560:

> Contrary to the notion of the majority in *General American Transportation*, deferral is not akin to abdication. It is merely the prudent exercise of restraint, a postponement of the use of the Board's processes to give the parties' own dispute resolution machinery a chance to succeed. The Board's processes may always be invoked if the arbitral result is inconsistent with the standards of *Spielberg*. [*Spielberg Mfg. Co.*, 112 NLRB 1080 (1955).]

Accordingly, I find and conclude that the issues raised by the consolidated complaint in Cases 13–CA–22322 and 13–CA–22353 should be deferred to the grievance-arbitration provisions of the collective-bargaining agreement between Respondent and Plastic Workers Union Local No. 18, AFL–CIO, under the principles of *Dubo Mfg. Corp.*, 142 NLRB 431 (1963); and of *Collyer*, supra; and *National Radio*, supra.

CONCLUSIONS OF LAW

1. T.L.B. Plastics Corporation is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. United Electrical, Radio and Machine Workers of America (UE) and Plastic Workers Union Local No. 18, AFL–CIO are each labor organizations within the meaning of Section 2(5) of the Act.

3. Good cause has been shown that the issues raised by the consolidated complaint should be deferred to the grievance-arbitration provisions of the applicable collective-bargaining agreement under the principles of *Dubo Mfg. Corp.*, supra, *Collyer*, supra, and *National Radio*, supra.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[6]

ORDER

The complaint is dismissed, provided that:

Jurisdiction of this proceeding is retained for the limited purpose of entertaining an appropriate and timely motion for further consideration upon a proper showing that either (a) the dispute has not, with reasonable promptness after the issuance of this Decision and Order, either been resolved by amicable settlement in the grievance procedure or submitted promptly to arbitration, or (b) the grievance or arbitration procedures have not been fair and regular or have reached a result which is repugnant to the Act.

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[6] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

General Teamsters and Food Processing Local 87, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America *and* Harry Shain *and* Don H. Williams *and* James W. Carpenter. Cases 31–CB–5242, 31–CB–5276, 31–CB–5419, and 31–CB–5299

7 February 1985

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS HUNTER AND DENNIS

On 28 June 1984 Administrative Law Judge Joan Wieder issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed cross-exceptions and a supporting brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions as modified[2] and to adopt the recommended Order.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

[1] The General Counsel has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] Chairman Dotson and Member Dennis agree with the judge's dismissal of the 8(b)(1)(A) allegations pertaining to the 1 July 1983 incident at the hiring hall. In doing so, however, they find that Williams was not engaged in protected concerted activity when he became involved in an altercation with the office manager following his discovery of the inadvertent omission of his name from an unofficial work dispatch list. They also find in these circumstances that Shain's failure to restrain Williams did not constitute a refusal to interfere with the protected activity of another. Accordingly, they find that further credibility resolutions are unnecessary and that the Union did not violate Sec. 8(b)(1)(A) when it fined and disciplined Williams and Shain following this incident.

Member Hunter finds merit to the General Counsel's exception that the judge's finding that Williams threatened Harer is not presently supported by the credited testimony and that the judge further erred in finding testimony regarding the 1 July 1983 incident in the hiring hall "undisputed" while failing to resolve clear inconsistencies in testimony as noted in her earlier factual findings. Accordingly, he would remand this portion of the decision to the judge for appropriate credibility resolutions.

DECISION

STATEMENT OF THE CASE

JOAN WIEDER, Administrative Law Judge. This case was tried before me on 15 and 16 February 1984 in Bakersfield, California, on the General Counsel's complaint, as amended, which alleges that the Respondent labor organization, General Teamsters and Food Processing Local 87, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (the Union or Respondent) engaged in violations of Section 8(b)(1)(A) and (2) of the National Labor Relations Act.

Specifically, the General Counsel alleges that Respondent violated Section 8(b)(1)(A) and (2) of the Act by refusing to allow Don W. Williams, James Carpenter, and Wendell Bell to register for employment and by failing and refusing to refer them for employment. Respondent answers that these individuals are owner-operators and, as such, have been previously ruled to be independent contractors, citing, among others, *General Contractors v. NLRB*, 564 F.2d 271 (9th Cir. 1977); *Teamsters Local 36 (California Dump Truck Owners)*, 249 NLRB 386 (1980), affd. 669 F.2d 759 (D.C. Cir. 1981); *Associated Independent Operators v. NLRB*, 407 F.2d 1383 (9th Cir. 1969); *Teamsters Joint Council No. 42 v. NLRB*, 671 F.2d 305 (9th Cir. 1981); *Teamsters Joint Council No. 42 v. Associated General Contractors of California*, 520 F.Supp. 3 (1981), affd. per curiam 662 F.2d 531 (9th Cir. 1981), cert. denied 109 LRRM 3016 (1982).

The General Counsel also asserts that the Union violated Section 8(b)(1)(A) of the Act by bringing charges against, assessing fines on, and disciplining Don H. Williams and Harry Shain. Respondent generally denies committing any violations, asserting that Williams is not protected since he is an independent contractor; the Union's actions were solely matters related to the acquisition and retention of membership, not their employment status; and Shain was not engaged in protected concerted activity.

On the record as a whole, including my observation of the witnesses, briefs, and arguments of counsel, I make the following

FINDINGS OF FACT

1. BACKGROUND

The Union[1] has been involved in a series of legal proceedings involving owner-operators of dump trucks and grading and excavating equipment wherein it was found by two circuit courts of appeals that these owner-operators are independent contractors, not employees. The instant proceeding involves owner-operators of water trucks. Historically the Union has taken the position that the owner-operators who hire out to contractors engaged in construction are employees.

A partial precis of these decisions and the Union's reaction thereto follows: In *Associated Independent Owner-Operators v. NLRB*, supra, owner-operators of grading and excavating equipment working on the jobsite, digging trenches, etc., were found to be independent contractors, reversing the Board's decision.

In *J. K. Baker Trucking Co.*, 181 NLRB 515 (1970), the Board found owner-operators of dump trucks working at construction sites in southern California to be employees. This decision was affirmed in *Teamsters Joint Council No. 42 v. NLRB*, 450 F.2d 1322 (D.C. Cir. 1971). In response

[1] It is undisputed that the companies and associations contracting with the Union are employers engaged in interstate commerce within the meaning of Sec. 2(2), (6), and (7) of the Act, and that the Respondent is a labor organization within the meaning of Sec. 2(5) of the Act.

to this decision, the Union modified its master labor agreement covering the heavy construction industry in southern California to clearly treat owner-operators as employees.[2]

In 1971, certain of the owner-operators covered by the master labor agreement filed a decertification petition. The Board found the petitioners to be employees. *Associated General Contractors of California*, 201 NLRB 311 (1973).

In *Associated General Contractors of California v. NLRB*, supra (564 F.2d 271), the court reversed a Board decision involving an alleged violation of Section 8(a)(2) and (1) of the Act and found that the owner-operators of dump trucks were independent contractors. The Board, on remand, dismissed the complaint and the decertification petition filed in *Associated General Contractors of California*, supra, accepting the circuit court's decision as the law of the case, 239 NLRB 686.

The Union did not modify its agreement and continued to treat owner-operators as employees. The General Counsel issued a complaint alleging Respondent was violating Section 8(e) and Section 8(b)(4)(i) and (ii)(A) of the Act by including these owner-operators in the agreement since they are independent contractors, under the law of the case in *Associated General Contractors of California*, id. The Board held that the issue of whether the owner-operators were independent contractors, in *Teamsters Joint Council No. 42 (Irvine-Sante Fe Co.)*, 248 NLRB 808 (1980), was res judicata, affd. 671 F.2d 305 (9th Cir. 1981).

In *Teamsters Joint Council No. 42 v. Associated General Contractors of California*, 520 F.Supp. 3 (C.D. Calif. 1981), affd. per curiam 662 F.2d 531 (9th Cir. 1981), cert. denied 455 U.S. 1021 (1982), it was held that, subject to the provisions of Section 302 of the Taft-Hartley Act, trust funds could not accept contrtibutions made on behalf of the dump truck owner-operators since they were found to be independent contractors. In the 1983–1987 master labor agreement, entitled "Owner-Operators," the provisions of the 1971–1983 agreement were modified to delete all references to owner-operators being employees and/or under the control of the contractor being placed on the payroll, receiving contract wages or maintaining union membership. Also section 2304 of the 1983–1987 master labor agreement provides that owner-operators are covered by the "owner-operator clause of the agreement" except when action in their capacity as employers when they operate under a "short-form agreement" incorporating by reference the master labor agreement. In sum, the Union determined to treat all owner-operators as independent contractors. Thus the Union precluded all owner-operators from registering with the Union as employees and being referred for employment. To do otherwise, the Union argues, would risk contempt of court proceedings and lawsuits under Section 303 of the Act.

In January 1984, the Regional Director for Region 31 issued an order consolidating cases, second amended consolidated complaint and notice of hearing asserting, in part, that water truck owner-operators are sufficiently different from dump truck and excavation equipment owner-operators to be deemed employees

II. ALLEGED VIOLATIONS OF THE ACT

A. *Failure to Register and Dispatch*

It is undisputed that in mid-September the Union had a meeting to ratify the 1983–1987 master labor agreement which, as described above, greatly modified the section covering owner-operators. Shortly thereafter, Williams,

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[2] Compare art. XIX, sec. 1903, of the 1965–1968 master labor agreement, entitled "Owner-Operator," which provides, as here pertinent:

> When a truck or piece of equipment is driven or operated by its owner as an independent contractor and is used on jobsite work covered by this agreement, the owner-driver or operator of said truck, or piece of equipment, shall receive a rate of pay not less than that specified in this Agreement. Such operator shall be, and remain, a member in good standing of the Union, and shall have a valid, current clearance from the Local Union covered by this Agreement having area jurisdiction.

with art. XIX, secs. 1900, 1901, 1902, 1917, and 1918, which provide:

ARTICLE XIX

OWNER-OPERATOR

1900. Owner-Operator is an individual that holds legal or registered title to a motor vehicle or to the power equipment unit thereof in his name and who personally drives such vehicle or unit in the performance of work covered by this Agreement.

1901. The Contractor expressly reserves the right to control the manner, time, means and details of, and by which the Owner-Operator performs his services, as well as the ends to be accomplished, and shall be the sole judge of the capability of the Owner-Operator's equipment to perform the work required to be performed and may if the Contractor determines that the Owner-Operator's equipment is not capable of performing the work required to be performed, terminate such Owner-Operator's services; provided, however, that the Owner-Operator may file and process a grievance under Paragraph 1919 hereof on the grounds that the Contractor's determination that the Owner-Operator's equipment is inadequate was a pretext for terminating the Owner-Operator's services. Failure to work the day or one-half (1/2) day out, as directed, shall terminate the Owner-Operator's employment and he shall be paid only for actual time worked prior to such failure. The Contractor shall not pay for time spent by the Owner-Operator in repairing, servicing, or maintaining his equipment after termination or employment or before or after his shift or half-shift, as the case may be.

1902. The Owner-Operator shall be carried on the payroll of the Contractor as an employee and as such, all the terms and conditions of this Master Agreement and any amendment or amendments thereto, shall be applicable to him except as provided elsewhere in this Article and except that in the event that it is determined that the services of an Owner-Operator were terminated without just cause, any payment for time lost shall be limited to the wage and fringe benefit payments provided in this Agreement, and shall not in any event include any payment with respect to the equipment or the loss of use thereof; and except, further, that Owner-Operator shall not be subject to the provisions of Paragraph 204, sub-paragraph 204.1 through 204.7.1.1 inclusive.

1917. It is understood by the parties that this Agreement provides for an Employer-Employee Relationship between the Contractor or Sub-contractor and each Owner-Operator of equipment used hereunder.

1918. It is recognized that many Owner-Operators have executed "short-form" agreement with the Teamsters Union which incorporate by reference provisions of this Master Labor Agreement. The provisions of such "short-form" agreement shall be applicable to said Owner-Operators only in their capacity as employers, i.e., when such Owner-Operators are employing one or more employees. When Owner-Operators are working on a job covered by this Master Labor Agreement their employment shall be covered by the Owner-Operator clause of this Agreement.

Similar provisions were included in the master labor agreement executed in 1974, 1977, and 1980.

Carpenter, and Bell were informed that they had to sign a declaration of nonownership before they could register with the Union as out of work and be dispatched. Since at least 1 October 1983, Respondent has refused to allow Bell and Carpenter to register or to refer them for employment, and Williams since about 1 December 1983,[3] the General Counsel asserts that the applicable law is the right-to-control "test of employee status" as promulgated in *NLRB v. United Insurance Co. of America*, 290 U.S. 254 (1968), which holds that all of the incidents of the relationships must be assessed and weighed with no one factor being decisive.

In order to find a violation, it must be determined that Williams, Carpenter, and Bell are employees. Section 2(3) of the Act specifically excludes "any individual having the status of independent contractor from its definition of 'employee.'" Only employees must be registered and dispatched by the Union.[4] This exclusion was enacted in 1947 to ensure the application of "general agency principles in distinguishing between employees and independent contractors under the Act." *NLRB v. United Insurance Co. of America*, 390 U.S 254, 256 (1967), citing 93 Cong.Rec. 6441–6442, 2 Leg. Hist. of the Labor Management Relations Act 1537 (1947). See H.R. Rep. No. 245, 80th Cong., lst Sess., 18, 1 Leg. Hist., 1947, p. 309; H.R. Conf. Rep. No. 510, 80th Cong., lst Sess., 32–33, 1 Leg. Hist. 536–537 (1947). See also *Merchants Home Delivery Service v. NLRB*, 58 F.2d 968 at 975 (9th Cir. 1978), discussing the effect of amendment to the Act on the holding in *United States v. Silk*, 331 U.S. 704 at 719 (1947), as follows:

> [W]here the arrangements leave the driver-owners so much responsibility for investment and management as here, they must be held to be independent contractors. These driver-owners are small businessmen. They own their own trucks. They hire their own helpers. . . . It is the total situation, including the risk undertaken, the control exercised, the opportunity for profit from sound management, that marks these driver-owners as independent contractors.

The Ninth Circuit Court of Apeals held in *Merchants*, supra at 976, that the economic realities discussed in the *Silk* case were still applicable.

The legislative history of Section 2(3) is not antipodal to this finding. House Report No. 245 on H.R. 3020 (Leg. Hist. of the Labor Management Relations Act of 1947, Vol. 1, p. 309) provides:

> (D) An "employee," according to all standard dictionaries, according to the law as the courts have stated it, and according to the understanding of almost everyone, with the exception of members of the National Labor Relations Boad, means someone who works for another for hire. But in the case of *National Labor Relations Board* v. *Hearst Publications, Inc.* (332 U.S. 111 (1944)), the Board expanded the definition of the term "employee" beyond anything that it ever had included before, and the Supreme Court, relying upon the theoretic "expertness" of the Board, upheld the Board. In this case the Board held independent merchants who bought newspapers from the publisher and hired people to sell them to be "employees." The people the merchants hired to sell the papers were "employees" of the merchants, but holding the merchants to be "employees" of the publisher of the papers was most far reaching. It must be presumed that when Congress passed the Labor Act, it intended words it used to have the meanings that they had when Congress passed the act, not new meanings that, 9 years later, the Labor Board might think up. In the law, there always has been a difference, and a big difference, between "employees" and "independent contractors." *"Employees" work for wages and salaries under direct supervision. "Independent contractors" undertake to do a job for a price, decide how the work will be done, usually hire others to do the work, and depend for their income not upon wages, but upon the difference between what they pay for goods, materials, and labor and what they receive for the end result, that is, upon profits.* It is inconceivable that Congress, when it passed the act, authorized the Board to give to every word in the act whatever meaning it wished. On the contrary, Congress intended then, and its intends now, that the Board give to words not far-fetched meanings but ordinary meanings. To correct what the Board has done, and what the Supreme Court, putting misplaced reliance upon the Board's expertness, has approved, the bill excludes "independent contractors" from the definition of "employee." [Emphasis added.]

The risk of loss, or opportunity for profit, has been a traditional consideration in determining independent contractor status.[5] The Restatement of Agency refers to

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[3] The alteration in the master labor agreement is not determinative of employment status. *Todd v. Bernal Concrete Construction*, 710 F.2d 581 (9th Cir. 1983).

[4] Sec. 8(b)(1)(A) and (2) provides:

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: *Procided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or rention of membership there . . .

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership.

[5] For example, Restatement 2d, *Agency* § 220 (1957), provides:

Definition of servant

(1) A servant is a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other's control or right to control.

(2) In determining whether one acting for another is a servant or an independent contractor, the following matters of fact, among others, are considered:

(a) the extent of control which, by the agreement, the master may exercise over the details of the work;

Continued

"the extent of control" as only one of the elements to be considered in defining employee status. As the court held in *Teamsters Local 36 v. NLRB*, supra, 669 F.2d 759 at 674 (D.C. Cir. 1981):

> The Act does not define "independent contractor," but Congress intended the Board and the courts to "apply general agency principles in distinguishing between emplyees and independent contractors under Act." In applying agency principles the Board and the courts look at all aspects of an individual's relationship with the putative employer. Although no one part of the relationship is determinative, the degree of supervision over the means and manner of performing the task assigned is most important in determining whether a relationship is that of employee or independent contractor.

The Board, in *Comedy Store*, 265 NLRB 1422 (1982), considered business expenses incurred by the individuals found to be independent contractors. Thus by using the catch phrase "right to control test," the other general principles of agency used to distinguish between employees and independent contractors cannot be ignored. All the aspects of the water truck owner-operators' relationship with the contractors, as presented in the record, will be considered.

One test is whether the contractor exercised control over the manner and means of performance. *Seafarers Local 777 v. NLRB*, 603 F.2d 862 (D.C. Cir. 1978). Before October 1983, when the owner-operators got a job, after soliciting various construction companies, usually by telephone, and leaving their names with dispatchers, they went on the companies' payroll at the rate established in the master labor agreement, with deductions for taxes and stated benefits, and they rented their trucks to the contractor at an hourly rate.[6] The owner-operator kept track of the hours worked which was certified daily by the job superintendent or other agent of the contractor. There is no requirement that the owner-operator take a job offered by a contractor or give any reason for such a refusal.[7] Bell has admitted that the rental rate for leasing his truck to a contractor was subject to negotiation. Id. at 280.[8] This evidences a relative bargaining power not indicative of an employer-employee relationship. *NLRB v. Associated Diamond Cabs*, 702 F.2d 912, 921 (11th Cir. 1983).

The owner-operators have the responsibility of getting the equipment to the jobsite. Generally, water trucks are used to control dust and for soil compaction. On the days their services are needed, they generally keep the same work hours as the contractor's employees and their hours can be unilaterally changed by the employer. Id. at 280. They are paid if they are idle on the project for a few hours, unlike dump truck drivers in the other cases involving this Union, cited above. There was no showing if this operating practice was necessary to properly meet the demands of proper performance by general contractors or subcontractors using the water trucks. If the owner-operator is not needed for a few hours or a day or two, there was no bar by the contractor against their working for another contractor. Id. at 280. In fact, Williams did this on at least one occasion (Tr. 85).

The owner-operators are responsible for filling their own water trucks. They did not punch a timeclock. As noted above, they kept record of the hours they worked as certified by the superintendent or another agent of the contractor on a daily basis. There was no showing how employees such as laborers kept track of their time. After filling the trucks, they either went to an agent of the contractor for brief instructions, or just went to the worksite knowing what to do from the previous day's activities. The owner-operators are skilled in their occupation, knowing at times where to spray water without instructions. Occasionally a foreman, superintendent, or grade checker would have an application needing instruction where to spray or the amount of spray. At times it is necessary to communicate with the owner-operator using hand signals, but the majority of times the owner-operators would know where to go after they determine what the job requires. After a break in time, communication of a supervisory or instructional nature averages about 5 minutes a day. The amount of instruction time at the commencement of a job was not shown to be appreciably greater. The owner-operators often move from job to job but this is not unusual in the construction industry. These factors therefore do not clearly betoken employee status.

The contractor could disqualify an owner-operator based on dissatisfaction. Although there was a belief that owner-operators could receive discipline in the same manner as employees, such as suspension, there was no evidence that discipline other than discharge was ever imposed. Discharge is the exercise of a right of contractual control by being bound only to persons who can satisfactorily perform the work. *NLRB v. Associated Diamond Cabs*, supra, 702 F.2d at 921. The right to discharge, therefore, is not demonstrative of employee status.

The extent of control the contractor exercises over the owner-operators in this case is not a clear indicia of employment status. The techniques and skills of driving a water truck do not require extensive oversight if the driver is qualified. The right to control the manner of performance is not closely established in

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(b) whether or not the one employed is engaged in a distinct occupation or business;

(c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;

(d) the skill required in the particular occupation;

(e) *whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work*;

(f) the length of time for which the person is employed;

(g) the method of payment by the time or by the job;

(h) whether or not the work is a part of the regular business of the employer;

(i) whether or not the parties believe they are creating the relation of master and servant; and

(j) *whether the principal is or is not in business.* [Emphasis added.]

[6] According to Thomas C. Blevins, a dispatcher for the contractor C. W. Poss, brokers call him all the time to get work for water truck owner-operators.

[7] See *Associated General Contractors*, supra, 564 F.2d at 279.

[8] After 1 October 1983, the owner-operators worked for contractors at a flat hourly rate.

where the drivers are often on their own and follow established procedures and practices. There are few occasions for the assertion of control over the water truck drivers for most of their work. In such cases as this, consideration must be given to the "important distinction . . . between service under an agreement to accomplish results or to use care and skill in accomplishing results." Restatement 2d, *Agency* § 220, comment (e) (1957). The various indicia of control must be balanced and individually examined. There is no convincing showing that the contractor controlled the manner and means of the drivers' performance compared to mere control over the end result. *Seafarers Local 777*, supra, 603 F.2d at 874–875; *NLRB v. Deaton, Inc.*, supra, 502 F.2d at 1224.

While the control elements presented in this case are not a clear indication of status, the other indicia are clearly characteristic of independent contractors. The owner-operators own their own equipment and use only that equipment while so employed. As the court held in *Seafarers Local 777*, supra, 603 F.2d at 878:

> In the usual employment relationship, the employer not only owns the instrumentalities of labor, but also supplies them free of charge to the worker. Rather than leasing out tools so that the "employees" can pursue *their* chosen ends, the typical employer hires the employees to operate his machines in order to accomplish *his* chosen ends.

They also maintain their own equipment, provide the tools for the maintenance, and pay for insurance, gasoline, oil, tires, and licensing. They deduct depreciation for their vehicles on their tax returns. The owner-operators' involvement is substantial. Williams purchased a water truck for about $15,000 which he currently valued at $10,000.[9] He has a 1967 Ford pickup which he uses to carry his maintenance tools and it has a fuel tank to fuel the water truck. He operates under the name of Williams Water Truck Service. A separate checking account is maintained in this name. Prior to October 1983, the bills for leasing of the truck to various contractors were sent with a letterhead reading, "Williams Water Truck Service." On 1 July 1975, Williams signed a "Southern California Teamsters Construction Short Form" indicative of his right to hire others to drive the water truck.[10] Williams identified a document as "the check file signature card for the water truck business." This statement indicates that the acquisition of work was done under the belief he was operating a business separate and apart from the contractor.[11]

> Among the factors considered significant at common law in connection with the "right to control" test in determining whether an employment relationship exists are (1) whether individuals perform functions that are an essential part of the company's normal operation or operate an independent business; (2) whether they have a permanent working arrangement with the company which will ordinarily continue as long as performance is satisfactory; (3) whether they do business in the company's name with assistance and guidance from the company's personnel and ordinarily sell only the company's products; (4) whether the agreement which contains the terms and conditions under which they operate is promulgated and changed unilaterally by the company; (5) whether they account to the company for the funds they collect under a regular reporting procedure prescribed by the company; (6) whether particular skills are required for the operations subject to the contract; (7) whether they have a proprietary interest in the work in which they are engaged; and (8) whether they have the opportunity to make decisions which involve risks taken by the independent businessman which may result in profit or loss.[3]

[3] *Standard Oil Company*, 230 NLRB 967, 968 (1977), citing *N.L.R.B. v. United Insurance Company*, *supra*; *N.L.R.B. v. Pepsi Cola Bottling Co. of Mansfield, Ohio*, 455 F.2d 1134, 1141 (6th Cir. 1972), and Restatement of Agency 2d § 220 (1958).

Bell owns two water trucks, a 1961 International and a 1948 Peterbilt respectively valued by him at $25,000 and $15,000. He also has two pickup trucks, a 1971 Ford that has a fuel tank and tools in it which is valued at between $2500 and $3000 and a 1982 Ford pickup with tools and a fuel tank worth about $12,000. Bell uses the pickup trucks to transport fuel and to have tools available for the water trucks when he is on a job. He fuels and maintains the water truck before and after work. He drives the International most of the time and rents the Peterbilt truck to a contractor on an hourly basis. The contractor provides the driver, and pays the driver's wages and other benefits for the Peterbilt truck. The Peterbilt truck has the name "Bell's Water Truck Service" on it; no name appears on the International. There is undisputed evidence that owner-operators' water trucks often have names other than the contractor affixed to them.

Carpenter owns a Kenworth truck valued at between $20,000 and $30,000 and a 1972 Ford pickup truck which has fuel tanks and toolboxes. Carpenter's truck does not have a logo or sign on it. None of the owner-operators who testified affix the contractor's name to their trucks.

It is found that the owner-operators have a substantial financial involvement in equipment and bear the risk of any loss or damage to the equipment. *Associated General Contractors v. NLRB*, supra, 564 F.2d at 281, citing *SIDA of Hawaii v. NLRB*, 512 F.2d 354 (9th Cir. 1975); *Brown v. NLRB*, 462 F.2d 699 (9th Cir. 1972), cert. denied 409 U.S. 1008 (1972). The owner-operators retain all the attributes of ownership even though they lease the equipment to the contractor. *Merchants Home Delivery Service v. NLRB*, supra, 580 F.2d at 975. The individual's ability

[9] New water trucks cost between $65,000 and $80,000.

[10] Williams claims he sold his water truck to his son on 1 May 1983. His son is attending college full time, never drove the truck, and was never credibly shown to have entered into a good-faith purchase. The failure of the Union to register and refer Williams after this asserted sale is not indicative of a proscribed motive, or a violation of the Act.

[11] *Capitol Parcel Delivery Co.*, 256 NLRB 302 at 303, remanded and supplemental decision and order issued at 269 NLRB 52 (1984). The

the water truck owner-operators, like any individuals who make their livelihood in the construction industry, often work for several contractors, moving from job to job. Restatement 2d, *Agency* § (2)(f). There was no showing that the employer retained the right to reject owner-operator's vehicles which failed to meet any set standards. *Georgia Pacific Corp.*, 249 NLRB 1280 (1980). Nor were the drivers subjected to any examination. No other drivers could be assigned unilaterally to operate the truck by the employer. *Propane Transport*, 247 NLRB 966 (1980).

Thus, under the standard common law criteria, it is concluded that the water truck drivers in this case are independent contractors within the meaning of Section 2(3) of the Act, not employees. The Union was correct in informing the owner-operators that they could not be dispatched as owner-operators and then be free to operate as independent contractors. The Union instituted membership requirements which it deemed necessary to insure that they dispatched only employees. The requirement of signing a declaration of divestiture of equipment was designed to meet these requirements and was not alleged, in itself, to be violative of the Act. The owner-operators all testified they wished to be dispatched as employees and operate their own equipment. There was no evidence that they were denied registration and referral as employees who would not operate their own equipment. Thus, while the divestiture requirement may arguably be too severe, it was not argued or shown to be an unlawful restraint on membership, registration, and/or referral. The failure to register and/or refer individuals who are indpendent contractors is not a violation of Section 8(b)(1)(A) and/or (2). Section 8(b)(1)(A) only protects employees in their exercise of Section 7 rights. *Roofers Local 66 (Sierra Employers Assn.)*, 267 NLRB 601 (1983). Similarly, finding water truck drivers are independent contractors within the meaning of Section 2(3) of the Act requires a conclusion that Respondent has not violated Section 8(b)(2) of the Act. *Teamsters Local 814 (Santini Bros.)*, 208 NLRB 184 (1974), reaffd. 223 NLRB 752 (1976), enfd. 546 F.2d 989 (D.C. Cir. 1976). This allegation of the complaint should be dismissed. See *Operating Engineers Local 18 (Ohio Contractors Assn.)*, 204 NLRB 681 (1973), remanded per curiam 496 F.2d 1308 (6th Cir. 1974), reaffd. 220 NLRB 147 (1975), enf. denied 555 F.2d 552 (6th Cir. 1977). *Teamsters Local 515 (Roundway Express)*, 248 NLRB 83 (1980).

B. *Allegations Derivative from the Events of July 1*

1. Pleadings

The General Counsel charges in the complaint that Respondent violated Section 8(b)(1)(A) of the Act as follows:

> 8. At all times material herein, pursuant to the collective-bargaining agreement as described above in paragraph 6, Respondent has maintained and administered an exclusive job referral system at Respondent's Bakersfield, California office which ... employer-members of the Contractors operating within the jurisdiction of Respondent's Bakersfield, California office. Such referral system includes employment lists as defined in Article II of the collective-bargaining agreement.[12]
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> 9. On or about July 1, 1983, at Respondent's Bakersfield, California office, Williams, in the presence of Shain, complained to Jessie Harer, hereinafter called Harer, about his placement on the employment list as maintained by Respondent at its Bakersfield, California office.[13]
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> 10. On or about August 1, 1983, Respondent, acting through Harer, filed intra union charges against Williams and Shain.
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> 11. On or about August 28, 1983, Respondent, acting through its seven-member Executive Board comprised of George Branson, Lawrence Burke, Bill Elliott, Wayne Epperson, Shirley Holt, Willie, Seay, and William Joyner:
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> (a) expelled Williams and Shain from membership in Respondent effective July 1, 1983;
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> (b) imposed court collectible fines of $1,500 each on Williams and Shain;
>
> (c) prohibited both Williams and Shain from entering Respondent's property for any purpose whatsoever; and
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> (d) removed Shain from his office as Respondent of Respondent and barred him forever from holding any office with Respondent.[14]

2. Events of 1 July

The finding that Williams is an independent contractor does not eliminate the need to discuss his involvement in these allegations for he could still register as an employee if he took reasonable steps to not assume the work as an owner-operator independent contractor, and the allegations also pertain to Shain, who is admittedly an employe as defined in the Act.

It is undisputed that Shain, the president of the local, and Williams casually met the morning of 1 July 1983 and came into the union hall to register as out of work, as required by the valid union procedure. Shain went to Barbara McNeil's window and started to register. Prior to registering, Williams checked a posted out-of-work list and noticed that his name was not on the list; another name, Steve Casen, appeared twice at numbers 30 and 31. Williams should have been number 30. The posted list was admitted to be unofficial and in error. Williams went to the window manned by Jessie Harer, Respondent's office manager and recording secretary to the local's board, an elected position. Williams asked why his name was not on the list. He also told her to "keep her damn hands off his name on the out of work list." Harer admitted the error. The subsequent actions and statements of Williams and Harer are in dispute. Harer asserts Williams was yelling at her in a threatening manner and when he told her to keep her hands off his name on the

[12] ... employees to employment with the ...

[13] Respondent denies this allegation.

list he shook his fist and finger at her. Harer was very upset over the incident, which reduced her to tears. Williams denies making any verbal or physical threats.

All the individuals in the small office area, save the office clerical, Barbara McNeil,[15] did not observe Williams screaming and yelling at Harer, threaten Harer either verbally or physically. Alan De Gough, a member of the Union, did overhear Williams tell Harer in a loud voice she was to keep her "goddamned hand off his name on the out-of-work list." De Gough would not characterize Williams as screaming, his tone was close to a shout. De Gough left before Williams. Albert Matthews, another member present at the start of the incident, testified Williams "raised his voice a little bit" and asked Harer about his name not being on the out-of-work list. Matthews then left with Shain. Later that day, Matthews called Harer because "I just like Jessie and felt like that mainly she would enjoy somebody consoling her," because "he [Williams] had his voice raised a little high."

Wayne Young, who also was present only for the first part of the conversation, corroborated the testimony that Williams spoke in a louder than normal voice, he did not shout, and did not make a verbal or physical threat in his presence. Based on demeanor, clarity of recall, and position as an uninvolved neutral observer, Young's testimony is credited.

McNeil testified she asked Shain if he could stop Williams. Her testimony is devoid of any indication that Shain heard her. When McNeil testified, she was very soft spoken. Shain did not respond or look up. McNeil did not repeat the request. There was no testimony indicating Shain heard her and ignored or refused her request. Shain testified without refutation that he did not hear McNeil make such a request. There is also no indication that Shain knowledgeably refused or refrained from interfering with Williams in his protest or any other actions considered protected by the Act. See *Myers Industries*, 268 NLRB 493 (1984). Shain left with Matthews and Young shortly after the Williams-Harer conversation started. Williams came out of the office shortly thereafter. McNeil did not ask anyone else for help and did not use the telephone or other instrumentatily to seek help.[16] This inaction contradicts her claim of fear and concern. However, this contradiction was not shown to have been known to Respondent prior to this trial.

Shortly after Williams left Harer, Don Frazer, a business representative and vice president of the Union, arrived at the union hall. McNeil told him Harer was in the bathroom crying and her version of what transpired with Williams. Frazer knew Williams was standing on the front porch and asked him to step inside Art Branson's[17] office. Frazer asked Williams:

> . . . what the problem had been and he said that his name had been left off the out-of-work list, and I advised him at that time that that wasn't a very logical reason to be terrorizing the office staff, that their job function was to help the members when they come in with health and welfare problems, to write letters and answer the telephone, such likes as that. If he had a problem with the way the union was being run, he should bring that problem to Branson or myself.
>
> Q. Did he respond to that?
>
> A. He no doubt had something to say but not a great lot. I don't really recall what he said specifically. I was pretty—pretty angry myself.
>
> Q. How long did the conversation last?
>
> A. Not very long. I advised him that the only thing that kind of conduct would get him would be a trip in front of the executive board and he wouldn't like that. And then I asked him to leave, and he did

About a month later, on 1 August, Harer filed the following charges:

> This will serve to advise you that I am filing charges against Brother Don Williams and President Harry Shain for the following offenses constituting a violation of the International Constitution, Article XIX—Section 6—(b) 1, 2, 5, & 6[18] and Local 87's Bylaws, Section 19, (E) 1 & 3.[19]

[15] McNeil was not a credible witness based on demeanor principally. She tended to embellish the facts to bolster the Union's case, rather than testify in a candid, forthright manner.

[16] McNeil's testimony is inconsistent. Initially she said Shain was signing his name when she asked him to help and he just said, "la-de-da-de-da." Subsequently she said Shain was looking at her when she said she made the request, getting ready to sign his card.

[17] Branson is the secretary/treasurer of the Union; the chief executive officer.

[18] These sections of the International constitution provide:

(b) The basis for charges against members, officers, elected Business Agents, Local Unions, Joint Councils or other subordinate bodies for which he or it shall stand trial shall consist of, but not be limited to, the following:

(1) Violation of any specific provision of the Constitution, Local Union Bylaws or rules or order, or failure to perform any of the duties specified thereunder.

(2) Violation of oath of office or the oath of loyalty to the Local Union and the International Union

. . . .

(5) Conduct which is disruptive of, interferes with, or induces others to disrupt or interfere with, the performance of any union's legal or contractual obligations. Causing or participating in an unauthorized strike or work stoppage.

(6) Disruption of Union meetings, or assaulting or provoking assault on fellow members or officers, or failure to follow the rules of order or rulings of the presiding officer at meetings of the Local Union, or any similar conduct in or about union premises or places used to conduct union business.

[19] The bylaws state:

E. Responsibility of Members to the Local Union

1. Every member by virtue of his membership in this Local Union is obligated to abide by these Bylaws and the International Constitution with respect to his rights, duties, privileges and immunities conferred by them. Each member shall faithfully carry out such duties and obligations and shall not interfere with the rights of fellow members.

. . . .

3. No member shall interfere with the elected officers or business agents of this organization in the performance of their duties, and each member shall, when requested, render such assistance and support in the performance of such duties as may be required by them, provided that this does not interfere with the individual rights of members. Each member and officer shall adhere to the terms and conditions of pertinent collective bargaining agreements and shall refrain from any conduct that would interfere with the performance by this Local Union of its legal or contractual obligations.

On Friday, July 1, 1983, Brother Don Williams and President Harry Shain came into the office together. President Harry Shain went to Barbara McNeil's window, Brother Don Williams came to my window. Brother Williams immediately initiated a violent attack and verbal assault upon me for a clerical error that occurred in our office.

He shouted, cursed, screamed and threatened[20] me in the presence of members and told me to "keep my god damn hands off his name on the construction out of work list."

President Harry Shain refused to assist another Officer in performance of duties, altho he was requested to do so, nor would he defend the integrity of the Local Union. He stood idly by and witnessed the entire abusive confrontation without offering assistance and left with Don Williams.

I hereby respectfully request that the charges be heard at the earliest possible date.

Harer explained the delay of a month in filing charges as being occasioned by discussions she had with her husband over the incident where she felt that a clerical employee should not be subjected to such incidents and her own knowledge that the executive board did not meet until August. Harer was of the opinion that she should not have been subjected to the confrontation as a means of retaining her job and that Shain, as president of the Local, had a responsibility to protect her "in her representation of the union."

It is the General Counsel's position that Williams was engaged in protected concerted activity for he was complaining about the operation of the hiring hall, i.e., his name being left off the out-of-work list. Derivatively, it is alleged that Respondent violated the Act because Shain was charged and disciplined for conduct which was the failure to interfere with the protected act of another. The threshold issue therefore is whether Williams' conduct was protected.

The finding that Williams was an owner-operator and therefore an independent contractor does not alter the fact that on July 1 he was attempting to sign the out-of-work list as an employee. There were occasions when he accepted dispatches in a role other than owner-operator. There was no showing that any of the activities on July 1 were related to his role as owner-operator. There is no contention that he did not have the right on 1 July to register on the out-of-work list as an employee and that his actions were other than an attempt to so register. There is also no showing that he would not accept employment from a referral as an employee rather than an owner-operator or independent contractor.

The next matter to be considered is whether the Respondent Union was motivated by Williams' past intraunion activities, including opposition to Respondent's decision to lay off Shain and retain Frazer as a business agent; his criticisms of Frazer about March 1983 with regard to dispatches of two nonmembers, one Frazer's son-in-law, to what was referred to as the "Mason job" in Caliente; and a complaint to Frazer about overtime and the filing of a charge about the misdispatches on 12 August 1983. Respondent argues that the record is insufficient in showing the reasons for the discipline were pretexts, that an employee engaged in activity which was improper and even if this occurred during protected action, it does not save him from discipline for such improper conduct. The nexus to determining whether a violation occurred therefore is determining whether the Union processed the charges and disciplined Williams and Shain for prescribed reasons.

Harer filed the charge on 1 August, approximately 1 month after the incident. Her chare filed against Williams and Shain prior to Williams' filing charges against the Union for misdispatching on 12 August 1983. Accordingly, it cannot be found that Harer's actions were in any way induced by Williams engaging in the protected activity of filing a charge against the Union.

In contemplation of filing charges, Harer asked Frazer to act in a position analogous to prosecutor in the conduct of the trial board. Frazer, consonant with the requirements of the Union's constitution and bylaws, stepped down from the executive board to assume this pseudoprosecutorial role. Harer also was not going to sit on the panel. In fact, of approximately seven executive board members, only two sat on the panel, George Branson and Tiny Burke. Prior to 1 August, again in contemplation of the filing of the charges, Frazer asked several union members if they would serve on a trial board. Branson interviewed five individuals, telling these prospective trial board members that the subject matter was delicate, that one union official was charged as well as a member for an incident occurring in the office, and they wanted to ensure that the prospective trial board members could render a fair and unbiased decision. It is undisputed that Frazer's asking individuals if they would be interested in serving on the trial board was unprecedented and occurred prior to the actual filing of the charge. Frazer's solicitation of three members to sit on the trial board[21] was not considered by Branson to be proper procedure. However, Branson interviewed them all. No one who served on the trial board as voting members were called to appear and testify and there was no indication that only members of a particular proclivity were selected or that Frazer's actions bespeak discriminatory motive.

At the trial board Branson, who was chairman of the trial board and did not have a vote, called Shain a liar and accused him of stirring up trouble with members ever since he was laid off as a business agent. Shain was laid off as a business agent in January 1983. The decision was Branson's. Branson decided to retain Frazer as business agent. Shain complained to Branson that Frazer had less seniority with that local than he. Branson replied that, in his view, Frazer was doing a better job, that he did not have a contract and was not obligated to follow seniority in hiring and firing or any other executive decision. Williams told Frazer in early 1983 that he thought

[20] In her testimony, Harer admitted Williams did not verbally threaten her, and she also testified elsewhere that the only reason she filed the charges was because Williams yelled at her. As indicated above, the threat was asserted to be shaking his finger and fist at her.

[21] Wayne Epperson, Shirley Holt, and Bill Joyner.

that Shain was a better business agent. Frazer candidly admitted a personal dislike for both Williams and Shain, stating he felt that Shain was less than candid and opining Williams was a loudmouth rebel who liked to intimidate others. There was no showing that Frazer participated in the trial board's decisionmaking process.

The trial board, held on 20 August, after Shain and Williams filed charges with the Board, included Frazer raising questions about Shain being guilty of misdispatching. Frazer asserts he raised this issue as demonstrative of credibility. Harer read a statement to the trial board wherein she mentioned Williams failed to register on one occasion on the out-of-work list and she, consonant with established practice, removed his name from the list.[22] Harer explained she raised the incident as a possible explanation for Williams' conduct on 1 July for she could not understand why the typographical error on the list, known to be unofficial and not used by the Union for dispatching, could have so upset him.

The trial board found Williams and Shain guilty of all charges; expelled them from membership in the Union effective 1 July; removed Shain from the office of president and barred him from future office holding; fined them $1500 each; prohibited them from entering the union's property for any purpose whatsoever; and extended to them the right to register and be dispatched by telephone. This decision was appealed to the Joint Council of Teamsters No. 38 which found there was no clear showing that Shain heard the argument and, thus, that he did not violate the International constitution or local bylaws as charged by Harer. All penalties imposed by the trial board, as here pertinent, were removed with regard to Shain. Williams was found guilty of abusive verbal conduct, fined $500 of which $300 was suspended provided he did not engage in similar conduct within a year. All other penalties, as here pertinent, were revoked and both were restored to membership in good standing.

The International's reversal of the Local Union's action and its removal of all penalties imposed by the Local because of Harer's charges[23] does not abrogate any potential violation by the Local Union for its actions because the joint board of the International did not repudiate the Local's conduct. *Auto Workers Local 1989 (Caterpillar Tractor Co).*, 249 NLRB 922 at 924 (1980): "Thus, the mere withdrawal of charges against the employees in an absence of action specifically repudiating the coercive effect of Respondent's conduct is clearly insufficient."

3. Discussion

The General Counsel argues that by disciplining and fining Shain and Williams, the Union illegally restrained and coerced members in the exercise of Williams' right to protest hiring hall procedures in violation of Section 8(b)(1)(A) of the Act.

Section 8(b)(1)(A) of the Act makes it an unfair labor practice for a union:

> . . . to restrain or coerce . . . employees in the exercise of the rights guaranteed in section 7; *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein.

The sweeping nature of the proviso to Section 8(b)(1)(A) was described by the Supreme Court in *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 181, as follows:

> Integral to . . . federal labor policy has been the power in the chosen union to protect against erosion of its status under that policy through reasonable discipline of members who violate rules and regulations governing membership.

This proviso results in the granting of some immunity to the unions for what may arguably be considered restraint or coercion of employees in the exercise of Section 7 rights. For example, the Board has found that a union fining members respecting the acquisition or retention of membership does not violate the Act. See, e.g., *Musicians (George Doerner)*, 165 NLRB 798 (1967), enfd. 395 F.2d 401 (2d Cir. 1968).

However, as held in *Teamsters Local 557 (Liberty Transfer)*, 218 NLRB 1117, 1120 (1975):

> It is now well established that the immunity accorded a union by the proviso with respect to the internal enforcement of its rules and policies is not an unqualified one. The proviso, it has been held, does not leave a union free to enforce union rules or policies which serve no legitimate union interest or run counter to other public policies of an overriding nature that Congress has imbedded in the labor laws.

As the Supreme Court stated in *Scofield v. NLRB*, 394 U.S. 423, 430 (1969):

> Section 8(b)(1) leaves a union free to enforce a properly adopted rule which reflects a legitimate union interest, impairs no policy Congress has imbedded in the labor law, and is reasonably enforced against union members who are free to leave the union and escape the rule.

In applying this test to the facts in *Scofield*, the Court "focused its inquiry on the legitimacy of the union interst sought to be encouraged by the rule and the extent to which the rule contravened any policy of the Act." *Operating Engineers Local 39 (San Jose Hospital)*, 240 NLRB 1122 (1979). The fact that any action taken by the union in conjunction with the rule may be internal "affords no immunity to a union when . . . [that action] 'invades or frustrates an overriding policy of the labor laws.'" Thus, to determine the legitimacy of the union action, "we must balance the legtimacy of the union interest at stake

[22] There is no allegation of wrongdoing by Williams with regard to his failure to register on the out-of-work list. Williams' unrefuted testimony is that he worked overtime the first few days of the job and did not have access to a telephone during the union business office hours. It was not unusual where members delayed several days in informing the Union that they have found work.

[23] Shain was fined for another matter that was completely unrelated to the issues in the complaint as stipulated to by the parties herein.

with the interest claimed to be contravened by the union action." Id. at 1123.

Scofield listed the following requirements for lawful imposition of union discipline under the Act:

> Section 8(b)(1)(A) leaves a union free to enforce (1) a properly adopted rule which (2) reflects a legimtate union interest, (3) impairs no policy which Congress has imbedded in the labor laws, and (4) is reasonably enforced against union members who are free to leave the union and escape the rule. [Supra at 423.]

Respondent's argument that Williams was an independent contractor and not entitled to the protections of Section 7 has been found above to be unpersuasive since there was no showing by the Union that he was registering solely to work as an owner-operator and would refuse any dispatches as an employee. Respondent also argues that since Williams' conduct was directed against a clerical employee, his actions were removed from the protection of the Act. This argument is also found to be without merit. The charges filed by Harer specifically stated that Shain "refused to assist another officer in performance of duties." The trial board found him guilty of those charges. Harer is also the recording secretary of the board and the bylaws and constitution refer to obligations to officers; Harer is also a union member and member of the executive board. This argument does not address the General Counsel's position that the allegation by Harer was a mere ruse to hide the fact that Williams and Shain were being discriminated against because of their engaging in protected activity, including Williams' filing of grievances and charges with the board or Shain's failure to interfere with Williams' engaging in such protected rights as complaining to the union about its operation of the hiring hall.

The question is whether Respondent subjected Williams and Shain to the trial board and disciplined them because they violated legitimate union rules or because of prescribed motives aroused because Williams and Shain engaged in rights protected by Section 7 of the Act.

Initially, it is found that the Union did not breach its duty of fair representation to Shain and Williams by holding the trial board and disciplining them. As the Board held in *Elevator Constructors Local 8 (San Francisco Elevator)*, 243 NLRB 53, 55 (1979):

> The duty of fair representation stems from a union's exclusive representative status for the employees of the employer.[8] This duty is relevant only at such times as the union is acting in this representative capacity or otherwise affects the member's employment status. Here, Respondent's actions against Finney were unreleated to any representation of Finney *vis-a-vis* any employer. Nor did Respondent seek to affect his status as an employee. Therefore, we find its conduct could not constitute a violation of the duty of fair representation.

We therefore find that Respondent did not act unlawfully in fining and removing Finney from office. Accordingly, we dismiss these allegations of the complaint.[9]

[8] *Miranda Fuel Company, Inc.*, 140 NLRB 181 at 184 (1962).

[9] The General Counsel's allegation of breach of duty of fair representation was not specifically stated in the complaint. It is found that the allegation had been encompassed in the verbiage of the complaint even though not specifically alleged.

As held in Vaca v. Sipes, 386 U.S. 171 at 177 (1967):

> [T]he exclusive agent's statutory authority to represent all members of a designated unit includes the statutory obligation to serve the interest of all members without hostility or discrimination toward any, to exercise his discretion with complete good faith and honesty, and to avoid arbitratry conduct . . . . It is obvious that [plaintiff's] . . . complaint alleged a breach by the union of duty grounded in federal statutes . . . . Though the allegation is found to be inapplicable to these facts, it is also found to have been fully and fairly tried.

Unit Train Load Sales, 234 NLRB 1265, 1272 (1978). *Alexander's Restaurant & Lounge*, 228 NLRB 165 (1978), enfd. 586 F.2d 1300, 1304 (9th Cir. 1978). See also *Free-Flow Packaging Corp.*, 219 NLRB 925 (1975), enfd. 556 F.2d 1124 (9th Cir. 1978); and *Retail Clerks Local 770 (Frito Co.)*, 138 NLRB 244 (1962), enfd. in relevant part. 330 F.2d 458 (9th Cir. 1964). It is concluded that this allegation of breach of duty of fair representation is without merit and does not support the finding of a violation of Section 8(b)(1)(A) of the Act.[24] There was no showing that either Shain's or Wiliams' employment was affected. There was no evidence that they were denied any information concerning employment or were denied proper dispatch. The penalties were not shown to be an action that invades or frustrates overriding policies of labor law. The lack of any proof on this point precludes the drawing of an inference that Respondent, in its operation of an exclusive hiring hall, denied Shain or Williams access to employment or information concerning employment or that any labor policy or Federal policy, such as the Labor Management Reporting and Disclosure Act of 1979, had been violated or frustrated. See *Carpenters Local 22 (Graziano Construction)*, 195 NLRB 1 (1972). citing *Teamsters Local 663 (Continental Oil)*, 193 NLRB 581 (1971). Cf. *Southern Steamship Co. v. NLRB*, 316 U.S. 31 (1942). Compare *Carpenters Local 1976 (Sand Door) v. NLRB*, 357 U.S. 93 (1958), and *Caesar's Palace*, 194 NLRB 140 fn. 5 (1971).

The question of the penalties imposed does have relevance to determination of the issue of whether the charges were brought, pursued, and discipline resulted therefrom based on discriminatory motive. It is undisputed that the charge had already been filed at the time the trial board met. There was no showing that any of

[24] The General Counsel did not argue nor proffer any testimony that the penalties imposed by the Union abrogated an employee's right to be free from unfair, irrelevant, or invidious treatment by their bargaining representative in matters affecting their employment. (*Miranda Fuel Co.*, Id.)

the voting trial board members knew of this filing at the time of the trial board. None of the trial board members other than Branson was called to appear and testify. Branson did not vote. Therefore there was an absence of a showing of a causal nexus between the decision to find a violation of the Union's bylaws and constitution and the filing of an unfair labor practice charge against the Union. Similarly, it is undisputed that Williams complained to Frazer about an employer's payment of overtime. There was no indication that Frazer harbored any animus based on this action or even that this action in some manner indicated ineptitute or other adverse inferences in the way Frazer was handling his position. Further, Frazer, in his pseudoprosecutorial role, removed himself from the decision-making milieu of the trial board. Again there was a failure to indicate that any of the voting members of the trial board knew of Williams' filing of grievances or complaints with Frazer or any other official of the Union.

Another basis for the thesis of the General Counsel that the Union disciplined Williams and Shain for exercising rights protected by Section 7 of the Act was the execssive penalty imposed upon the finding of violations of the Union's constitution and bylaws. The record clearly shows that during Branson's 23-year tenure as secretary-treasurer and additional 3-year tenure preceding that as business agent, he could not recall any fine exceeding or even totaling $500. The only other fine Branson could recall in recent history was one trial board in 1981 or 1982 involving a bakery driver being cited for breaching a contract. He believes that discipline was a fine with suspension and probation. The fine he does not think was as much as $500. Save the instant case, he cannot recall any fines or disciplines more severe than the bakery truckdriver. It appears, to place these matters in context, that there were no other charges brought against members that were similar to those brought against Shain and Williams. As found in *NLRB v. Boeing Co.*, 412 U.S. 67 (1963), that the reasonableness of a fine is not one of the criteria for establishing a violation of Section 8(b)(1)(A) of the Act. This, however, does not preclude the consideration of the severity of the fine or discipline in ascertaining the reason or purpose for the fine. See *Operating Engineers Local 138 (Charles S. Skura)*, 148 NLRB 679 (1964), and *Carpenters Local 1620 (David M. Fisher Construction)*, 208 NLRB 94 (1974). As the *Carpenters* case, id. at 99, indicates, the severity of the fine is imparted pertinence in its relationship to past practice and then is considered as part of the total picture in ascertaining the reason or purpose for the fine. In this proceeding, we are not afforded the opportunity to contrast the severity of the fine or discipline with a similar situation. The record does not contain the details of trial board proceedings of the Union; thus there is no facility to evaluate the actions of the trial board based on such a record.

As found in *Carpenters Local 1913 (Michael R. Amato)*, 189 NLRB 521 at 528 (1971):

> The correlative result of a conclusion that the conduct for which Amato was disciplined is not protected by Section 7 is that a judgment as to the reasonableness of the penalty is not the province of the National Labor Relations Board. That is not to say that the Board may not take the scope of the penalty into account in the process of determining whether a union member has been punished for exercising a protected right. Conceivably, in given cases, unprotected conduct may be used as a pretext to punish a union member for exercising a protected right, or the motive for the discipline may be obscure, and in such situations, the relative severity of the penalty might help shed light on its purpose.
>
> But multiple factors may govern an inquiry whether a penalty was aimed at the exercise of protected rights, and the mere fact that its scope may run counter to the factfinder's perception of what is reasonable does not inevitably spell out an invasion of Section 7 rights. Perceptions of the reasonable in penalties may reasonably vary widely, conditioned by such factors as variations in the behavioral standards of those charged with the responsibility of forming a judgment, or degrees of awareness of the need for the discipline imposed. Wide, but acceptable variations, in assessing damages or imposing penalties are a common experience in the courts. And in examining the range of the penalty as part of an examination of its underlying aim, one not charged with the responsibilities of Local 1913 and the District Council should exercise appropriate caution, lest he improperly invade their province.
>
> . . . I am unable to find in the discipline such unreasonableness as to warrant a conclusion that its aim was suppression of any protected right of protest.

While there is no question that Williams may freely and fully state his concern or dissatisfaction with the manner with which Respondent conducted its business, there must be a showing that the discipline was because he was exercising Section 7 rights and not because of the manner in which they were exercised. The General Counsel has failed to show pretext for it has failed to show that Respondent's conclusions were not based on Williams' and Shain's actions which were construed as improper and threatening the maintenance of orderly operation of the union hall and abusive conduct to one of the Union's officers and employees. As found in *Elevator Constructors Local 8 (San Francisco Elevator)*, 243 NLRB 53 at 54 (1979):

> Whether or not we agree with that determination is of no moment. Respondent has a right to maintain order and discipline in its meetings and the conduct of its affairs. Its actions in doing so here are not such that can be said to have acted outside its legitimate area of interest and in such a way as to impair any overriding policy of labor law.

In *Carpenters Local 1913 (Michael R. Amato)*, supra, 189 NLRB at 527, it was held that:

> Granting that union discipline of a member, obligated to belong to the union as a condition of employment for conduct protected by Section 7 violates

Section 8(b)(1)(A) if the penalty, although otherwise proper, exceeds reasonable limits,[16] there is an underlying fallacy in the General Counsel's thesis, and that is that Amato was disciplined for exercising Section 7 rights.

It is true as the General Counsel points out, that Local 1913 acts as the agent of the contracting employers in dispatching employees subject to the agreement to jobs, that Section 7 protects the right of such an employee to protest the operation of the contractual dispatch machinery to deny him a referral, and that, as the Seventh Circuit has said, "not every impropriety committed during such (Section 7) activity places the employee beyond the protective shield of the Act" (*N.L.R.B. v. Thor Power Tool Company*, 351 F.2d 584, 587). But it is also true, as the Court pointed out, that "flagrant conduct of an employee, even though occurring in the course of Section 7 activity, may justify disciplinary action by the employer . . . . The employee's right to engage in concerted activity may permit some leeway for impulsive behavior, which must be balanced against the employer's right to maintain order and respect" (*id*). And one need hardly add that a union that serves as the employer's hiring agent has a comparable "right" at its hiring facility.

[16] *Scofield v. NLRB*, 394 U.S. 423; see also *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, and *NLRB v. Industrial Union of Marine and Shipbuilding Workers*, 391 U.S. 418.

The General Counsel asserts that Williams' conduct was not so flagrant as to justify disciplinary action by the employer during the course of his Section 7 activity. The General Counsel does not dispute that the Union has a right to maintain peace and order in its facility and to protect its employees, members, and officers against undue harassment as a method of retaining trust in the fairness of the operation by its members and to protect its representatives and agents from unwarranted abuse while conducting their duties. It is undisputed that Williams, after being told that the list did contain a typographical error, that he was on the list, that a name appeared twice, for which Harer apologized, and Williams continued to be very abusive, using strong language in a strident voice despite assurances that the matter would be corrected immediately. Harer clearly felt threatened and the threatening of an individual engaged in the dispatch process is a matter to be avoided and was not the exercise of a Section 7 rights.

The evidence of record requires the conclusion that Harer filed charges against Williams and Shain which resulted in their discipline, not because Williams disagreed with or protested the clearly erroneous unofficial dispatch sheet but because of the manner of raising that protest which reduced Harer to tears, greatly upset her, and disturbed the peaceful and orderly operation of the hiring hall.

The General Counsel did not claim or demonstrate that the filing of the charges and the conduct of the proceedings violated the regular disciplinary procedures of the Union or the International. Although Frazer's solicitation of potential members for the trial board occasioned by the unusual nature of the events occurred prior to the actual filing of the charge, this has not been shown to be contrary to any bylaw or constitutional provision nor was it shown to be other than diligence in ensuring orderly processing in an expeditious manner of a forthcoming charge. As noted above, there is no warrant supporting a conclusion that the trial board based its decision on any matter other than the evidence before it. The evidence was not shown to have mentioned the filing of a charge by Williams with the Board, Williams' grievance or complaints filed with the Union or otherwise, or Shain's intraunion activities.

There was no basis to find that the evidence before the trial board, which was not clearly described in this record, may have led individuals who were not used to adjudicating in a legal sense and should not be judged by the criteria normally utilized in determining the propriety of evidentiary hearings and judicial proceedings, could not have reasonably led to the conclusion that Williams abused an employee, member, and representative of the Local while in the discharge of her dutiies.

Similarly, the record fails to show that the disciplinary action against Shain was motivated by proscribed reasons. Branson candidly admitted that Shain was dissatisfied, and was stirring up trouble with members since he was laid off as a business agent in January 1983. Although Shain testified at this trial that he intended to run for the position of secretary-treasurer, Branson's unrefuted testimony was that the first day he heard of it was 16 February 1984 and it cannot be found as a motivating factor in Respondent's actions. Branson had planned to retire at the end of his current term but reacted to Shain's announcement of his plans to oppose Branson by stating that that altered his plans and he intended to run again. Shain's grousing was not alleged nor was it shown to be a motivating factor in the decision to file charges or to discipline him. As noted above, neither Branson nor Frazer voted. The evidence presented to the trial board was not specifically detailed.

It is found that the facts do not support the General Counsel's allegation and it has not been shown by the preponderance of the evidence that Respondent took its action against Shain and Williams for reasons other than attempting to maintain order in the union hall. It is not unreasonable for a union to assert that an officer and member has an affirmative duty to maintain order and discipline within the hall and to ensure that its officers and employees are not subjected to undue harassment. Respondent has not been shown to have acted unlawfully in fining and disciplining Shain and Williams and the evidence fails to establish that a violation of the Act has occurred. Accordingly, I recommend that the complaint in this proceeding be dismissed in its entirety.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[25]

ORDER

It is ordered that the complaint be dismissed in its entirety.

[25] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

Haynes Motor Lines, Inc. *and* **General Truckdrivers, Chauffeurs, Warehousemen & Helpers Local No. 270, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, Independent** *and* **Edward Collins.** Cases 15–CA–9207,[1] 15–RC–7037, and 15–CA–9237

8 February 1985

DECISION, ORDER, AND DIRECTION OF SECOND ELECTION

BY CHAIRMAN DOTSON AND MEMBERS HUNTER AND DENNIS

On 24 September 1984 Administrative Law Judge James T. Youngblood issued the attached decision. The Respondent filed exceptions and a supporting brief.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[2] and conclusions[3] as modified and to adopt the recommended Order as modified.

We agree with the judge's conclusion that the Respondent violated Section 8(a)(1) of the Act by interrogating employees, threatening employees with discharge and plant closure, and creating the impression of surveillance of employees' union activities. For the following reasons, however, we disagree with the judge's finding that the Respondent violated Section 8(a)(1) by berating and disparaging employee Henry Michelle in the presence of other employees because of his union support and activity.[4]

The pertinent facts are as follows. The Union filed a petition 18 October 1983. On 13 December 1983, 2 days before the election, Respondent's terminal manager Wilber Hubble held a meeting in the company lunchroom attended by 19 employees, including Michelle. Hubble informed the employees that he was not supposed to discuss the Union, but he had something to say anyway. He stated that he was a company man and did not want the Union. He further stated that it would be fine if the employees wanted the Union, but they should not follow Michelle as a leader because he was organizing the Union out of revenge because the Company did not give him a salesman's job. Hubble also stated that Michelle was a "parking lot lawyer" who was gathering information and passing out authorization cards.

We view Hubble's statements as legitimate expressions of opinion protected by Section 8(c) of the Act. Hubble did not suggest that the employees refrain from engaging in protected concerted activities, but merely that they consider whether to follow Michelle in view of his apparent personal motives. The statements contained no explicit or implied threats of reprisal or force which would tend to coerce employees in the exercise of their Section 7 rights. Accordingly, we dismiss this complaint allegation.

Notwithstanding this dismissal we conclude, in agreement with the judge, that the record contains sufficient evidence of unlawful conduct during the critical period to warrant setting aside the 15 December 1983 election.

AMENDED CONCLUSIONS OF LAW

1. Substitute the following for Conclusion of Law 2.

"2. By threatening its employees with discharge and plant closure if they selected the Union as their bargaining representative, the Respondent has violated Section 8(a)(1) of the Act."

2. Delete Conclusion of Law 4.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Haynes Motor Lines, Inc., New Orleans, Louisiana, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1(b).

"(b) Threatening its employees with discharge and plant closure if they support the Union or any other labor organization."

2. Delete paragraph 1(d) and reletter the subsequent paragraph.

3. Substitute the attached notice for that of the administrative law judge.

IT IS FURTHER ORDERED that the election held in Case 15–RC–7037 be set aside and that said case be remanded to the Regional Director for Region 15 to conduct a new election when he deems the cir-

[1] The administrative law judge incorrectly listed the second case number as 15–CA–7037.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[3] The judge correctly found that the Respondent violated Sec. 8(a)(1) of the Act by threatening its employees with plant closure, but he omitted this finding from his Conclusions of Law. We will amend the Conclusions of Law, modify the Order, and issue a new notice to correct this inadvertent error.

[4] Member Hunter agrees with his colleagues in finding the above violations, and in setting aside the election on the basis of the unlawful activity. Consequently, he finds it unnecessary to pass on whether Terminal Manager Hubble's remarks to employees about employee Henry Michelle also violated the Act because they disparaged Michelle.

cumstances permit the free choice of a bargaining representative.

[Direction of Second Election omitted from publication.]

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT coercively interrogate our employees about their union support or union activities, or the union activities of their fellow employees.

WE WILL NOT threaten our employees with discharge or plant closure if they support General Truckdrivers, Chauffeurs, Warehousemen & Helpers Local No. 270, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, Independent, or any other labor organization.

WE WILL NOT create the impression of surveillance of our employees' union activities by informing our employees that we know which employees are responsible for initiating the union organizing campaign.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

HAYNES MOTOR LINES, INC.

DECISION

STATEMENT OF THE CASE

JAMES T. YOUNGBLOOD, Administrative Law Judge. This case was tried before me in New Orleans, Louisiana, on March 22, 1984, pursuant to complaints which issued on January 23 and February 24, alleging that Haynes Motor Lines, Inc. (Haynes or Respondent), engaged in certain acts and conduct in violation of Section 8(a)(1) of the Act. The Respondent filed an answer admitting certain jurisdictional allegations to the complaint but denied the commission of any unfair labor practices. All parties were represented at the hearing, and following the close of the hearing the Respondent filed a brief which has been duly considered.

On the entire record, and from my observations and the demeanor of each witness while testifying and the brief herein, I make the following

FINDINGS AND CONCLUSION[1]

I. THE BUSINESS OF THE RESPONDENT

The Respondent is a Louisiana corporation with an office and place of business located in New Orleans, Louisiana, where it is engaged in the transportation of general merchandise. The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The complaints allege, the Respondent admits, and I find that General Truckdrivers, Chauffeurs, Warehousemen & Helpers Local No. 270, a/w Internationl Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, Independent (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

On October 18, 1983,[2] the Union filed a petition to be certified as the collective-bargaining representative of the full-time and regular part-time employees at the Respondent's New Orleans terminal.

Pursuant to a stipulation for certification upon consent election approved on November 16, the Regional Director for Region 15 held an election by secret ballot among the Respondent's employees on December 15. The Union was rejected by a 49–38 vote.

On December 20, the Union filed five objections to the election. The Regional Director overruled four of these objections, but ordered that a hearing be held to resolve the Union's Objection 2, which alleged that in a meeting with employees the Respondent created the impression of surveillance of its employees' union activities and berated certain prounion employees. He also ordered that the hearing be consolidated with the hearing on the complaint in Case 15–CA–9207. On February 27, 1984, the Board issued its Decision and Order in Case 15–RC–2037 referring the case back to the Regional Director for the purpose of arranging a hearing pursuant to the Regional Director's report.

On January 23, 1984, the complaint in Case 15–CA–9207 issued alleging that since on or about December 13, 1983, the Respondent by its supervisor and agent Butch Hubbel created the impression of surveillance of employees' union activities by informing employees that he knows which employee is responsible for initiating the union organizing campaign and berated and disparaged an employee in the presence of other employees because of his union support and activities. Also on January 23,

[1] The facts found herein are a compilation of the credited testimony, the exhibits, and stipulations of fact, viewed in light of logical consistency and inherent probability. Although these findings may not contain or refer to all of the evidence, all has been weighed and considered. To the extent that any testimony or other evidence not mentioned in this decision may appear to contradict my findings of fact, I have not disregarded that evidence but have rejected it as incredible, lacking in probative weight, surplusage, or irrelevant. Credibility resolutions have been made on the basis of the whole record, including the inherent probabilities of the testimony and the demeanor of the witnesses. Where it may be required I will set forth specific credibility findings.

[2] All dates refer to 1983 unless stated otherwise.

1984, the Regional Director issued an order consolidating the complaint in Case 15–CA–9207 and the objection in 15–RC–7036 for a hearing. On February 24, 1984, the Regional Director issued a complaint in Case 15–CA–9237 allleging additional violations of Section 8(a)(1) of the Act, and also consolidating that complaint with the previous complaint and objection.

Paragraphs 6(a) and (b) of the complaint issued in Case 15–CA–9237 allege that in or about the week prior to Thanksgiving 1983, and on or about December 3, 1983, the Respondent through its supervisor and agent Sam Haynes, at its New Orleans facility, created the impression of surveillance of employees' union activity by informing employees that he knew which employee is responsible for initiating the union organizing campaign.

Paragraph 7 of this complaint also alleges that Bill Rabelais, the Respondent's supervisor, on various dates between November 30 and December 16, threatened employees with discharge, created the impression of surveillance, and interrogated employees regarding their union sympathies and activities.

Edward Collins testified that he was employed by the Respondent from January 2, 1983, until January 13, 1984. Collins testified that around the time the employees learned that there was to be an election he was called into a meeting conducted by Sam Haynes, Respondent's president. There were approximately seven other employees in this meeting. Collins testified that Haynes said, "He was talking about—how he first started out, he say, well, I know who kicked off the union deal because his feelings got hurt. He wanted a position in the office as a salesman but we turned him down for other reasons." Collins stated that Haynes said that the Respondent would close down and move to Baton Rouge if the Union was to come in. Collins also said that Haynes told the employees of approximately 75 other companies that had shut down as a result of union problems.

Collins testified that during the week of the election he had a meeting with Bill Rabelais in Rabelais' office. Collins stated that Rabelais told him to have a seat, and then "he asked me whether I am for the Union or not." When Collins did not respond, Rabelais asked him again if he was for the Union or not. Collins told him that he did not know himself. Collins stated that Rabelais said that Haynes will close down, lock up these gates, and take his business to Baton Rouge if the Union got in.

Collins testified that on the day of the election Rabelais was wearing a "Vote No" sign or button. On that day he went with Rabelais to the tire shed where the election was being held and that he and Rabelais entered the tire shed to get a tire. Henry Michelle informed the Board agent that Rabelais was a supervisor. The Board agent then asked Rabelais what his title was and when he was told that he was a foreman, the Board agent told Rabelais to leave, at which point both he and Collins left. As they were nearing the mechanics' shop Rabelais said, "Well, I going to find who's for the union and get rid of them." Collins testified that on the day after the election Rabelais came into the terminal in the morning and stated that "we're going to find out who is for the union and get rid of them slowly but surely." Collins said that there were about five to six employees present in the mechanic shop when this statement was made.

Henry Michelle testified that he has been employed by the Respondent since June 20, 1981. On December 13, he was called into the lunchroom along with 18 other employees for a meeting with Wilber Hubble, the Respondent's terminal manager.

Michelle testified that Hubble said he was not supposed to talk about the Union but he did have something to say about it anyway. He stated that he was a company man and did not want the union. He said that if the employees want the Union that is fine, but do not follow Michelle as a leader because all he wants is revenge. Michelle testified that Hubble told the employees that Michelle had been asking for a saleman's job and when he did not get it he got the Union for revenge. He stated that Hubble said he was a parking lot lawyer and that he was gathering information and passing out union cards; that he had seen Michelle passing out union cards on the dock. Hubble admitted telling the employees that he knew Michelle was the union organizer and he was doing this because the company was not letting him be a saleman and that he resented the fact that the company took away a lunch period. He told the employees that they should not follow Michelle.

Charles Brister testified that he was employed by the Respondent in late June 1983, and discharged in December 1983. He testified that sometime during the first week of December he was present at a meeting where Sam Haynes talked about the Union. He said there were six or seven other employees present and, to his knowledge, there were no other supervisors. He stated that Haynes started off talking about the Union and stating "how he would not be intimidated by letting the union come in and tell him how to run his business." Haynes also said, "before he'd let the union come in and tell him how to run his business he would close down and sell his dock equipment, the trucks, and move to Baton Rouge." Brister stated that he mentioned other trucking companies that went out of business because of the union. Brister testified that he attended another meeting held by Haynes during the second week in December, just before the election. This meeting took place in the personnel office and there were about six other employees present, and again there were no other supervisors present. He stated that Haynes told them that this would be the last time that he would see them before the election, and "if the union got in we wouldn't have to worry about being back to work on Monday. If the Union didn't get in we would be working again."

Brister also testified that his supervisor was Bill Rabelais and that he had a conversation with him during the first week of December. This was in the office behind the mechanic shop and Johnny Chaney was also present. He stated that Rabelais went over a few things that Haynes had talked about, his experiences with unions, and that he would not have anything to do with unions because they more or less gave him the shaft. During this meeting Brister stated Rabelais asked him if he had ever been affiliated with the Union. Brister told him he had when he was in Public Service. He stated that Rabe-

lais repeated what Haynes had said and stated, "that they would close up, sell the dock equipment, trucks, and move back to Baton Rouge," if the Union came in. Brister further stated that following the election he heard Bill Rebelais say that after this was over, the Respondent was going to find out the people that head voted for the Union and they would get rid of the people that had voted for the Union.

Employee Jerry Sterling testified that he attended a meeting in November 1983 where Sam Haynes spoke about the Union. He said the meeting took place in Hubble's office. He said that there were a number of other employees present and he named Ed Collins and Lionel Maxwell, but that there were no other supervisors present. He stated that "he introduced himself to the people that didn't know him. And he said the meeting was about the union, that there was no damn way a union was going to get in and tell him how to run his business."

In response to a question about how the Union got started, Haynes said "that a certain person or people employed got their feelings hurt when they took away the paid lunch hours." Sterling had a meeting with Rabelais around that same week, in which Rabelais, "just talked—basically the same thing that Mr. Haynes had said about companies closing up because of the union." He said that Rabelais told him, "I don't know how you feel about the union but I can tell you Mr. Haynes is not going to let no union in this company and tell him how to run it." In response to a question as to what would happen if the union came in, Sterling stated that Rabelais said "that Mr. Haynes would put a lock on the gate and we'd all be without jobs." He stated that Rabelais said that bulldog, Ed Collins, was for the union and that he was the only person that he knew was for the Union in the building. Sterling was asked if he ever had a conversation with Hubble about the Union and he said that during the last or middle part of November, Hubble asked him how he felt about the Union. He said that Hubble told him that he did not have to answer that, and stated that there is only one person in this whole company "that's admitted they'd vote for the union."

The Respondent denies that its supervisors and agents made statements as attributed to them by the General Counsel's witnesses and in support of that put on witnesses to contradict this testimony.

Hubble testified that at the meeting on December 13 he stated that he was talking about the conditions that the Union would get into the Company, and that he was referring to "them." At this point he told the men let's quit referring to "them" as we all know that Henry Michelle is the one organizing the Union. He said that he told the men that he knew Henry was the organizer, and they knew that he was the organizer, so get it out in the open. He stated that he told the men that he knew Michelle was the organizer and passed out the cards, and that it was important for everyone to realize and understand that Michelle did this as a personal vendetta against Hubble because of personal things that he had supposedly done to Michelle. He stated that he did not use any obscene, profane, or abusive language in talking about Michelle and that he made no threats. He stated that about five different employees came to him and informed him about Michelle and that at no time did he ask any employees how they were going to vote. He stated that in addition he knew that Michelle was responsible for the Union because each time he would go to him he would have a certain number of employees (two, three, or four men) gathered around him. When he approached they immediately broke up and disbanded.

John Chaney, a night-shop foreman for the Respondent, was called as a witness for the Respondent and asked if at any time before or afer the election did he ever hear Rabelais say that anybody that voted for the Union would be fired. He answered no. He was also asked, if he ever heard him threaten anybody about the Union, and if they were for or against the Union. He again answered no. He was asked if he ever heard him make any general statement to any group of people that union supporters would be fired. He answered no.

William L. Rabelais testified that at no time did he tell any of the employees that Haynes said he would close up if the Union came in. He testified that he informed the employees that he did not intend to be intimidated by the Teamsters Union, but that he did not threaten any of them with discharge. Nor did he ever tell them that if the Union got in they need not come to work on the following Monday.

Thus, the Respondent denies that it engaged in any of the conduct above and requested that the complaint be dismissed in its entirety.

Discussion and Conclusions

I have carefully evaluated the testimony of all of the witnesses in this proceeding. During the hearing I observed all the witnesses while they were testifying. I observed Henry Michelle, Edward Collins, and Charles Brister, employees of the Respondent who voted for the Union, and two of whom were discharged following the election. The Respondent argues that their testimony should not be credited because they are hostile employees, Michelle because he was mad at the Company over a job, and Collins and Brister because they had been discharged after the election. I have carefully evaluated all of the testimony and it is my conclusion that the testimony of the witness for the General Counsel, Henry Michelle, Edward Collins, Charles Brister, and Jerry Sterling, had a ring of truth and was straightforward, and that the testimony of the Respondent's witnesses did not have such a ring of truth. Therefore I credit their testimony over the general denials of the Respondent's supervisors.

Therefore it is my conclusion that the Respondent did threaten employees with discharge if the employees selected the Union as their bargaining representative; did create the impression of surveillance of the employees' union activities by informing the employees that the Respondent knew which employees were responsible for initiating the union organizing campaign, and did interrogate its employees regarding the employees' union sympathies and the sympathies of the employees' fellow employees. This conduct occurred prior to the election and during the critical period. It is further my conclusion

that the General Counsel has sustained his burden in proving that the Respondent did engage in the conduct as alleged in Objection 2 to the election and that this conduct constitutes a sufficient basis for setting the election aside. Most certainly when considered with the additional conduct as alleged in the complaint the election must be set aside.

It is clear that employees were interrogated concerning their union activities. It is also clear that Respondent's entire course of conduct was intended to coerce and intimidate the employees into not voting for the Union. Thus, the Respondent's statements that they are aware of the employees that are pushing the Union, clearly conveys to the employees that their union activities are under surveillance and clearly create the impression of surveillance. Such conduct is clearly coercive and clearly intimidates the employees in the exercise of their rights guaranteed by Section 7. See *Dutch Boy Inc.*, 262 NLRB 4 (1982). Moreover, the Respondent's threats of discharge, and the statements by the Respondent's representatives that the Respondent would close its doors and would move back to Baton Rouge before it allowed the Union to come in, clearly was intended to influence the employees' vote in the upcoming election. Under all the circumstances, it is my conclusion that the Respondent has violated Section 8(a)(1) of the Act as alleged in the complaint.

CONCLUSIONS OF LAW

1. By coercively interrogating employees the Respondent has violated Section 8(a)(1) of the Act.

2. By threatening its employees with discharge if they selected the Union as their bargaining representative, the Respondent has violated Section 8(a)(1) of the Act.

3. By creating the impression of surveillance of its employees' union activities by informing its employees that the Respondent knew which employees were responsible for initiating the union organization campaign, the Respondent has violated Section 8(a)(1) of the Act.

4. By creating the impression of surveillance of the employees' union activities by informing the employees that the Respondent knew which employees were responsible for initiating the union organizing campaign and by berating and disparaging an employee in the presence of other employees because of his union support and activity, the Respondent has engaged in conduct violative of Section 8(a)(1) of the Act.

THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find it necessary to order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[3]

ORDER

The Respondent, Haynes Motor Lines, Inc., New Orleans, Louisiana, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Coercively interogating its employees about their union support or union activities, or the union sympathies of their fellow employees.

(b) Threatening its employees with discharge if they support the Union or any other labor organization.

(c) Creating the impression of surveillance of its employees' union activities by informing the employees that they know which employees are responsible for initiating the union organizing campaign.

(d) Creating the impression of surveillance of the employees' union activities by informing the employees that they know which employees are responsible for initiating the union organizing campaign and berating and disparaging an employee in the presence of other employees because of his union support and activity.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Post at its facility in New Orleans, Louisiana, and its other facilities in Louisiana and Alabama, copies of the attached notice marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Region 15, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that the election held in Case 15–RC–7037 on December 15, 1983, be set aside and that this representation case be referred to the Regional Director for Region 15 for further proceedings in this matter as he sees fit.

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[3] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[4] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Inland Container Corporation *and* United Paperworkers International Union, AFL–CIO, Local No. 522. Case 17–CA–10772

8 February 1985

SUPPLEMENTAL DECISION ON RECONSIDERATION

BY CHAIRMAN DOTSON AND MEMBERS HUNTER AND DENNIS

On 13 September 1983 the National Labor Relations Board issued a Decision and Order in the above-entitled proceeding[1] finding that the Respondent did not, as alleged, violate Section 8(a)(1), (3), and (5) of the National Labor Relations Act.

On 4 November 1983 United Paperworkers International Union, AFL–CIO & CLC, Local No. 522 (the Union) filed a petition in the United States Court of Appeals for the District of Columbia Circuit seeking review of the Board's decision. Thereafter, on or about 20 August 1984 the Union filed a "Conditional Motion . . . For Leave To Adduce Additional Evidence." In response, the Board filed a motion on 12 September 1984 seeking an immediate remand of the case. On 17 September 1984 the court granted the Board's motion. In doing so the court specifically directed "that the NIRB report its decision on reconsideration to the court . . . ." The court also stated in its order that "[p]ending the NLRB's reconsideration and report to the court, in the interest of the complete and expeditious final disposition of this matter, the panel shall retain jurisdiction over the case."

The Board then invited the parties to file statements of position with respect to the issues raised on remand. The Respondent and the Union thereafter filed such statements with the Board.

The complaint in this case alleges, inter alia, that the Respondent, in staffing its newly acquired Kansas City, Kansas plant, unlawfully refused to consider for hire or to hire any of the predecessor employer's employees at that location because they were represented by the Union. In finding no merit to this allegation in its original decision, the Board relied on the credited testimony of the Respondent's vice president for employee relations staff services, David Harrison, and its employee relations supervisor, Janet Dudley, that the Respondent applied only the following three criteria in selecting employees for hire at the Kansas City plant: (1) a preference for high school graduates; (2) a preference for applicants who had 2 years or more of factory experience; and (3) an absolute prohibition against hiring any employee with previous boxmaking experience. Although the third criterion eliminated from consideration all the predecessor's employees, the Board adopted the administrative law judge's finding that it was justified by the Respondent's assertion of the "not inherently implausible" business consideration that it has experienced a considerable degree of success at other plants where it solely hired inexperienced production and maintenance employees. The Board ultimately dismissed the complaint based, inter alia, on this finding.

In its statement of position the Union argues that certain newly discovered evidence, when considered in conjunction with the preexisting record, now establishes that a motivating factor in the Respondent's decision not to hire its predecessor's employees was a desire on the Respondent's part to avoid recognizing and bargaining with the Union. The additional evidence the Union offers concerns a Federal district court proceeding[2] where Janet Dudley answered an interrogatory relating to the Respondent's hiring policies at the Kansas City facility. Dudley stated in writing there that the Respondent applied four rather than three criteria in selecting employees for the new operation: the three criteria set out above plus a preference for employees with "a demonstrated willingness to work in a nonunion environment." In addition, the Union seeks to introduce into evidence a manual the Respondent used in retraining its predecessor's supervisors before operations commenced. The Union claims that the manual demonstrates that such training related to methods of identifying and resisting union organizational activity.

The Respondent contends in its statement that the Union's motion to reopen the record should be denied on three grounds: (1) the proffered evidence is not newly discovered in that the Union failed to ask pertinent questions or to introduce documents which existed at the time of the hearing; (2) the evidence which the Union seeks to introduce bears only on the credibility of witnesses and thus cannot be considered under established Board and court precedent; and (3) this evidence, even if adduced and credited, would not require a different result since the alleged criterion involving a willingness to work in a nonunion plant would not apply to its predecessor's employees who had been excluded because they possessed boxmaking experience.

The Board, having duly considered the matter, concludes that the disposition of the issues raised here requires reopening the record and remanding

[1] 267 NLRB 1187 (1983).

[2] *Baker v. Inland Container Corp.*, No. 83–2341 (D. Kansas), which was brought under the Age Discrimination in Employment Act by applicants who were rejected for hire at the Kansas City location because of the Respondent's no-experience criterion.

the case for further hearing before the administrative law judge. However, we recommend limiting the proposed hearing to the taking of additional evidence concerning what impact Janet Dudley's answer to the interrogatory might have on this proceeding. While the Union also seeks to introduce into evidence the Respondent's training manual, this document clearly was in existence at the time of the original hearing and there is no showing that it was concealed from the Union. We therefore conclude that the training manual does not constitute newly discovered evidence under Section 102.48(d)(1) of the Board's Rules and Regulations and that further hearing on this point thus is unjustified.[3]

In making our report to the court, we specifically reject the Respondent's argument that Dudley's answer to the interrogatory does not also constitute newly discovered evidence. The record evidence in this case discloses that Dudley, when asked at the hearing how she went about securing the work force at the Kansas City location, testified that she simply applied the three criteria which the Board previously considered in deciding this case. Based on Dudley's precise testimony there, we cannot fault the Union for failing to adduce the alleged fourth criterion from Dudley as the Respondent would have it.

The Respondent further contends, as noted, that the record should not be reopened because the proffered evidence bears only on the credibility of witnesses. Although courts have held that "newly discovered evidence, the effect of which is merely to discredit, contradict or impeach a witness, does not afford a basis for the granting of new trial,"[4] the present case raises a substantial question whether a key witness or witnesses may have committed perjury in testifying regarding a material fact. No tribunal can disregard allegations of this kind.[5]

Finally, we also find no merit to the Respondent's contention that further hearing is unwarranted because the proffered evidence would not require the Board to reach a different result on the merits. Since the Board relied on the evidence of the Respondent's hiring criteria in its prior dismissal of the complaint, we conclude that in the circumstances here the Union should be afforded the opportunity to present additional evidence on this point.

In light of the above, the Board recommends to the District of Columbia Circuit Court that the disposition of the issues raised here requires reopening the record and remanding the case for further hearing before the judge for the purpose of taking additional evidence necessary to decide what impact, if any, Dudley's answer to the interrogatory should have on this proceeding.[6]

MEMBER DENNIS, dissenting.

Contrary to the majority, I do not believe that the court of appeals intended the Board to use the cumbersome and novel procedure of issuing a "report to the court."

The Board filed a motion with the court to remand this case because of newly discovered evidence bearing on the credibility of witnesses. The court issued an order that granted the Board's motion and remanded the record, thereby authorizing the Board to reopen the record and receive the evidence. See Section 10(e) of the Act.[1] The court, conscious of administrative delay, set a date certain for the Board to issue its decision and retained jurisdiction over the case "in the interest of the complete and expeditious final disposition of this matter." Consistent with our representations to the court and the terms of the court's order, including its emphasis on a speedy resolution of this proceeding, I would issue an order reopening the record and remanding the case to the judge who heard the testimony to consider the effect of the newly discovered evidence.[2]

[3] *K-C Machine & Tool Co.*, 268 NLRB 1474 fn. 3 (1984).

[4] See *NLRB v. Sunrise Lumber Corp.*, 241 F.2d 620, 625, 626 (2d Cir. 1957).

[5] See, e.g., *Electrical Workers IUE Local 745 (National Electric Coil)*, 268 NLRB 308 (1983); *Northern States Beef*, 234 NLRB 921 (1978).

[6] We believe there are issues in this case that can only be resolved after further hearing and we do not believe in the unique circumstances present here that the Board has authority to remand this case without the court's prior approval. The Board in its motion to the court specifically requested "an immediate remand of this case . . . so that the Board may regain jurisdiction to reopen the record . . . ." In granting the Board's motion, however, the court directed that "[p]ending the NLRB's reconsideration and report to the court . . . the panel shall retain jurisdiction over the case." Thus, based on our reading of this directive, we find that the Board is precluded from directly remanding this case to the judge. Rather, we conclude that the Board, in accordance with the court's order, must issue this "Report" by a date certain for the court's consideration setting out recommendations on the issues raised in the conditional motion for leave to adduce additional evidence.

[1] Indeed, the Board's motion explicitly requested "an immediate remand of this case to the Board pursuant to Section 10(e) of the Act, 29 U.S.C. 160(e), so that the Board may regain jurisdiction to reopen the record and reconsider its decision in light of the evidence now tendered by the Union."

[2] I would also leave the issue of the admissibility of the training manual initially to the judge.

BDJ Contracting Co., Inc.; BDJ Contracting Co., Inc., Debtor-in-Possession; Modestine Ward, Bianco Abrego, and Maria Aristud, d/b/a Dynasty Fashions *and* Local 169, Amalgamated Clothing & Textile Workers Union, AFL–CIO, CLC. Case 22–CA–12792

12 February 1985

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS HUNTER AND DENNIS

Upon a charge filed by the Union 3 November 1983[1] and amended 29 December, the General Counsel of the National Labor Relations Board issued a complaint 30 December, amended 6 July 1984, against BDJ Contracting Co., Inc.; BDJ Contracting Co., Inc., Debtor-in-Possession; and Dynasty Fashions; collectively the Respondent, alleging that it has violated Section 8(a)(5) and (1) of the National Labor Relations Act. Although properly served copies of the charge, amended charge, complaint, and amended complaint, the Respondent has failed to file an answer.

On 20 August 1984 the General Counsel filed a Motion for Summary Judgment. On 28 August 1984 the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Company filed no response. The allegations in the motion are therefore undisputed.

Ruling on Motion for Summary Judgment

Section 102.20 of the Board's Rules and Regulations provides that the allegations in the complaint shall be deemed admitted if an answer is not filed within 10 days from service of the complaint, unless good cause is shown. The complaint states that unless an answer is filed within 10 days of service, "all of the allegations in the complaint shall be deemed to be admitted to be true and shall be so found by the Board." Further, the undisputed allegations in the memorandum supporting the Motion for Summary Judgment state that the General Counsel sent a mailgram to the Respondent 8 February 1984 advising that failure to file an answer to the complaint by 14 February 1984 would result in a Motion for Summary Judgment. On 1 August 1984 the General Counsel sent another mailgram to the Respondent stating that its failure to file an answer to the amended complaint by 3 August 1984 would result in a Motion for Summary Judgment.

In the absence of good cause being shown for the failure to file a timely answer, to the complaint or the amended complaint, we grant the General Counsel's Motion for Summary Judgment.[2]

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

Respondent BDJ Contracting Co., Inc. (BDJ) has been engaged as a sewing contractor for clothing manufacturers at its facility in Hoboken, New Jersey. During the 12-month period ending 6 July 1984, Respondent BDJ, in the course and conduct of its business operations, provided services valued in excess of $50,000 for Gwen Sportswear, a corporation with an office and place of business in North Bergen, New Jersey, which, during the same period, purchased goods and materials valued in excess of $50,000 directly from points outside the State. We find that Respondent BDJ is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

Since about 22 July, Modestine Ward, Bianca Abrego, and Maria Aristud have been partners doing business as Dynasty Fashions (Dynasty) with an office and place of business at Respondent BDJ's Hoboken, New Jersey facility. Dynasty has been engaged as a sewing contractor for clothing manufacturers. Based on a projection of its operations, since about 22 July, the date Dynasty commenced its operations, Respondent Dynasty, in the course and conduct of its business operations, will annually perform services valued in excess of $50,000 directly for Gwen Sportswear. We find that Respondent Dynasty is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

Since about 12 September, Respondent BDJ Contracting Co., Inc., Debtor-in-Possession, has been duly designated by the United States Bankruptcy Court, District of New Jersey, as the debtor-in-possession, of Respondent BDJ and Dynasty with full authority to continue operations and exercise all powers necessary to the administration of the business of Respondents BDJ and Dynasty, and has been a successor in bankruptcy to Respondents BDJ and Dynasty at all material times. Since 12 September Respondent BDJ, Debtor-in-Possession, with an office and place of business at

[1] All dates are in 1983 unless otherwise indicated.

[2] In granting the General Counsel's Motion for Summary Judgment, Chairman Dotson specifically relies on the total failure of the Respondent to respond to the allegations of the General Counsel's complaint and amended complaint. Thus, the Chairman regards this proceeding as being essentially a default judgment which is without precedential value.

Respondent BDJ's Hoboken, New Jersey facility, has been engaged as a sewing contractor for clothing manufacturers. Based on a projection of its operations since about 12 September, Respondent BDJ, Debtor-in-Possession, in the course and conduct of its business operations, will annually perform services valued in excess of $50,000 directly for Gwen Sportswear. We find that Respondent BDJ, Debtor-in-Possession, is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

We find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *The Alter Ego Relationship and the Successor Relationship*

On 25 July Respondent BDJ established Respondent Dynasty as a subordinate instrument and disguised continuation of BDJ. BDJ, Dynasty, and BDJ, Debtor-in-Possession, have been affiliated business enterprises with common ownership, management, operators, and supervision. They have formulated and administered a common labor relations policy affecting the employees of those enterprises, and they have shared common premises and facilities. They have employed substantially the same employees and have held themselves out to the public as a single integrated business enterprise.

Based on these facts, we find that BDJ, Dynasty, and BDJ, Debtor-in-Possession, are alter egos and a single employer within the meaning of the Act.

On 22 July Respondent Dynasty leased equipment and purchased assets from Respondent BDJ. Since that date Dynasty has been engaged in the same business operations at the same location, and has sold the same services or products to substantially the same customers as BDJ. In addition, Dynasty has as a majority of its employees individuals who were previously employed by BDJ in the unit set forth below.

Based on these facts, we find that Respondent Dynasty and Respondent BDJ, Debtor-in-Possession, is a continuing employing entity of and a successor to Respondent BDJ.

B. *The Unit and the Union's Representative Status*

The following employees of Respondent constitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

> All of the employees employed by the Employer or all Contractors employed by the Employer in any and all capacities including, but not limited to cutters, markers, operators, pressers, carters, and/or shippers of garments, office or clerical workers, miscellaneous or auxiliary workers, but excluding executives, supervisors, managers, and guards within the meaning of the National Labor Relations Act.

The Respondent has recognized the Union as the exclusive collective-bargaining representative of the employees in the unit. Such recognition has been embodied in collective-bargaining agreements between the Respondent and the Union, the most recent of which was effective for the period 16 October 1981 to 15 October 1984.

C. *The 8(a)(5) and (1) Violation*

Since about May 1983 the Respondent has failed to comply with the provisions of its collective-bargaining agreement with the Union, including the provisions regarding wages, vacations, holiday pay, union security, checkoff, and welfare funds. On 22 July the Respondent withdrew recognition of the Union as the exclusive representative of the employees in the unit described above. About 28 July the Union requested, by letter, information relating to the alleged transfer of business between Respondents BDJ and Dynasty, as well as the Respondent's books and records for purposes of an audit. Since that date, the Respondent has refused to furnish this information, which is necessary for and relevant to the Union's performance of its function as the exclusive collective-bargaining representative of the employees in the unit described above. Accordingly, we find that the Respondent, by this conduct, has violated Section 8(a)(5) and (1) of the Act.

D. *The Independent 8(a)(1) Violation*

About 25 July the Respondent's owner William DiResta and a supervisor and agent of the Respondent, and Modestine Ward, also a supervisor and agent, interrogated employees about their union membership, activities, and sympathies. We find the Respondent violated Section 8(a)(1) of the Act by this conduct.

CONCLUSIONS OF LAW

1. By failing and refusing to comply with the provisions of its collective-bargaining agreement with the Union since May 1983, by withdrawing recognition of the Union on and after 22 July 1983, and by refusing to furnish the Union with relevant and necessary information it had requested 28 July 1983, the Respondent has engaged in unfair labor practices affecting commerce within the meaning

of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

2. By interrogating its employees regarding their union membership, activities, and sympathies on 25 July 1983, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that the Respondent unlawfully withdrew recognition from the Union, and failed and refused to comply with the terms of its collective-bargaining agreement, we shall order the Respondent to recognize and bargain on request with the Union, and to give effect to the terms of the agreement. We shall further order the Respondent to comply with the dues-checkoff provision of the contract and remit to the Union the dues due and owing for each employee who executed a dues-deduction authorization, with interest computed in the manner prescribed in *Florida Steel Corp.*, 231 NLRB 651 (1977). See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962). We shall further order the Respondent to make whole unit employees for any loss of wages or other benefits caused by its failure to adhere to the terms of the contract until 12 September 1983,[3] including making the required payments to the welfare funds.[4] The Respondent shall also reimburse its employees for any expenses ensuing from the Respondent's unlawful failure to make payments to the welfare funds, as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enfd. 661 F.2d 940 (9th Cir. 1981). Backpay shall be made in a manner consistent with Board policy as stated in *Ogle Protection Service*, 183 NLRB 682 (1970), with interest as prescribed in *Florida Steel Corp.*, supra.

Having also found that the Respondent unlawfully failed and refused to furnish the Union with the relevant and necessary information it requested 28 July 1983, we shall order the Respondent to furnish such information to the Union on request.

ORDER

The National Labor Relations Board orders that the Respondent, BDJ Contracting Co., Inc., BDJ Contracting Co., Inc.; Debtor-in-Possession; Modestine Ward, Bianca Abrego, and Maria Aristud, d/b/a Dynasty Fashions, Hoboken, New Jersey, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Withdrawing recognition from and refusing to bargain with Local 169, Amalgamated Clothing & Textile Workers Union, AFL–CIO, CLC as the exclusive representative of the employees in the bargaining unit.

(b) Failing and refusing to adhere to the terms of its collective-bargaining agreement with the Union until 12 September 1983, including the terms relating to wages, vacations, holiday pay, union security, checkoff, and welfare funds.

(c) Coercively interrogating any employee about union support or union activities.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, recognize and bargain with the Union as the exclusive representative of the employees in the following appropriate unit on terms and conditions of employment:

> All of the employees employed by the Employer or all Contractors employed by the Employer in any and all capacities including, but not limited to cutters, markers, operators, pressers, carters, and/or shippers of garments, office or clerical workers, miscellaneous or auxiliary workers, but excluding executives,

[3] Consistent with the Supreme Court's recent opinion in *NLRB v. Bildisco & Bildisco*, 104 S.Ct. 1188 (1984), our remedy extends only to 12 September 1983, the date the Respondent filed its Chapter 11 bankruptcy petition. *Bildisco* held, in relevant part, that an employer does not violate Sec. 8(a)(5) and (1) by changing the terms and conditions of a collective-bargaining agreement during the period between the filing of a bankruptcy petition and the bankruptcy court's determination whether the collective-bargaining agreement may be rejected.

Member Hunter, for the reasons fully set forth in *Edward Cooper Painting*, 273 NLRB 224, issued today, disagrees with terminating the remedy as of 12 September 1983, the date the Respondent filed its bankruptcy petition, because all of the violations found preceded the filing of the petition.

We are mindful that the Bankruptcy Amendments and Federal Judgeship Act of 1984, enacted by Congress 10 July 1984, modifies *Bildisco* and governs a debtor-in-possession's rejection of a collective-bargaining agreement. The statute does not apply, however, to cases such as this where the bankruptcy petition was filed prior to its enactment. Pub. L. 98-353 § 541, 98 Stat. 333, 390–391 (1984).

[4] Because the provisions of employee benefit fund agreements are variable and complex, the Board does not provide for the addition of a fixed rate of interest on ulawfully withheld fund payments at the adjudicatory stage of a proceeding. We leave to the compliance stage the question whether the Respondent must pay any additional amounts into the benefit funds in order to satisfy our "make-whole" remedy. Depending on the circumstances of each case, these additional amounts may be determined by reference to provisions in the documents governing the funds at issue and, where there are no governing provisions, by evidence of any losses directly attributable to the unlawful withholding, which might include the loss of return on investment of the portion of funds withheld, additional administrative costs, etc., but not collateral losses. *Merryweather Optical Co.*, 240 NLRB 1213, 1216 fn. 7 (1979).

supervisors, managers, and guards within the meaning of the National Labor Relations Act.

(b) Adhere to the terms and conditions of its collective-bargaining agreement with the Union until 12 September 1983, including its provisions regarding wages, vacations, holiday pay, union security, checkoff, and welfare funds.

(c) Make whole unit employees for any loss of wages or other benefits suffered as a result of the Respondent's failure to abide by the terms of its collective-bargaining agreement with the Union, in the manner set forth in the remedy section of this decision.

(d) Reimburse the Union for all membership dues that the Respondent has failed to withhold and transmit to the Union pursuant to signed dues-deduction authorizations and in accordance with the checkoff provision of the collective-bargaining agreement, with interest, in the manner set forth in the remedy section of this decision.

(e) Furnish the Union with the information it requested by letter 28 July 1983 regarding the alleged transfer of business between Respondent BDJ and Respondent Dynasty, as well as the Respondent's books and records for purposes of an audit.

(f) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(g) Post at its facility in Hoboken, New Jersey, copies of the attached notice marked "Appendix."[5] Copies of the notice, on forms provided by the Regional Director for Region 22, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(h) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[5] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted By Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT withdraw recognition from and refuse to bargain with Local 169, Amalgamated Clothing & Textile Workers Union, AFL–CIO, CLC as the exclusive representative of the employees in the bargaining unit.

WE WILL NOT fail and refuse to adhere to the terms of our collective-bargaining agreement with the Union, until 12 September 1983, including the terms relating to wages, vacations, holiday pay, union security, checkoff, and welfare funds.

WE WILL NOT coercively question you about your union support or activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, recognize and bargain with the Union as the exclusive representative of the employees in the following appropriate unit on terms and conditions of employment:

> All of the employees employed by the Employer or all Contractors employed by the Employer in any and all capacities including, but not limited to cutters, markers, operators, pressers, carters, and/or shippers of garments, office or clerical workers, miscellaneous or auxiliary workers, but excluding executives, supervisors, managers, and guards within the meaning of the National Labor Relations Act.

WE WILL adhere to the terms and conditions of our collective-bargaining agreement with the Union until 12 September 1983, including its provisions regarding wages, vacations, holiday pay, union security, checkoff, and welfare funds.

WE WILL make whole the unit employees for any loss of wages or other benefits suffered as a result of our failure to abide by the terms of our collective-bargaining agreement with the Union, with interest.

WE WILL reimburse the Union for all membership dues that our employees authorized to be deducted but we failed to deduct and transmit to the Union.

WE WILL furnish the Union with the information it requested by letter 28 July 1983 regarding the alleged transfer of business between BDJ Contracting Co., Inc., and Dynasty Fashions, as well as our books and records, for purposes of an audit.

BDJ CONTRACTING CO., INC.; BDJ CONTRACTING CO., INC., DEBTOR-IN-POSSESSION; MODESTINE WARD, BIANCA ABREGO, AND MARIA ARISTUD, D/B/A DYNASTY FASHIONS

Interprint Co. *and* Graphic Arts International Union, Local 14L, AFL–CIO, CLC. Case 4–CA–11919

12 February 1985

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS HUNTER AND DENNIS

On 14 May 1982 Administrative Law Judge Walter J. Alprin issued the attached decision. The Respondent filed exceptions and a supporting brief.[1] The General Counsel filed cross-exceptions to the judge's decision and a brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions only to the extent consistent with this Decision and Order.

The issue presented in this case is whether the parties had reached a meeting of the minds on the terms and conditions of the collective-bargaining agreement. The judge found that the Respondent violated Section 8(a)(5) and (1) of the National Labor Relations Act by refusing to execute an agreed-upon contract. We disagree with his finding that the Respondent violated Section 8(a)(5) and (1) of the Act by refusing to execute the draft since we hold there was no agreement on the terms of the proposed contract.

The essential facts are as follows: Representatives from the newly certified Union and the Respondent met at 10 bargaining sessions between 12 March and 23 September 1980 and agreed on numerous items by initialing them. At the first session the Union advised that its practice was to have the employees vote to ratify any contract. It was also agreed that noneconomic issues would first be negotiated before economic items, and that there would be no complete contract until final agreement was reached on all items.

After the parties could not agree on a number of items at the 21 July 1980 meeting, the Union's local representative Ed Toff contacted the Federal Mediation and Conciliation Service for assistance. After the second meeting with the Federal mediator on 17 September 1980 the mediator told the Union that Interprint was not going to move from its last offer. The Union on 23 September 1980 held a vote to decide whether to accept the Company's final proposal. Toff called J. P. Jones, attorney for Interprint, and told him that the employees had ratified the contract. Toff testified Jones said, "Oh, okay." Toff said he would draw up a contract and mail it for Jones' signature. Toff testified Jones responded, "Fine." Toff prepared the final contract using articles initialed by both sides, his own notes of issues agreed to during negotiations, and Interprint's proposals which had not been agreed to by the Union during negotiating sessions. Three copies of the contract were mailed to Jones on 5 November 1980 with a cover letter asking Jones to approve and sign the contracts. After more than 2 months, on 20 January 1981, the Union sent a followup letter. Jones responded 29 January 1981 saying the Employer had some doubt as to whether a collective-bargaining agreement had ever been reached.

The judge found that there was a meeting of the minds once the Union accepted the Employer's proposals regarding not previously agreed-upon items and therefore the resulting contract, albeit inartistically and inaccurately drawn, was binding on both parties. We find, contrary to the judge, that this is not a case in which the parties had a meeting of the minds that is not reflected in the proffered draft merely because it was inartistically or inaccurately drawn. Instead, it is clear that the parties here failed to discuss, much less agree to, certain important clauses in the draft and that certain other clauses, allegedly agreed on, were omitted or altered by the Union.

First, there were no commencement and termination dates in the draft proposal. These had been left blank. The judge takes care of this inadvertence by noting that "generally" the effective date of a contract is the date on which the offer is accepted which would be the date that the Union agreed to the proposed contract on 23 September 1980. Aside from begging the question, this sort of analysis, whether or not it is reasonable, is no substitute for an express agreement of the parties. See *Mercedes-Benz*, 258 NLRB 803 (1981).

In fact, Toff admitted at the hearing that at no time during the negotiations did the parties discuss or agree to a commencement date for the contract. The Board will not write a contract for the parties on the basis of what is "generally" done in these circumstances.

Second, there were several clauses that were omitted or altered by the Union in its proffered draft to make the draft more acceptable to the Union. For example, Interprint's proposal in article 19 dealing with transfer of equipment stated:

> The Company agrees that it will not transfer equipment to any other plant or location when

[1] The Respondent has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

[2] In the first paragraph of sec. D of the judge's decision the date 24 November should read 24 September.

> such equipment transfer will result in the lay off of bargaining unit employees. This section shall in no way be construed to prevent the sale of equipment even if such sale results in lay offs, but in such event, the rights of the employees will be determined under the seniority provisions of this Agreement.

The altered version submitted to Interprint, as written by Toff, said:

> The Company agrees that it will not transfer equipment to any other plant or location when such equipment transfer will result in the lay off of bargaining unit employees. This section shall, in no way, be construed to prevent the sale of equipment, *except to a plant or subsidiary company of Interprint or A.U.S. (Associated Utilities Service).*

Toff's explanation for changing the provision was, "I wrote that in there because I thought the language would be acceptable to me if we inserted that. And it ended up getting into the final contract when it was typed because it was on there. It really doesn't belong in the final contract; it should be taken out of there." The willingness of the Union, at the hearing, to concede that certain clauses should have been included in the contract or retained in their original form does not convince us that there has been a meeting of the minds on 23 September 1980.

Third, although the judge acknowleged that the Board may not force the parties to agree to any terms or to make concessions, he proceeded to go through the "final contract" adding terms which he surmised the parties would have agreed to, adding terms that the Union had decided to leave out, and correcting certain clauses which the Union had modified to suit its purpose. For example, article 15 of the contract on new machinery and processes differs from the handwritten notes of what was agreed to in that it left out language which takes certain manning requirements decisions from Interprint and makes them subject to binding arbitration. Toff explained this inconsistency by his own inadvertence since he did not have a copy of the agreed provision when he made up the contract. The judge found that the Union has admitted its error in omitting this clause and "the addition can be made." The judge also found that the Respondent's proposal on the International Union responsibility clause was inadvertently left out and it, too, should be added.

Other evidence which compels the conclusion that the parties never reached a final collective-bargaining agreement which could be executed is obvious in examining article 11 of the contract involving holidays. The judge found there was no *agreement* on the Union's extensive proposal on holidays but there was *discussion* resulting in Interprint agreeing "to the Union's counterproposal of 1/2 additional day before Christmas and New Years for a total of 9 holidays" and in the third year of the contract for an "additional holiday, either the day after Thanksgiving or Martin Luther King's birthday." The purported contract used the specific language of the Union's original proposal with, in addition, an effective date of 1 July 1980 without mention of the additional half days and effective 1 July 1982 the addition of a tenth day not including an alternate choice of Martin Luther King's birthday or the day after Thanksgiving. The judge resolves the discrepancies by saying, "The intent of the Holidays Clause is clear, and the language can be altered to conform." A review of the record shows the intent is not clear. Toff testified he could not recall if the parties ever discussed the specific holiday language at any time during the negotiations. The United States Supreme Court held in *H. J. Heinz Co. v. NLRB*, 311 U.S. 514, 526 (1941), that, on request by an exclusive collective-bargaining representative, it is only a written contract embodying *agreed* terms which the Board may require the company to sign. The judge himself admits that the Company had not agreed to the specific wording of the Union's original extensive proposal on holidays which is incorporated in the purported agreement. The Company's counterproposal of 15 July 1980 shows that it "agreed" to the Union's counterproposal of additional half days for a total of nine holidays and the addition of a 10th day in the third year. The Company's notes, however, do not suggest that it "agreed" to the specific language of the holidays clause as written by the Union.

Finally, the judge found at a meeting on 18 April 1980 Interprint provided a list of proposals including a zipper clause. The parties discussed the clause, which provided that the contract contained the entire agreement. Interprint's demand for the clause was never withdrawn. The zipper clause was not included in the contract. It was not specified to the mediator as being one of the items still being open. The judge found, however, that in acceding to all open items on 23 September 1980 the Union had agreed to the insistence of Interprint that this clause be inserted.

In our view the judge has written the contract for the parties. This is contrary to the Board's remedial powers as interpreted by the United States Supreme Court in *H. K. Porter Co. v. NLRB*, 397 U.S. 99 (1970). The Court there held that neither the company nor the union can be bound by a col-

lective-bargaining provision to which it did not agree.

As the Supreme Court held in *NLRB v. American National Insurance Co.*, 343 U.S. 395, 401–402 (1952):

> . . . The National Labor Relations Act is designed to promote industrial peace by encouraging the making of voluntary agreements governing relations between unions and employers. The Act does not compel any agreement whatsoever between employees and employers. Nor does the Act regulate the substantive terms governing wages, hours and working conditions which are incorporated in an agreement. The theory of the Act is that the making of voluntary labor agreements is encouraged by protecting employees' rights to organize for collective bargaining and by imposing on labor and management the mutual obligation to bargain collectively. [Footnotes omitted.]

In this case the judge went too far in drafting the agreement for the parties. The record clearly shows that there was no meeting of the minds on many contractual issues, and therefore the Respondent did not violate Section 8(a)(5) and (1) of the Act when it refused to execute the purported agreement.

ORDER

The complaint is dismissed.

MEMBER DENNIS, concurring in the result.

Because the parties never agreed on significant contract terms, i.e., commencement and termination dates, I find that there was no "agreement" within the meaning of Section 8(d) that the Respondent was obligated to assist in reducing to writing. Accordingly, the Respondent's refusal to execute the collective-bargaining agreement that the Union submitted did not violate Section 8(a)(5). See *Luther Manor Nursing Home*, 270 NLRB 949 fn. 1 (1984); *Mercedes-Benz*, 258 NLRB 803 (1981). It is, therefore, unnecessary to discuss the separate issue of the extent to which the Union's draft contract deviated from the proposals the parties agreed to during negotiations.

DECISION

STATEMENT OF THE CASE

WALTER J. ALPRIN, Administrative Law Judge. The primary issue in this matter is whether Respondent refused to engage in collective bargaining in violation of Section 8(a)(1) and (5) of the National Labor Relations Act by failing since November 5, 1980[1] to execute a collective-bargaining agreement allegedly reached about September 23. The charge was filed March 4, 1981, and the complaint issued April 17, 1981. The case was tried at Philadelphia, Pennsylvania, on December 14 and 15, 1981, and briefs were later submitted by Respondent and the General Counsel.[2]

FINDINGS OF FACT

I. JURISDICTION

The Respondent (Interprint) is a Pennsylvania corporation engaged in the business of printing at Trevose, Pennsylvania. It admits, and I hereby find, that it sold and shipped goods valued in excess of $50,000 in interstate commerce during the past year, and that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. Graphic Arts International Union (the Union) constitutes a labor organization within the meaning of Section 2(5) of the Act.

II. THE NEGOTIATIONS

The Union was certified on February 19 as collective-bargaining representative of

> All lithographic production employees, including employees engaged in camera, stripping, platemaking, and printing press operations, but excluding all other employees, including office clericals, guards and supervisors as defined in the Act.

Between March 12 and September 23 there were 10 bargaining sessions, during which articles agreed upon were initialed on behalf of the Union by Robert J. Finnegan or Edward J. Toff, and on behalf of Interprint by Attorney J. P. Jones. At the first session the Union advised that, although not required by its constitution or bylaws, its practice was to have the employees vote to ratify any contract and that the employees had the final say on whether or not a contract was accepted. It was agreed that as far as possible the parties would first negotiate noneconomic issues before moving to economic issues, and that there would be no complete contract until final agreement was reached on all items.

Various articles were agreed or disagreed to during the negotiations. On July 15, Interprint offered its second counterproposal. At that meeting it agreed that whatever final wage increases were negotiated would be made retroactive to July 1. Its offer at the time was an increase of 25 cents per hour the first year of the contract, 30 cents the second year, and 35 cents the third year. The Union contacted the Federal Mediation and Conciliation Service to ask assistance, and two meetings, one on August 1 with both parties, and one on September 17 with the parties separately, were held with a Federal mediator. At the first meeting the mediator asked which issues were open, and was told they were union shop, checkoff, struck work, chain shop, management security, no transfer of equipment, individual rights of the employees, for-

[1] All dates are in 1980 unless otherwise specified.

[2] The General Counsel's unopposed motion to correct the transcript, dated February 19, 1982, is granted and received in evidence as G.C. Exh. 54.

eign work, agreement continuity, international responsibility, strikes, lock out, grievances, wages, cost of living, night shift, hours of work, overtime, complement of help, layoff, discharge, apprentices, health and welfare, supplemental disability, delinquent liability, and sick and bereavement days. After the last separate meeting on September 17, the mediator told the Union that Interprint was not going to move from its last offer. The Union then, on September 23, held a meeting of bargaining unit employees, and the employees were given an opportunity to vote. There is a testimonial difference as to the information presented to the voters, with Union Representative Toff testifying that "we presented the contract as it was proposed by the Company, you know, their final proposals to the people." Charles Butler, Respondent's sole witness, had been a member of the bargaining unit but later became a higher paid supervisory employee. Butler testified that the specific proposals were not presented. In any event, the bargaining unit voted to accept what they understood to be Interprint's last offer.

Either that night or the next morning, Toff phoned Interprint's attorney, Jones, and informed him that the employees had ratified the agreement, the response to which was "Oh, okay." Toff said that he would put the contract together and mail it out for signature, to which Jones' response was "Fine." Toff then prepared the final contract[3] using articles initialed by both sides, his own notes of issues agreed to, and Interprint's proposals not agreed to by the union during the negotiating sessions. Because of other matters, it took until November 5 to prepare the contract, when it was mailed to Jones, with the following covering letter:

> Enclosed are three contracts for Interprint. Please look them over and if they are correct have them signed by the proper person and return all three copies for signatures, after which a copy will be returned to you.

After more than 2 months with no response, on January 20, 1981, the Union sent a followup letter. Nine days later, Attorney Jones answered as follows:

> This is in reply to your certified letter of January 20, 1981.
>
> It appears as if we have some valid questions concerning whether or not a collective bargaining Agreement was ever reached.
>
> We are in the process of reviewing this with our client and will be in touch with you shortly regarding our position on it.

The Union responded 6 days later, on February 4, 1981, stating

> It is the position of Local 14L that a collective bargaining agreement was reached and ratified by the employees of Interprint, and if we do not receive the signed agreements shortly, we will have to pursue the legal means available to us.

There were no further communications from Interprint, and 1 month later the Union filed its charge.

III. AREAS OF DISPUTE

Many of the provisions of the contract had been initialed by both parties and others have never been contested. The following are all of the contract provisions disputed by Interprint as having been not agreed to, having been left out of the contract, or having been included in the contract in altered form.

1. *Effective Date and Termination Date*: Article 1 of the Contract states:

> This agreement executed and effective as of the lst day of July, 1980 . . . .

Article 33 states:

> This contract shall be effective on the 1st day of July, 1980 and shall terminate on the 30th day of June, 1983.

Effective and termination dates in draft proposals were all left blank. Toff explained that he utilized the agreed dates of wage increases, found in the undisputed Article 7, entitled "Wages," which states:

> Effective July 1, 1980, a twenty-five cents (25¢) per hour increase for each employee.
>
> Effective July 1, 1981, a thirty cents (30¢) per hour increase for each employee.
>
> Effective July 1, 1982, a thirty-five cents (35¢) per hour increase for each employee.

2. *International Union Responsibility: The Union's proposal was as follows:*

> This agreement is subject to the approval of the International President. Such approval does not, however, under any circumstances, make the International responsible for the observance of this contract, or any breach thereof.

The entire provision was left out of the contract and Toff testified:

> I left it out . . . I left it out inadvertently because I just didn't think that the International would sign this contract anyway, and it's out of the final document; but it should be in.

3. *New Machinery and Processes*: As article 15 of the contract, this provision differs from the handwritten notes (G.C. Exh. 29) of what actually was agreed to in that it took certain manning requirement decisions from Interprint and made them subject to binding arbitration. Toff testified that this was a matter of inadvertence on his part, occasioned by not having a copy of the agreed provision when he made up the contract.

4. *Picket Lines*: The provision to which the parties agreed (G.C. Exh. 23) had a handwritten insert of the word "primary," so that a clause referred to "any pri-

[3] It is understood that the issue in the proceeding is whether the document actually was a contract, but for ease of reference it will be referred to herein as a "contract."

mary lawful authorized picket line." The word "primary" was not included in article 18 of the contract.

5. *Seniority:* This union proposal (G.C. Exh. 19) consisted of three single-spaced typed pages of material. Various changes proposed by Respondent (G.C. Exh. 43) primarily related to apprenticeship matters were all included in article 13 of the contract, but for one. One of the six grounds by which employees would cease to hold seniority was originally stated:

> d. Failure to report for work when recalled during a layoff within seven (7) working days, except in case of illness.

During negotiation the words "during a layoff within seven (7) working days" were stricken through, and a clause added: "Provided at least seven days notice is given." (R. Exh. 2, Art. 17, p. 2) This change did not appear in the final contract.

6. *Transfer of Equipment*: Interprint's proposal (G.C. Exh. 25) was:

> The Company agrees that it will not transfer equipment to any other plant or location when such equipment transfer will result in the layoff of bargaining unit employees. This section shall in no way be construed to prevent the sale of equipment even if such sale results in layoffs, but in such event, the rights of the employees will be determined under the seniority provisions of this agreement.

As article 19 of the contract, the words "except to a plant or subsidiary company of Interprint of A.U.S. (Associated Utilities Service)" were added after the words "sale of equipment." Further, the final clause of the original, from the words "but in such event," was left out.

The only explanation for the addition to the agreed provison was Toff's testimony that "I wrote that in there, because I thought that language would be acceptable to me if we inserted that. And it ended up getting into the final contract when it was typed because it was on there. It really doesn't belong in the final contract; it should be taken out of there. There is no explanation for dropping the final clause of the original provision."

7. *Holidays*: The Union made an extensive proposal (G.C. Exh. 41) covering two-thirds of a single-spaced typewritten page. There was no agreement on this clause, but there was discussion (G.C. Exh. 34, second page) resulting in Interprint's agreeing "to union's counterproposal of one-half additional day before Christmas and New Years, for total of nine holidays," and, in the third year of the contract, for "an additional holiday, either day after Thanksgiving or Martin Luther King's birthday."

Article 11 of the contract used the Union's original language, with, in addition, an effective date of July 1, 1980, with no mention of additional one-half days, and with the addition of a 10th day, not including the alternative choice of Martin Luther King's birthday, after July 1, 1982.

8. *Entire Agreement Clause*: At the meeting of April 18, Interprint provided a list of proposals which included a provision that the contract contained the entire agreement between the parties, a so-called zipper clause. The parties discussed the clause, and the demand for it was never withdrawn. However, the clause did not appear in the final form of the contract.

IV. SECOND VOTE

Respondent's sole witness, Butler, was the shop steward during the negotiations. He testified that on November 24, the morning after the vote had been taken, he was approached by three bargaining unit members who felt they had voted too quickly. Butler decided to hold a meeting that afternoon for another vote, and gave oral notice to the unit members but no notice to the Union. Butler testified at one point that the vote was on the contract, and at another point that it was whether or not to retain the union. Under questioning by the Administrative Law Judge he testified it was "a vote as to whether we wanted to accept 90 cents over 3 years or just forget the union, period." After the second vote, Butler phoned Toff, and told him that the employees "had changed their mind about the previous vote that we had the night before."

V. DISCUSSION

Section 8(a)(5) of the Act makes it an unfair labor practice for an employer to "refuse to bargain collectively with the representatives of his employees." Section 8(d) of the Act requires "the execution of a written contract incorporating any agreement reached if requested by either party." It has long been settled that in implementing these statutory provisions "the Board may not, either directly or indirectly, compel concessions or otherwise sit in judgment upon the substantive terms of collective-bargaining agreements."[4] On the other hand, the Board has authority to order the signing of a contract to which the parties have agreed.[5] The central issue in this matter is whether there was a meeting of the minds among the parties to the collective bargaining.

When the Federal mediator was called in, he was told of all the open items to the negotiations. When he reported that Respondent would not change its position, the Union surrendered and accepted all of the Employer's proposals. On being told this on September 23 Respondent raised no objection and agreed that the Union would collect the various clauses into a hard copy of the contract. Throughout the period from late September to early November, while this was being done, Respondent never took the position that the agreement was less than complete.

Respondent then held the contract without comment from about November 5 until January 29, 1981. Then, in answer to a followup letter from the Union, it raised for the first time the issue of "whether or not a collective-bargaining agreement was ever reached." Though promising that it would be "in touch with you shortly regarding our position," Respondent did not contact the Union

[4] *NLRB v. American National Insurance Co.*, 343 U.S. 395, 401 (1952).
[5] *NLRB v. Electra-Food Machinery*, 621 F.2d 956, 958, and cases cited therein (9th Cir. 1960).

prior to the charge being filed a month later on March 4, 1981, after the charge was filed, or after the complaint was issued.

In its answer of April 28, 1981, to the complaint herein, Respondent denied that the particular employees constituted an appropriate bargaining unit, denied that the Union was the exclusive bargaining agent of the specified employees, denied that it had recognized the Union, denied it had engaged in negotiations with the Union, and denied that it had been requested to execute a written contract, in addition of course to denying that it had reached a full agreement with the Union. It also raised an affirmative defense laches. At no time prior to the hearing, some 15 months after it received the contracts from the Union with the invitation to "look them over," did the Respondent specify any alleged differences between the contract it received and what had been agreed to after 6 months of collective bargaining.

The parties participated in a mediation designed to cover all open items of disagreement. The Union capitulated and accepted Respondent's position on all such items. Respondent tacitly agreed from September 23, 1980, until January 29, 1981, that an agreement had been reached, and never particularized any argument that agreement had not been reached until the hearing herein. On all the evidence it is clear that the parties did in fact reach an agreement through collective bargaining.

Though there was a meeting of the minds, the resulting hard copy contract was inartistically or inaccurately drawn. However, it has been said that:

> The purpose of the Act is to achieve industrial stability by encouraging the processes of collective bargaining and the execution of agreed-upon bargaining contracts . . . . The mere fact that (to reflect the terms of the agreement as reached) required some additions or alterations in the agreement submitted does not relieve the parties of the obligation to execute the bargaining contract agreed to. See *International Union of Operating Engineers Local 525, AFL-CIO (Clark Oil & Refining Corp.)*, 185 NLRB 609 (1970).[6]

The Union has admitted its error in failing to include Respondent's proposals regarding international union responsibility, and regarding new machinery and processes. The additions can be made. The single word left out of the clause relating to picket lines is easily inserted, as are the short portions left out of the seniority clause and the transfer of equipment clause. The intent of the holidays clause is clear, and the language can be altered to conform thereto.

The entire agreement clause, or "zipper clause," was not among those specified to the mediator as being open. However, it was a proposal made by Respondent and fully discussed by the Union, and was litigated by the Respondent during the hearing herein. In acceding to all open items on September 23, the Union also agreed to the continued insistence by Interprint that this clause be included in the written contract, and it must be inserted.

There remain for consideration the effective date and the period or termination date of the contract. Generally, the effective date of a contract is the date on which the offer is accepted, unless the agreed terms state otherwise. Here, agreement came with the Union's acceptance on September 23, and except for an agreed retroactivity applying solely to wage increases, there is no other expression of effective date. Therefore, the effective date is September 23.

The termination date is provided by the clear intent of the parties. "Even though the contract may not state in express terms that it is to endure for a definite period, the time mentioned therein may indicate that the parties intended that it shall continue for at least such period."[7] The parties understood that the principal point of the agreement was a wage increase of 90 cents over a 3-year period—25 cents the first, 30 cents the second, and 35 cents the third year. Even the "second vote", hereinafter referred to, was clearly as to this understanding. Thus, we have a contract agreement for a 3-year period measured from the first wage increase. The parties explicitly agreed that the wage provision would be retroactive to July 1, 1980, and the 3-year term intended will expire and the contract terminate on June 30, 1983.

Respondent argues that this case should be governed by the decision of the Board in *Mercedes-Benz, Inc.*, 258 NLRB 803, (1981). In that case six prior contracts had been effective February, and when that date had passed in new contract negotiations a strike took place. The strike was settled a month later, after further negotiations which did not directly concern effective date. The Union erroneously testified the wage increases to have been retroactive, while the Employer correctly insisted that there was no such agreement. The Board found that under these circumstances there had not been a meeting of the minds between the parties, and that there was no contract. The facts of the matter at hand are different. This was the first contract negotiated between the Respondent and the recently certified Union. The parties specifically agreed to retroactivity on wage increases. There was no misunderstanding or disagreement as to an effective date, and the contract came into effect upon the Union's capitulation on all outstanding open issues. In this case there was no disagreement between the parties as would negate the formation of a contract when the offer was accepted.

Finally, the Respondent alleges that, by reason of the "second vote" described above, the Union failed to receive a proper ratification of the proposed contract. As pointed out by the Union, that "second vote" came after the proposed contract had already been accepted and at most could be a unilateral and ineffective act. Of greater importance, the so-called ratification was not necessary to the acceptance of the contract, and the vote was a purely internal union affair having no effect on the validity of the contract. See *Bronson Methodist Hospital*, 223 NLRB 95 (1976); *Pioneer Broadcast Co.*, 202 NLRB 1005, 1008 (1973).

[6] *Trojan Steel Corp.*, 222 NLRB 478, 483 (1976).

[7] 17 Am. Jur., *Contracts* 955–956.

On the foregoing facts and on the entire record, I make the following

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of the Act.

2. The Charging Party is a labor organization within the meaning of the Act.

3. All lithographic production employees, including employees engaged in camera, stripping, platemaking, and printing press operations but excluding all other employees, including office clericals, guards, and supervisors as defined in the Act constitute a unit appropriate for bargaining within the meaning of Section 9(b) of the Act.

4. At all times material herein, the Union has been and continues to be the exclusive representative of the employees in the aforesaid appropriate unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing to execute the collective-bargaining contract agreed to by Respondent and the Union, Respondent violated Section 8(a)(5) and (1) of the Act.

THE REMEDY

It having been found that Respondent has engaged in and is engaging in unfair labor practices in violation of Section 8(a)(1) and (5) of the Act, it will be recommended that Respondent cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

As I have found that Respondent violated its obligation under the Act by refusing to execute the agreement herein, I shall also recommend that Respondent be ordered upon request to sign such an agreement, to comply retroactively with its terms, and to make whole the employees for losses, if any, which they may have suffered by Respondent's refusal to sign such an agreement, in accordance with the formula set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and *Florida Steel Corp.*, 231 NLRB 651 (1977).[8]

[Recommended Order omitted from publication.]

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[8] See also *Isis Plumbing Co.*, 138 NLRB 716.

Edward Cooper Painting, Inc. and Cooper and Cooper Painting, an Alter Ego *and* International Brotherhood of Painters and Allied Trades of the United States and Canada, Local 768, AFL–CIO. Case 9–CA–17245

12 February 1985

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS HUNTER AND DENNIS

On 29 December 1982 Administrative Law Judge James M. Fitzpatrick issued the attached decision. The Respondent filed exceptions and a supporting brief.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings, and conclusions[1] and to adopt the recommended Order as modified.

As stated in the judge's decision, on 4 December 1981 Respondent Edward Cooper Painting, Inc. (Respondent Corporation) petitioned the United States District Court for the Eastern District of Kentucky for relief as a voluntary debtor in bankruptcy under Chapter 11, Title 11, of the United States Code. According to the undisputed representations of the Respondent in its brief in support of exceptions, the debtor-in-possession requested permission to reject under 11 U.S.C. § 365(d)(1) the collective-bargaining agreement entered into between the Union[2] and Respondent Corporation (as a member of the PDCA[3]) effective 1 April 1980 through 31 March 1982.[4] The Supreme Court recently held in *NLRB v. Bildisco & Bildisco*[5] that from the filing of a petition in bankruptcy until formal acceptance the collective-bargaining agreement is not an enforceable contract within the meaning of Section 8(d) of the National Labor Relations Act and that a debtor-in-possession does not commit an unfair labor practice when it unilaterally rejects or modifies a collective-bargaining agreement before formal rejection is approved by the bankruptcy court.[6] The judge's recommended Order would require that Respondent Corporation abide by the terms of the then-existing collective-bargaining agreement from the date of its unlawful abrogation of the contract (1 August 1981) until the expiration of the agreement (31 March 1982). Consistent with the Supreme Court's opinion in *Bildisco*, we modify that recommended Order to require that Respondent Corporation enforce the terms and conditions of the applicable contract only until 4 December 1981, the date on which Respondent Corporation filed its petition for bankruptcy. In all other respects, the recommended Order[7] of the judge is adopted.[8]

Our dissenting colleague states that, because the violation found here preceded the date of the filing of the Chapter 11 bankruptcy proceedings, the Board should adopt the judge's remedy and provide for backpay under the terms of the collective-bargaining agreement even into the period of the bankruptcy proceedings. From a practical standpoint, this has no bearing on the actual backpay sums owing by Respondent Corporation because it had ceased operations prior to filing for bankruptcy. However, although we agree with our colleague's observation that *Bildisco* stated nothing which questioned or disputed the Board's authority to adjudicate prepetition unfair labor practices, our remedy for the prepetition unfair labor practices we find here, limited so as not to affect Respondent Corporation's obligations under the bargaining agreement during the bankruptcy proceedings, accords proper consideration to the effect of *Bildisco* on this case. Our colleague expressly notes that the Court in *Bildisco* emphasized giving primacy to the policy underlying Chapter 11 bankruptcy proceedings to permit the successful rehabilitation of debtors, but nevertheless would impose on the debtor-in-possession the terms of the collective-bargaining agreement in this case, a result clearly inconsistent with this policy.[9] The contractual backpay remedy

[1] In the absence of exceptions, we accept the determination of the judge that following the expiration of the collective-bargaining agreement on 31 March 1982 the Respondent was obligated to bargain in the single-employer unit alleged and found appropriate.

[2] International Brotherhood of Painters and Allied Trades of the United States and Canada, Local 768, AFL–CIO.

[3] The PDCA (Blue Grass Chapter of the Painting and Decorating Contractors of America) is an association of employers engaged in group collective bargaining of which Respondent Corporation was a member at all times material to the issues in this case.

[4] The record does not establish whether the bankruptcy court has granted Respondent Corporation permission to reject the contract.

[5] 104 S.Ct. 1188 (1984).

[6] We are mindful that the Bankruptcy Amendments and Federal Judgeship Act of 1984 Congress enacted 10 July 1984 modifies *Bildisco* and governs a debtor-in-possession's rejection of a collective-bargaining agreement. The statute does not apply, however, to cases such as the instant one in which the bankruptcy petition was filed prior to its enactment. Pub. L. 98–353, § 541, 98 Stat. 333, 390–391 (1984).

[7] In adopting the judge's recommended remedy as revised to reflect our decision herein, we shall also revise the remedy to include that payments be made to the employees' vacation fund.

[8] The record reveals that on 17 May 1982 Edward Cooper as an individual filed a petition for relief as a voluntary debtor in bankruptcy under Chapter 7, Title 11, of the United States Code. There is no evidence that Respondent Partnership, Cooper and Cooper Painting, has been brought within the jurisdiction of either of the bankruptcy proceedings referred to in this Decision and Order. Thus, we adopt the recommended Order of the judge as it applies to Respondent Partnership.

[9] Our dissenting colleague would impose the terms of a bargaining agreement on a respondent in bankruptcy who repudiated the agreement just prior to filing for bankruptcy, but would not impose such terms on a respondent who repudiated the agreement just after filing. Our colleague has not adequately explained how the successful rehabilitation of debtors is accorded paramount weight in the former setting as well as the latter.

we here award fully restores the status quo prior to the filing of the bankruptcy petition. The validity of the contract's repudiation during the term of the bankruptcy and the issue of whether any additional sums are owed employees under the repudiated agreement are matters for the bankruptcy court to decide under bankruptcy law, and the Board's remedy here does not foreclose their consideration in that forum.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Edward Cooper Painting, Inc. and Cooper and Cooper Painting, an alter ego, Lexington, Kentucky, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(b).

"(b) Give effect to the terms of the collective-bargaining agreement entered into between the Respondent and the Union in 1978 for the period 1 April 1978 through 31 March 1980 and as amended 1 April 1980 except that Respondent Corporation's liability under this provision shall terminate as of 4 December 1981, the date on which the Corporation filed its petition for bankruptcy."

2. Substitute the following for paragraph 2(c).

"(c) Reimburse all employees in the bargaining unit, the funds established under the bargaining agreement (excluding the industry advancement fund), and the Union for any losses they may have suffered as a result of the Respondent's abrogation of the collective-bargaining agreement from and after 1 August 1981, with interest, in the manner prescribed in the section of this decision entitled 'The Remedy,' except that Respondent Corporation's liability under this provision shall terminate as of 4 December 1981, the date on which the Corporation filed its petition for bankruptcy."

3. Substitute the attached notice for that of the administrative law judge.

MEMBER HUNTER, dissenting in part.

Contrary to my colleagues, I find no basis in the Supreme Court's opinion in *NLRB v. Bildisco & Bildisco*[1] for terminating the Board's remedies as of the date of the filing of a bankruptcy petition where, as here, the adjudicated violations occurred prior to the filing of the petition.[2] My colleagues are proceeding on a false premise if they believe that the Board must give priority to the Federal bankruptcy statutes regardless of when the unfair labor practice occurred, i.e., even if it was before the filing of the bankruptcy petition. Thus, while *Bildisco* establishes some limitation on the Board's jurisdiction to adjudicate unfair labor practices which occur *after* the date of the bankruptcy petition,[3] it does not establish such a limit on the Board's authority to adjudicate or remedy prepetition unfair labor practices. In fact, the Supreme Court was conspicuously silent about the Board's authority to remedy prepetition unfair labor practices once a bankruptcy petition is filed. I am convinced this is so because the Board's remedy does not constitute an independent adjudication of an unfair labor practice.

In *Bildisco*, the Court held, inter alia, that a debtor-in-possession in a Chapter 11 bankruptcy proceeding does not violate Section 8(a)(5) and (1) and Section 8(d) by unilaterally rejecting or modifying a collective-bargaining agreement between the filing of the bankruptcy petition and formal rejection by the bankruptcy court. Giving primacy to the policy underlying Chapter 11 to permit successful rehabilitation of debtors, the Court concluded that "from the filing of a petition in bankruptcy until formal acceptance, the collective-bargaining agreement is not an enforceable contract within the meaning of NLRA [Section] 8(d)."[4] Once a petition in bankruptcy is filed, it is the bankruptcy court which has the exclusive authority to determine whether rejection of the collective-bargaining agreement should be permitted.[5] Moreover, rejection relates back to the date immediately preceding the filing of the petition, which means that "suit may not be brought against the debtor-in-possession under the collective-bargaining agreement; recovery may be had only through administration of the claim in bankruptcy."[6]

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[1] 104 S.Ct. 1188 (1984)

[2] I would adopt the judge's recommended Order with minor modifications. I agree with the revision of the judge's remedy specified at fn. 7 of the majority's decision to provide for payments to the employees' vacation fund. I further would revise par. 2(b) of the judge's recommended Order to clarify that the collective-bargaining agreement by which the Respondents are to abide is the agreement which was effective 1 April 1980 through 31 March 1982. In addition, I find it unnecessary to pass on the judge's discussion regarding multiemployer bargaining units because a single-employer unit was found appropriate here. Finally, with regard to the violations found against Respondent Partnership, I concur with my colleagues' adoption of the judge's make-whole remedy for the reasons stated herein.

[3] Because the violations found in this case occurred prior to the filing of the petition in bankrupicy, I find it unnecessary to reach the issue of the extent, if any, of the Board's jurisdiction to adjudicate postpetition allegations involving other types of conduct or other sections of the Act.

[4] 104. S.Ct. at 1199.

[5] The Court stated in this regard that, although the bankruptcy court must be persuaded before acting on a request to modify or reject a collective-bargaining agreement that "reasonable efforts to negotiate a voluntary modification have been made and are not likely to produce a prompt and satisfactory solution," the bankruptcy court does not have to determine whether the parties have bargained to impasse or committed any unfair labor practices since the filing of the petition. 104 S.Ct. at 1196–97.

[6] 104 S.Ct. at 1198–99.

I therefore agree with my colleagues that under *Bildisco* the critical date for determining whether a violation of the Act has occurred is the date the bankruptcy petition is filed. I note, however, that the Court in *Bildisco* stated nothing which questioned or disputed the Board's authority to adjudicate and/or remedy prepetition unfair labor practices. Thus, it is undisputed that the Board has the exclusive authority to determine whether alleged unfair labor practices have occurred prior to the filing of the bankruptcy petition. If the Board is to adjudicate prepetition unfair labor practices—and if such an adjudication is to have any meaning—it follows that the Board should also be able to remedy them, with the understanding that the Board's remedy may be reviewed by the bankruptcy court as a creditor's claim.[7]

Further, the Supreme Court's opinion in *Bildisco* left undisturbed the Board's authority under Section 10(c) of the Act to require a person who has been found to have engaged in unfair labor practices to cease and desist therefrom and "to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act." As the Supreme Court held in *Nathanson v. NLRB*,[8] the fixing of monetary remedies is an administrative function confided solely to the Board.[9] Moreover, the authority to modify or set aside a remedial order rests exclusively with the Board and the appropriate reviewing Federal courts.[10] The Board will, of course, take changed circumstances into consideration in subsequent compliance or contempt proceedings,[11] but it is the bankruptcy court which will examine the allowability of monetary claims resulting from Board orders and determine their relative priority to other creditors' claims.[12]

Accordingly, where, as here, the violations have occurred prior to the filing of the bankruptcy petition, there is no reason—logical, statutory, or precedential—for the Board to cut off its normal remedial provisions as of the date of the petition. To the contrary, by cutting off the remedy as of the date of the bankruptcy petition, my colleagues are necessarily foreclosing the bankruptcy court from adjudicating the bankruptcy and determining the allowability and priority of the Board's monetary claims, and, most importantly here, whether to allow the voiding or modifying of the contract. Such usurpation of the bankruptcy court's authority is inconsistent with the Court's attempt in *Bildisco* to accommodate the competing policies of the NLRA and the Bankruptcy Code. I further submit that such action by the Board goes further than the Court's holding.

The majority, responding to my position, states that I have "not adequately explained how the successful rehabilitation of debtors is accorded paramount weight" if I would impose the terms of a collective-bargaining agreement on a respondent in bankruptcy who repudiated such contract *before* the filing of the bankruptcy petition, when I would not impose such a remedy on a respondent who repudiated the contract *after* the filing of the petition. First of all, the critical difference in the question, as posed by the majority, is that in the one case the respondent has committed an unfair labor practice and in the other case it has not; i.e., if a respondent has repudiated the contract prior to the filing of the bankruptcy petition, it has committed a classic violation of Section 8(a)(5) and (1) which must be remedied accordingly. However, under *Bildisco*, if a respondent repudiates the contract after the filing of the petition, it does not commit an unfair labor practice. The Supreme Court so held *without* disturbing the Board's prepetition jurisdiction, thus making it clear that the policies underlying Chapter 11 should be accorded primacy over the NLRA only *after* the filing of the bankruptcy petition. My colleagues misunderstand *Bildisco* when they interpret it otherwise.

I further submit, contrary to the majority, that the traditional make-whole remedy which I favor for prepetition unfair labor practices does not in fact impose the terms of the collective-bargaining agreement on the debtor-in-possession. As I have indicated above, if a respondent is involved in Chapter 11 proceedings, then the Board's remedy becomes a creditor's claim like any other, i.e., it is a monetary claim which may or may not be allowed by the bankruptcy court.

Finally, the majority insists that by cutting off the remedy as of the date of the bankruptcy petition they do not, as I suggest, foreclose consideration by the bankruptcy court of issues relating to the appropriateness of rejection of the contract or to the determination of sums owed under the rejected contract. I remain convinced, however, that by cutting off the remedy as of the filing of the petition, the majority is effectively determining that the contract is properly rejected as of that date, i.e., before the bankruptcy court has had a chance

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[7] My colleagues do not dispute that the Board traditionally has imposed full remedies for prepetition unfair labor practices with no qualifications imposed because of subsequently filed bankruptcy proceedings.

[8] 344 U.S. 25 (1952).

[9] 344 U.S. at 29.

[10] See Sec. 10(e) of the Act.

[11] *Ahrens Aircraft v. NLRB*, 703 F.2d 23 (1st Cir. 1983), enfg. 259 NLRB 839 (1981). See also *Southport Petroleum Co. v. NLRB*, 315 U.S. 100, 106 (1942).

[12] In this regard, I note that the Regional Director filed with the bankruptcy court a proof of multiple claims for bankruptcy amounts due to 1 June 1982.

to make that determination itself as it has the exclusive authority to do.[13]

Accordingly, in the instant case, because all of the violations found preceded the filing of the bankruptcy petition by Respondent Corporation on 4 December 1981, I dissent from the majority's failure to order a traditional make-whole remedy.

[13] I find it interesting that my colleagues have not accounted for the possibility that the bankruptcy court may dismiss the bankruptcy petition. Would they then allow the charging party to petition the Board for an extension of the remedy? That would seem consistent, however unpalatable, with their view.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT terminate employees because they belong to a union or desire to work under union conditions.

WE WILL NOT withdraw recognition from International Brotherhood of Painters and Allied Trades of the United States and Canada, Local 768, AFL–CIO as the duly designated representative of our employees in a unit appropriate for collective bargaining.

WE WILL NOT abrogate our collective-bargaining agreement with International Brotherhood of Painters and Allied Trades of the United States and Canada, Local 768, AFL–CIO.

WE WILL NOT in any other manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer Walter Young Jr. immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, and WE WILL make him whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest.

WE WILL notify him that we have removed from our files any reference to his discharge and that the discharge will not be used against him in any way.

WE WILL give effect to the terms of our most recent contract with the Union, except that the liability of Edward Cooper Painting, Inc. under that agreement shall terminate as of 4 December 1981, the date on which the Corporation filed its petition for bankruptcy.

WE WILL make whole all employees in the bargaining unit and the Union for lost dues and for any losses of wages or health benefit coverage as the result of our abrogating the terms of the agreement, with interest.

WE WILL make whole our employees by paying to the various fringe benefit funds, except the industry advancement fund, the contributions which should have been made pursuant to the provisions of the above contract.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit:

> All employees engaged in painting employed by Edward Cooper Painting, Inc. or Cooper and Cooper Painting at and out of its Lexington, Kentucky facility, but excluding all office clerical employees, guards, professional employees and supervisors as defined in the Act.

EDWARD COOPER PAINTING, INC. AND COOPER AND COOPER PAINTING, AN ALTER EGO

DECISION

STATEMENT OF THE CASE

JAMES M. FITZPATRICK, Administrative Law Judge. In this case a union painting contractor in financial distress attempts to escape collective-bargaining obligations by terminating the union contract, hiring nonunion employeees, changing from a corporate enterprise to a partnership, and seeking voluntary bankruptcy for the Corporation and himself personally. For the reasons set out below, I find that the Corporation and the Partnership committed unfair labor practices in not dealing with the Union and in terminating the employment of a union member.

This proceeding originated with unfair labor practice charges filed August 7, 1981,[1] (and amended August 11) by International Brotherhood of Painters and Allied Trades of the United States and Canada, Local 768, AFL–CIO (the Union), against Edward Cooper Painting, Inc. (Respondent Corporation). A complaint based on the charges issued September 14 (and was amended July 13, 1982), alleging that the Corporation and its alter ego, a partnership named Cooper and Cooper Painting[2] (Respondent Partnership, and with the Corporation collectively referred to as Respondent), had committed unfair labor practices forbidden by Section 8(a)(1), (3), and (5) of the National Labor Relations Act (the Act). The prin-

[1] All dates herein are in 1981 unless otherwise indicated.
[2] The name appears as amended at the hearing.

cipal issues are (a) whether in late July Respondent constructively discharged David Young Jr. in violation of Section 8(a)(3), (b) whether as of August 1 Respondent unlawfully reneged on a collective-bargaining agreement with the Union, (c) whether about the same time Respondent unlawfully withdrew from group bargaining with the Union, (d) whether subsequent to August 1 Respondent remained bound to the terms of the existing collective-bargaining agreement with the Union, (e) whether the next successive collective-bargaining agreement between the group and the Union, effective April 1, 1982, is binding on Respondent, and (f) whether Respondent's precarious financial condition justified abandonment of the collective-bargaining agreement, group bargaining, and recognition of the Union. The case was heard at Lexington, Kentucky, on July 13 and 14, 1982.

At the opening of the hearing Respondent sought a stay of these proceedings, contending the Board lacks jurisdiction because Respondent, as a debtor-in-possession under the bankruptcy laws, is a different entity from the prebankruptcy company, not party to any collective-bargaining agreements not affirmatively assumed, and in any case, subject to the jurisdiction of the bankruptcy court rather than the Board. Respondent reiterated its contentions in its posthearing brief. Having reserved ruling on the motion, I now conclude that the Board has primary jurisdiction over questions of unfair labor practices, including questions involving parties before the bankruptcy courts, and that findings respecting unfair labor practice issues should not be deferred because a respondent in a Board proceeding is also a petitioner in the bankruptcy courts. *Nathanson, Trustee v. NLRB*, 344 U.S. 25, 29 (1952).

Based on the entire record, including my observation of the witnesses and consideration of the briefs of the General Counsel and Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Blue Grass Chapter of the Painting and Decorating Contractors of America (PDCA) is an organization of painting contractors engaged in group collective bargaining with the Union which represents their employees. Member employers of PDCA annually perform services valued in excess of $50,000 in States other than the State in which they are located.

Respondent Corporation, a Kentucky corporation, has maintained a place of business near Lexington, Kentucky, and has been engaged in the Lexington area as a painting contractor, particularly in commercial and industrial painting. Since its inception in late 1981 Respondent Partnership has similarly been engaged in business. At times material to the issues in this case, Respondent Corporation has been a member of PDCA. It is undisputed that Respondent Corporation and Respondent Partnership are employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Union and Respondent*

The Union is a labor organization within the meaning of Section 2(5) of the Act. Prior to the hearing, as detailed hereinafter, it has represented employees of Respondent Corporation. One issue presented here is whether such representation continues and includes employees of Respondent Partnership. The General Counsel alleges, Respondent admits, and I find that the following describes a unit appropriate for purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All employees engaged in painting employed by Respondent at and out of its Lexington, Kentucky facility, but excluding all office clerical employees, guards, professional employees and supervisors as defined in the Act.

A considerable number of years ago Edward Cooper as an individual began working as a journeyman painter employed at various times by B. L. Raden and Son, Inc. and Norvell and Blakeman, two of the three current members of PDCA. He was a member of the Union and at times served on the union negotiating committee in collective bargaining with PDCA. Around 1971, the exact time not being apparent in the record, he went into business for himself and at some point formed Respondent Corporation of which he is sole stockholder, president, and secretary and treasurer. The Corporation employed a small crew of painters, the number varying from a low of one to a high of seven and included his son William David Cooper who, by the time of the events involved here, functioned as working foreman of the crew. In this capacity the son held no corporate stock, had no access to corporate records, made no business decisions, and, like the other workmen, received an hourly wage, although at a higher rate. All decisions for the Corporation were made by Edward Cooper.

It is not clear precisely when Respondent began business nor when the Corporation was formed. The evidence indicates, and I find, that from the time Respondent entered into business until August 1, 1981, it operated as a union enterprise. In the early 1970s Edward Cooper individually signed a collective-bargaining agreement with the Union as an independent contractor (not through PDCA) and continued to be an independent signatory to subsequent union contracts until he joined PDCA around 1978. These agreements were his adoption of agreements negotiated between PDCA and the Union. The earliest Cooper agreement received into evidence, which covered the period April 1, 1975, through March 31, 1976, was the PDCA/union contract of that time signed individually by Edward Cooper. Cooper, apparently as an individual, joined PDCA in 1978 and as a member of that association participated in negotiations with the Union of the contract for the period April 1, 1978, through March 31, 1980. In the back of that contract "Edward Cooper" is listed as one of the contracting members of PDCA. He also participated in negotiating the next agreement covering the period April 1,

1980, through March 31, 1982. He did not participate in the negotiations which resulted in the current PDCA/union agreement covering the period April 3, 1982, through March 31, 1983.

B. *The IBM Subcontracting Policy*

International Business Machines (IBM) is one of the important customers of industrial painting contractors in the Lexington vicinity. Since 1971 or 1972 Respondent has relied heavily on maintenance contracts let by IBM. Historically, IBM's business policy respecting maintenance painting work had been to contract only with union contractors which included members of PDCA. In the latter part of May 1981 IBM announced a change in policy in that in the future it would invite bids for maintenance painting from both union and nonunion contractors. The effect of this change was immediate and traumatic for union contractors. Nonunion contractors underbid them and they no longer obtained the amount of work they had previously. The impact of the change on Respondent was even greater. As the smallest unionized industrial painting contractor in the area, Respondent experienced difficulty competing with the larger union contractors and frequently was in arrears in its financial obligations to the Union and the various recipient funds provided for in the collective-bargaining agreement. Respondent Corporation borrowed heavily in order to meet these obligations and Edward Cooper mortgaged his home to obtain funds for that purpose. With the change in IBM policy, Respondent's business fell off drastically. As Edward Cooper testified, he was going broke.

C. *Respondent's Efforts to Survive*

When Respondent's drop in business reached the point in July when it was employing only one painter part time, Edward Cooper decided to change from a union to a nonunion operation. As he testified without contradiction, Respondent had difficulty competing with the larger contractors; the depressed state of the economy made it increasingly difficult to obtain contracts justifying a union wage scale; the Corporation's credit was exhausted; he had mortgaged his residence in order to meet the payroll and payments called for under the collective-bargaining agreement and, at times, was unable to draw pay for his own work. Interest rates on outstanding loans were so high that Respondent could pay only interest and could make no payments on principal. He testified he ultimately lost his home. By the first week of July his working crew was down to three painters which, I infer, included his son who was a working foreman, and they were working only irregularly. The last rank-and-file employee was Walter Young Jr., recording secretary of the Union, son of Union Business Representative Douglas Young, and an employee of Respondent since 1977. Young testified that work had dropped off in July, and that on July 23 and 24, his last days of work, he worked only 1-1/2 to 2 hours each day. On July 24 Edward Cooper took decisive action by writing the following letter to the Union:

> Business Representative
> Painters Local #768
>
> Mr. Doug Young
> 348 Peach Tree Road
> Lexington, Ky.
>
> Doug,
>
> Please be advised as of August 1, 1981 we wish to have our name removed as signatory to our agreement. This is to terminate our agreement.
>
> Through the years our relationship has been very harmonious. I deeply regret that circumstances have caused me to make this grave decision.
>
> Sincerely,
> Ed Cooper

The Union did not immediately learn of this letter because Young was away and did not return until the end of the month.

The practice in the trade had been for employers to call employees when they were needed for work on a job and for employees who were not called to call their employer to inquire if work was available. In the days following his last days of work, Walter Young Jr., having received no calls from the Coopers, called David Cooper on July 29 to ask for work at IBM. David told him he did not think he would have any work for quite a while. Young then asked if he was telling him he should find something else and David Cooper answered, "Yes." Later the same day Edward Cooper telephoned Walter Young at home, telling him he did not think he would be doing any more union work and was sorry about it, that if he had work at a later date, maybe Young could come back to work or do subcontracting or something. Young replied that, due to his position in the Union, as well as his father's, he did not think it was possible under any conditions. Cooper stated that he still had some union work but he did not know how he was going to do it or anything right then. According to him, he did honor these unspecified contracts which were entered into while the Company was operating under union conditions and did complete them under union conditions by paying employees union scale and making appropriate contributions to the union funds. According to him, some of this work under "union conditions" continued after August 1, but by about November 1 Respondent was no longer operating under union conditions on any work. Edward Cooper testified credibly and I find that through the last part of July Respondent had no work to perform. However, in early August Respondent obtained a time and materials contract from IBM.

After the telephone conversation between Edward Cooper and Walter Young Jr. at the end of July, Young did not again work for Respondent, nor did he seek to. The Coopers did not in so many words discharge Young. They simply did not have any work to offer him at the time and Edward Cooper indicated he would give him employment in the future if he had work. But he made it clear that Respondent no longer would operate as a unionized enterprise. With that condition, both understood that Young would not accept further employment with Respondent. As found hereinafter, Respondent continued to be legally bound to the collective-bar-

gaining agreement. Respondent's indicated refusal to continue to employ Young under those assured conditions when work became available constituted a discharge in violation of Section 8(a)(3) and (1) of the Act. *Marquis Elevator Co.*, 217 NLRB 461 (1975).

As already noted, union officials first read Cooper's July 24 letter about July 30. A few days thereafter, I infer during the week of August 3, Cooper was seen working at IBM with employees who were not union members. Upon learning this, Business Representative Walter Young sent word to Edward Cooper to meet him at a service station near IBM. When they met, Young explained that the notification Cooper had sent to the Union was not the proper procedure. He did not indicate what was the proper procedure in the circumstances. Cooper then described to Young his financial problems, to which Young responded that he was going about it in the wrong way. Cooper said that he could not help it, that he was low on finances, he had to make a change and he felt the notice he had given was okay. Young advised him that he was creating problems for both sides, that the Union would have to protest and would file unfair labor practice charges with the NLRB. He asked Cooper to abide by the collective-bargaining agreement but Cooper said he could no longer do so. The meeting ended without the problem being resolved. On August 7 the Union filed the charges which gave rise to this proceeding and on the following Monday, August 10, began picketing in front of the IBM plant to protest Respondent's unfair labor practices of terminating union employees, employing nonunion employees, and lowering wages below the scale set in the collective-bargaining agreement.

In effect, Cooper also withdrew Respondent from PDCA when he sent his July 24 letter to the Union. Although he did not specifically advise PDCA that Respondent was withdrawing from the association, PDCA Secretary Carl Radden received a copy of the July 24 letter to the Union. Around that same time Respondent ceased being a member by not paying dues, there being no prescribed protocol for terminating membership.

The July 24 letter to the Union was a forthright rejection of Respondent's collective-bargaining obligations. Respondent thereby reneged on the balance of the contract which by its own terms ran through March 31, 1982, and "from year to year thereafter unless either party shall serve written notice of their desire to alter, modify or terminate the Agreement by giving such written notice to the other party not less than sixty (60) calendar days prior to any expiration date of the Agreement."[3] Respondent's letter was more than 60 days prior to the expiration date. I find that the July 24 letter was within the prescribed notice period for terminating the then existing contract. However, it did not and, absent the consent of the other contracting party, could not operate to foreshorten the agreed-upon duration of that agreement. The July 24 letter was soon followed by Respondent's nonunion operations in early August in blatant violation of the contract. In their conversation at that time Business Representative Young urged Cooper to honor the contract, noting he had not used the proper procedure, that he was going about it the wrong way, and was creating problems for both sides. Cooper said he had no alternative because of his financial dilemma. But the availability of special negotiations in view of the circumstances was not suggested by either, although Young, who initiated the meeting, hinted at alternatives, and the option of negotiation must have been apparent to both. Apparently the only course which Cooper considered was the nonunion operation already launched, assertedly for financial reasons. The only alternative specifically voiced by Young, even considering Respondent's financial plight, was adherence to existing contract terms. In sum, after Respondent took the initiative in prematurely terminating the agreement, the Union presented Cooper with the opportunity, but did not press for, negotiations, an opportunity which Respondent let pass. As the party interested in change, it was Respondent's responsibility to seek a solution compatible with its bargaining obligations. Cooper failed to do so. He was not entitled to presume that an effort to bargain about Respondent's financial dilemma would have been futile. So far as this record shows, he never specifically asked the Union for relief.

I find that Respondent, by its July 24 letter to the Union terminating the bargaining relationship as of August 1, followed by its unilateral imposition of nonunion working conditions and its failures to abide by the terms of the collective-bargaining agreement then in effect, failed to bargain collectively with the Union as required by Section 8(d) of the Act and thereby committed unfair labor practices proscribed by Section 8(a)(5) and (1) of the Act. *Marquis Elevator Co.*, supra.

By this conduct Respondent categorically refused to further recognize or bargain with the Union whether through group bargaining or as an individual employer. Cf. *Spun-Jee Corp.*, 171 NLRB 557 (1968); *U.S. Lingerie Corp.*, 170 NLRB 750 (1968). The General Counsel views Respondent's conduct as an untimely effort to withdraw from group bargaining, but that approach seems myopic. Cooper turned his back on any kind of bargaining. The abandonment of group bargaining is, therefore, immaterial to the finding of a violation of Section 8(a)(5). However, it does bear on the question of the continuing agency of PDCA to bind Respondent to the successor agreement. The General Counsel contends such agency continues and Respondent is now bound to the present group contract with the Union in the negotiation of which Respondent did not participate. Even though I find Respondent's obligation to bargain with the Union on request continues, I disagree that it is now bound to the terms of the current PDCA/union agreement.

The July 24 letter, although it failed to terminate the existing agreement on August 1 as Cooper intended, did serve to trigger termination on March 31, 1982, the anniversary date, pursuant to article X, section 1, of that agreement, and for that purpose was timely notice of

[3] The PDCA/union contract which followed thereafter, negotiated to go into effect April 1, 1982, limited this notice period to 15 days, that is, not less than 60 nor more than 75 days prior to the expiration date of the contract.

intent to terminate. Withdrawal from group bargaining was a necessary consequence of the letter. In *Retail Associates, Inc.*, 120 NLRB 388, 393–395 (1958), the Board, in announcing its standards for such withdrawal, noted that the right to withdraw is not unfettered and is limited by reasonable controls as to the time and manner of withdrawal. The intention to withdraw must be unequivocal, and exercised at an appropriate time. In the present matter Respondent's letter of July 24, a copy of which was provided to PDCA, together with Respondent's operation of a nonunion enterprise and its de facto resignation from PDCA by nonpayment of dues, unequivocally expressed an intention to permanently abandon bargaining through PDCA. Further, the timing of this abandonment satisfies the Board standard in view of the lack of any PDCA or contract requirements limiting advance withdrawal, the apparent willingness of Carl Radden, secretary and principal official of PDCA, to allow Respondent to drop out, and the absence of any pending negotiations at the time of withdrawal. *Retail Associates* also requires good faith of the withdrawing party, which Respondent cannot claim, Cooper having no intention of bargaining with the Union on any basis. Thus, the question of whether Respondent now remains bound by group bargaining, after termination of the prior union contract pursuant to the terms thereof and Respondent's withdrawal from group bargaining, seems to turn on the significance of Respondent's lack of a good-faith intent to continue bargaining as a single employer.

In *Retail Associates* the Board underscored the importance of stability in bargaining units. The Board has also long considered single employer units as well as multiemployer units to be appropriate for bargaining. In the present matter the bargaining unit alleged and admitted to be appropriate is a single-employer unit.[4] The description of that unit is part of the frame within which this case has been litigated. I find the alleged unit is appropriate. Additional circumstances for consideration are Respondent's history of financial difficulties, Respondent's current status before the bankruptcy court noted hereinafter, and whether, as a matter of labor relations policy, these matters are better addressed in group or in single-employer bargaining. Considering the above factors and, in particular, the time lapse between Respondent's withdrawal and the deadline designated in the contract for modification or termination, I conclude that, with the expiration of that agreement, Respondent ceased to be contractually bound and, therefore, is not now bound by the new agreement negotiated between PDCA and the Union for the period April 1, 1982, through March 31, 1983. I conclude that Respondent's duty to bargain subsequent to August 1, 1981, can be met by either multi- or single-employer bargaining. In this connection, it may be noted that PDCA has considered Respondent to be out of its bargaining group, apparently since August 1981. For its part, the Union has not specifically made a point of Respondent's abandonment of PDCA representation. Union charges which initiated these proceedings in August 1981 are aimed at cancellation of the contract rather than escape from group bargaining. Similarly, participation in this litigation has been in the context of the bargaining duties asserted in the complaint which, as noted above, are in terms of a single-employer unit consisting of Respondent's employees. By way of posthearing brief the General Counsel has shifted theory to include withdrawal from PDCA in the claimed violation and to seek a remedial order requiring Respondent to abide by the successor PDCA/union agreement effective April 1, 1982, which agreement differs from its predecessor. With matters in this posture, and considering that both the multi- and single-employer unit are appropriate, and that Respondent's withdrawal from PDCA occurred many months prior to negotiation of the successor contract and necessarily had less adverse impact on the stability of the multibargaining unit than if it had been attempted during negotiations and for that reason had been untimely,[5] I conclude that Respondent is obligated to bargain in the single-employer unit alleged and found appropriate herein even though it did not in good faith contemplate such bargaining when it withdrew recognition as of August 1, 1981. I am further constrained to so hold because it seems to me that Respondent's lack of good faith from August 1, 1981, until now has little bearing on the question of whether single- or multiemployer bargaining is the preferable tool for protecting Respondent's employees, given the particular economic circumstances presented here. See *J. D. Candler Roofing Co.*, 158 NLRB 341 (1981).

D. *Formation of the Partnership*

As already noted, Edward Cooper is the sole stockholder and officer of Respondent Corporation and personally has made all business decisions for that entity. It is a one-man corporation. After August 1, as noted above, Respondent resumed working at IBM, apparently in the same business format as before. Although some of Edward Cooper's testimony suggests he was operating as an individual, it is clear the Corporation was not dissolved. The name remained the same. Edward Cooper continued as before, using his son as a foreman and employing several painters to perform the work. He indicated that on occasion he himself worked with his hands, as did his son, but I infer that the occasions on which Edward Cooper did so were infrequent, and he continued as the head of the enterprise.

Formation of Respondent Partnership did not come about suddenly. The Coopers, father and son, talked

[4] This uncontroverted portion of the complaint reads as follows:

The following employees of Respondent constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All employees engaged in painting employed by Respondent at and out of its Lexington, Kentucky facility, but excluding all office clerical employees, guards, professional employees and supervisors as defined in the Act.

[5] As noted in *Retail Associates*, supra at 395, "the timing of an attempted withdrawal from a multiemployer bargaining unit, as Board cases show, is an important lever of control in the sound discretion of the Board to ensure stability of such bargaining relationships. We would accordingly refuse to permit the withdrawal of an employer or a union from a duly established multiemployer bargaining unit, except upon adequate written notice given prior to the date set by the contract for modification, or to the agreed-upon date to begin the multiemployer negotiations."

about a partnership about the time of the July 24 letter to the Union but they formed the partnership much later. David Cooper placed the actual formation in November 1981. Edward Cooper did not testify as to the time the Partnership was formed other than to say it was subsequent to his notice to the Union. On the other hand, he testified that the Corporation took on no new business after August 1 and only concerned itself with completing preexisting contracts. Yet it is apparent that immediately after August 1 Respondent was engaged in performing newly acquired work at IBM, hired nonunion painters to perform the work, and used David Cooper as foreman to supervise them. In these circumstances, I do not credit Edward Cooper's testimony that the Corporation performed no new work after August 1. I find it continued in business with both old and new work until formation of the partnership in November. He testified he decided on a partnership with his son at a time when he had no business but felt he might get some, and that he started a new operation in order to make a living, both of them then working with their hands. The only time at which the evidence in the record indicates Respondent was without business was the end of July. In early August new business developed and there is no specific evidence indicating a total lack of business after that.

The one aspect in which Respondent's operation differed subsequent to its July 24 letter was its substitution of nonunion employees for union employees. The same type of painting work continued to be performed. Work at IBM continued. The same office and telephone were continued. The same office secretary was employed. David Cooper continued as foreman and Edward Cooper continued as head of the operation.

Change in managerial structure of the enterprise occurred only when the Partnership was formed in November. Prior thereto David Cooper had no participation in business decisions, had no access to the books and records, and was paid an hourly wage. Since formation of the Partnership he participates in partnership decisions, hires employees, writes checks on partnership bank accounts, buys materials with both check and cash, shares in profits on a basis of 60 percent to his father and 40 percent to himself, has access to the books and records, and supervises work on the jobs, working with tools himself when that is necessary. He also signs the payroll, assists in estimating jobs, and is privy to all expenditures. He now draws a salary rather than an hourly wage as previously.

The Partnership continues the business previously carried on by Respondent Corporation, including work at IBM. Neither the Corporation nor the Partnership is a member of PDCA. Edward Cooper testified that the operation of the enterprise continued in this same manner at the time of the hearing herein. On November 10 he informed Harry Sammons, the contracting administrator at IBM, of the formation of Respondent Partnership. He confirmed this the same day in a letter to Sammons on Respondent Corporation's letterhead which read as follows:

> Mr. Sammons:
>
> In reference to our phone conversation on 11-10-81, we submit the following information.
>
> Beginning 11-17-81 we have formed a new company under the name Cooper & Cooper Painting which will be operated as a partnership. The principal stockholders will be Edward Cooper as President and William Cooper (my son) as secretary. All new business beginning that date should be directed to Cooper & Cooper Painting.
>
> Edward Cooper Painting Inc. will terminate as of 11-17-81.
>
> We now have one contract PS81-6358 and PS81-6599 which will be completed by and billed by Edward Cooper Painting Inc. Any future orders that may be forth coming should be directed to Cooper & Cooper Painting Inc.
>
> Sincerely,
>
> Edward Cooper
> President

The complaint alleges that Respondent Partnership was established as a subordinate instrument and a disguised continuation of Respondent Corporation and, further, that the Corporation and Partnership are alter egos and a single employer.[6] I agree. I base this on the continuing role of Edward Cooper as the major managerial figure in both, the continuing operation of the same business from the same location, performing the same sort of work for the same class of customers and for one specific customer in particular, IBM. David Cooper as a partner continues to perform all of the functions he performed under the Corporation with the addition of the greater managerial functions noted above. The one office employee remains the same and it is at least inferrable that the working painters remain substantially the same. In this latter connection, it should be noted that, although Respondent Corporation ceased employing union painters at the end of July and a complete changeover to nonunion painters occurred in early August, there is no evidence respecting turnover in the staff from that point forward. In the circumstances the probabilities are, and I find, that Respondent continued to use substantially the same group of employees after formation of the Partnership. Being a continuation of the same enterprise, the Partnership is, for labor relations purposes, legally obligated to the same extent as the Corporation, including the proscriptions of Section 8(a)(1), (3), and (5) of the Act. *Century Printing Co.*; 242 NLRB 659, 666-667 (1967).

E. *The Bankruptcy Proceeding*

On December 4 Respondent Corporation, over the signature of Edward Cooper as president, petitioned the United States District Court for the Eastern District of Kentucky for relief as a voluntary debtor in bankruptcy under Chapter 11, Title 11 of the United States Code. That matter is now pending. On May 28, 1982, the

[6] The General also asserts that the Partnership is a successor to the Corporation but it is unnecessary to treat that question because it is subsumed in the alter ego finding.

Board's Regional Director for Region 9 filed with the court a proof of multiple claims totaling $120,296 for wages, salaries, or commissions covering claims of backpay due employees to June 1, 1982. On June 11, 1982, the Corporation as debtor-in-possession filed with the court its objection to the Board's proof of claim. On May 17, 1982, Edward Cooper (under the name Henry Edward Cooper) as an individual filed a petition in the same court for relief as a voluntary debtor in bankruptcy under Chapter 7, Title 11 of the United States Code. That proceeding is also pending.

III. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The unfair labor practices of Respondent set forth in section II, above, occurring in connection with the operations described in section I, above, have a close and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

CONCLUSIONS OF LAW

1. PDCA (Blue Grass Chapter of Painting and Decorating Contractors of America) is an association of employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act which, on behalf of those employers, bargains collectively with various labor organizations, including the Union herein.

2. Respondent Corporation (Edward Cooper Painting, Inc.) and Respondent Partnership (Cooper and Cooper Painting) are employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

3. Respondent Corporation and Respondent Partnership (collectively referred to herein as Respondent) are alter egos and a single employer within the meaning of the Act.

4. The Union is a labor organization within the meaning of Section 2(5) of the Act.

5. In terminating the employment after August 1, 1981, of Walter Young Jr., and in failing to employ him thereafter when work became available, Respondent discriminated against him because of his union affiliation, discouraged membership in the Union, and engaged in unfair labor practices proscribed by Section 8(a)(3) and (1) of the Act.

6. All Respondent's employees engaged in painting at and out of its Lexington, Kentucky facility, but excluding all office clerical employees, guards, professional employees and supervisors as defined in the Act, constitute a unit appropriate for collective bargaining within the meaning of Section 9(b) of the Act.

7. At all material times the Union, by virtue of Section 9(a) of the Act, has been the exclusive collective-bargaining representative of employees in the unit described above.

8. On July 24, 1981, Respondent withdrew recognition of the Union as the exclusive collective-bargaining representative of the employees in the unit described above and since then has failed and refused to so recognize and bargain with the Union or to adhere to the terms of the collective-bargaining agreement with the Union then in effect. Respondent thereby failed and refused, and is failing and refusing, to bargain collectively in good faith with the Union and has been, and is, engaging in unfair labor practices proscribed by Section 8(a)(5) and (1) of the Act.

9. The above unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent violated Section 8(a)(3), (5), and (1) of the Act, I recommend that it be ordered to cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act. I recommend that Respondent be ordered to offer Walter Young Jr. immediate and full reinstatement to his former position or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or other benefits and privileges, and that he be made whole for any loss of earnings incurred as a result of being terminated as of August 1, 1981, with backpay to be computed as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and with interest as set forth in *Isis Plumbing Co.*, 138 NLRB 716 (1962), and *Florida Steel Corp.*, 231 NLRB 651 (1977). I further recommend that Respondent be required to preserve and make available to Board agents, on request, all pertinent records and data necessary in analyzing and determining whatever backpay or other amounts may be due, and further, that Respondent be required to expunge from its records or files any reference to the termination of David Young Jr.

Inasmuch as Respondent withdrew recognition from the Union as of August 1, 1981, and abrogated the then existing collective-bargaining agreement, I shall order that it cease its refusal to recognize the Union, that it abide by that agreement, and that it take certain affirmative action to recognize and bargain with the Union and honor that contract. I shall order Respondent to recognize the Union as the collective-bargaining representative of the employees in the bargainng unit described above, to rescind or revoke its unilateral abandonment of the terms and conditions of employment provided for in that agreement and to enforce the terms and conditions thereof retroactively to August 1, 1981, until March 31, 1982, the date on which that agreement by its terms expired as a result of the notice of termination by Respondent to the Union on July 24, 1981. I shall also order Respondent, on request, to bargain in good faith with the Union as the collective-bargaining representative of its employees.

Respondent will be ordered to make whole the employees in the appropriate unit found above for any loss of wages or other benefits they may have suffered as a result of Respondent's abrogation of the agreement in effect at that time, with interest as provided for in *Florida Steel Corp.*, supra.[7]

Respondent will also be ordered to make those payments which should have been made to the Union's health and welfare trust fund, and the education fund. Any interest applicable to such fund payments shall be

[7] See generally *Isis Plumbing Co.*, supra.

paid in accordance with the criteria set forth in *Merryweather Optical Co.*, 240 NLRB 1213 (1979); and see *Fox Painting Co.*, 263 NLRB 437 (1982). I shall also order Respondent to reimburse the Union with interest for loss of dues which the Union would have received pursuant to the dues-checkoff provisions of the collective-bargaining agreement which Respondent attempted to abrogate as of August 1, 1981. *Fox Painting Co.*, supra. In addition, Respondent will reimburse any unit employee for premiums which an employee may have paid to a third-party insurance company for medical coverage and for any medical bills any employee paid directly to a health care provider that said collective-bargaining agreement policy would have covered. *Fox Painting Co.*, supra; *Angelus Block Co.*, 250 NLRB 868 (1980). Respondent's acts in this matter indicate a proclivity to engage in unfair labor practices and, accordingly, the broad injunctive relief is appropriate. See *Hickmott Foods*, 242 NLRB 1357 (1979).

The recommended Order will run against "Respondent, its agents, successors, and assigns," the normal wording of Board orders. The order is designed to include within its reach receivers, trustees, and debtors in possession functioning pursuant to the bankruptcy laws of the United States. See Section 2(1) and (2) of the Act. See also *Imperial Hospital*, 257 NLRB 581 (1981); *Nathan Yorke*, 259 NLRB 819 (1981). Even though such a functionary is a distinct person for bankruptcy purposes, it is subject to the Act as an employer or the successor of an employer. Application of the Act does not automatically cease upon the filing of a petition in bankruptcy by an employer. Board orders are binding on successors in charge of an enterprise for reasons other than evasion of the Act because under Section 10(c) of the Act, the Board is charged with effectuating the policies of the Act. *Golden State Bottling Co. v. NLRB*, 414 U.S. 168, 176, 177 (1973).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[8]

ORDER

The Respondent, Edward Cooper Painting, Inc. and Cooper and Cooper Painting and alter ego, Lexington, Kentucky, its agents, successors, and assigns, shall

1. Cease and desist from

(a) Abrogating the terms of the collective-bargaining agreement to which Respondent was a party.

(b) Withdrawing recognition from the duly designated collective-bargaining representative of the majority of Respondent's employees in a unit appropriate for collective bargaining.

(c) Terminating employees because they belong to a union or desire to work under union conditions.

(d) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Recognize and, on request, bargain with International Brotherhood of Painters and Allied Trades of the United States and Canada, Local 768, AFL–CIO, as the duly designated collective-bargaining representative of its employees in the following unit appropriate for purposes of collective bargaining:

> All employees engaged in painting employed by Respondent at and out of its Lexington, Kentucky facility, but excluding all office clerical employees, guards, professional employees and supervisors as defined in the Act.

(b) Abide by the terms of the collective-bargaining agreement entered into between Respondent and the Union in 1978 for the period April 1, 1978, through March 31, 1980, and as amended on April 1, 1980.

(c) Reimburse all employees in the bargaining unit, the funds established under the bargaining agreement (excluding the industry advancement fund) and the Union for any losses they may have suffered as a result of Respondent's abrogation of the collective-bargaining agreement from and after August 1, 1981, with interest, in the manner prescribed in the section of this decision entitled "The Remedy."

(d) Offer to Walter Young Jr. immediate and full reinstatement to his former position or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges previously enjoyed, and make him whole for any loss of earnings or benefits he may have suffered by reason of Respondent's discrimination against him as set forth in the section of this decision entitled "The Remedy."

(e) Expunge from its files any reference to the termination of Walter Young Jr., and notify him in writing that this has been done and that evidence of this unlawful separation will not be used as a basis for future personnel actions against him.

(f) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(g) Post at its Lexington, Kentucky facility copies of the attached notice marked "Appendix."[9] Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecu-

[8] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[9] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

tive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(h) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

*U.S. GOVERNMENT PRINTING OFFICE: 1986-461-629:20003